

Corporate Liability for Human Rights Violations

I. Introduction

Much of the discussion around “Environmental, Social and Governance” (ESG) initiatives has focused on the “E”—the environment. Yet more and more attention is being paid to the “S”—social issues, which include the impact a business has on its workers and on the communities in which it operates. That has driven legislation, administrative regulation, criminal prosecution, and civil litigation to impose corporate and executive responsibility for human rights abuses, human trafficking and slavery, and diversity and inclusion outcomes.

The most recent trend in this space is regional- and national-level legislation. The United States, the United Kingdom, Australia, France, Germany and other countries have passed legislation to impose corporate accountability for human rights issues, in particular as to due diligence and reporting. These laws, almost all of which apply to companies based in the country or merely doing business there, focus on preventing and remedying human rights violations, in particular as related to slavery and forced labor.

As a result, multinational businesses must be aware that their responsibility to conduct due diligence and report on their efforts to protect human rights is governed by a complex set of international norms, common law, and legislation at the national and regional levels, and they must take steps to ensure compliance with the laws not only of their country of incorporation but also in any other countries in which they operate.

II. Background: What Are Human Rights?

“Human rights” encompass a broad range of issues. In 1948, the United Nations adopted the Universal Declaration of Human Rights, setting forth a list of fundamental and inalienable rights.¹ These include the right to life, liberty and security of person; freedom from slavery or servitude; freedom from torture; recognition as a person before the law; equality before the law and freedom from discrimination; freedom from arbitrary arrest or detention, and effective remedies by competent national tribunals to protect these rights. As defined in the Universal Declaration of Human Rights, human rights also include freedom from arbitrary interference with privacy, family, and home; freedom of movement; the right to marry; the right of property ownership; freedom of thought and religion; freedom of speech; the right to work; the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care, and necessary social services; and the right to an education.

In the ensuing decades, the United Nations expanded the definition of human rights through more specific covenants, including the International Covenant on Economic, Social and Cultural Rights, which lays out the right to work in just and favorable conditions, the right to social protection and to an adequate standard of living, and the right to education; and the International Covenant on Civil and Political Rights, which addresses rights such as freedom of movement, equality before the law, and prohibitions on arbitrary deprivation of life, torture, slavery, and arbitrary arrest or detention.² Other United Nations conventions further prohibit genocide, racial discrimination, and discrimination against women, and protect the rights of children and persons with disabilities.³

¹ <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>

² <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>; <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

³ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-prevention-and-punishment-crime-genocide>; <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>; [https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-](https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms)

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Together, many of these foundational documents form the International Bill of Human Rights.⁴ The International Bill of Human rights comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and the Second Optional Protocol to the International Covenant on Civil and Political Rights (aiming at the abolition of the death penalty). The human rights obligations covered by these declarations and covenants apply to states.⁵

Several “soft law” instruments (that is, principles and declarations that are not legally binding) apply these universal human rights principles to businesses. The United Nations Guiding Principles on Business and Human Rights, Principles 11 to 24, outline the responsibilities of businesses as to human rights, and also form the basis for regional and national-level regulations on business conduct.⁶ For example, the United States National Action Plan on Responsible Business Conduct is based in part on the United Nations Guiding Principles.⁷ The United States National Action Plan emphasizes: (1) “the positive contributions businesses can make to economic, environmental, social progress;” (2) due diligence efforts; and (3) businesses compliance “with legal obligations within their supply chains both at home and overseas.” The Biden-Harris administration is updating the plan to further safeguard workers’ rights and protect the environment. Although the plan emphasizes corporate accountability for human rights, like other soft law instruments, it lacks an enforcement mechanism and does not directly impose legal liability on corporations.

III. Sources Of Human Rights Obligations For Businesses

A. Criminal Liability

Corporations may face criminal liability for human rights violations committed by the corporation’s officers, employees or agents under the respondent superior doctrine, agency principles, or under a theory of accomplice liability.⁸ In recent years, corporations and their executives have also faced direct criminal liability for their involvement in human rights abuses. For example, the Paris Court of Appeal confirmed the indictment of the French-based company LafargeHolcim SA (“Lafarge”) in May 2022 for complicity in crimes against humanity committed by the Islamic State of Iraq and Syria (“ISIS”).⁹ The indictment alleges that Lafarge, through a foreign subsidiary Lafarge Cement Syria, paid and traded raw materials with ISIS to keep Lafarge’s Syrian cement plant running, thereby contributing to the crimes against humanity ISIS perpetrated during the Syrian civil war. In Sweden, a public prosecutor charged the chairman and former CEO of Lundin Energy (but not the company itself) in November 2021 with aiding and abetting war crimes committed in Sudan in the late 1990s and early 2000s.¹⁰

B. Tort Liability

The Alien Tort Statute (28 U.S.C. 1350) vests U.S. federal courts with jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law. Historically, some courts interpreted the Alien Tort Statute to allow non-U.S. citizens to sue in United States courts for human rights violations committed outside the U.S. However, in the last ten years, the Supreme Court in a series of decisions—*Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386

[discrimination-against-women](https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child); <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>; <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁴ <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet2Rev.1en.pdf>

⁵ <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>

⁶ https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁷ <https://www.state.gov/responsible-business-conduct-national-action-plan/>

⁸ <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1116&context=jcred>

⁹ <https://www.nytimes.com/2022/05/18/business/lafarge-human-rights-violations.html>

¹⁰ <https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-war-crimes-sudan/>

(2018), and *Nestle USA, Inc. v. Doe*, 141 S.Ct. 1931(2021)—severely limited the application of the Alien Tort Statute to businesses’ legal liability for extraterritorial human rights violations.¹¹ In *Kiobel*, the Court held the Statute does not apply extraterritorially, unless the claims “touch and concern the territory of the United States ... with sufficient force.” 569 U.S. at 124-125. The Court further limited the Alien Tort Statute’s application in *Jesner*, holding that the Statute does not establish jurisdiction over non-U.S. corporations, and in *Nestle*, holding that the Statute does not confer jurisdiction on U.S. courts where the allegedly tortious conduct occurred abroad and only “general corporate activity” occurred in the U.S.

Despite these holdings, tort cases may still be filed on “supplemental jurisdiction” grounds in the United States against corporations for human rights abuses occurring outside the United States. For example, Chiquita Brands International is being sued for allegedly funding and arming known terrorist organizations in Colombia based both on Colombian law and the Torture Victims Protection Act, which gives individuals the right to bring claims for torture and extrajudicial killing committed in foreign countries.¹² Although the Southern District of Florida dismissed the plaintiff’s claims under the Alien Tort Statute based on *Kiobel*, the Colombian tort claims survived on supplemental jurisdiction grounds (28 U.S.C. 1367).¹³

Across Canada and Europe there have also been tort cases against corporations for alleged human rights violations, including extraterritorial violations. For example, in 2020 the Supreme Court of Canada held in *Nevsun Resources Ltd v Araya*, 2020 SCC 5, that a Canadian corporation could be liable under Canadian law for breaches of international law committed in other countries.¹⁴ Thus, the Court determined that Eritrean workers could sue Nevsun in British Columbia for alleged human rights abuses, including forced labor, torture, and slavery, that occurred at a company mine in Eritrea. And in the Netherlands, The Hague District Court ruled in 2021 that Royal Dutch Shell must reduce its emissions, based on its determination that Shell has an obligation to comply with international human rights obligations, the UN Guiding Principles on Business and Human Rights, and the goals of the 2015 Paris Agreement, according to the standard of care under Dutch tort law.¹⁵

Recent cases such as *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)* [2019] UKSC 20, in which the Supreme Court of the United Kingdom held that Zambian citizens could bring tort claims for negligence and breach of statutory duty in the United Kingdom based on alleged injuries to their health and livelihoods from toxic mine emissions in Zambia, and *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3, in which the Supreme Court determined that polluted Nigerian communities could sue Royal Dutch Shell in the English Courts, illustrate that corporations can be sued in the United Kingdom under tort principles for human rights violations committed abroad.¹⁶ In these cases (which U.S. readers may consider classic toxic tort cases), the courts relied on human rights principles to find jurisdiction in the U.K. courts for non-U.K. citizens to sue for harms incurred abroad. These cases reflect a willingness of courts to expand jurisdiction for extraterritorial business activities that harm local communities and the environment.

The latest focus in United Kingdom and elsewhere relates to conduct by overseas suppliers of goods and services. For example, in a recent decision against British American Tobacco, the England and Wales High Court (Queen’s Bench Division) refused to strike claims against British American Tobacco, a U.K.

¹¹ https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf;
https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf;
https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf

¹² <https://www.govinfo.gov/content/pkg/STATUTE-106/pdf/STATUTE-106-Pg73.pdf>

¹³ See *In re Chiquita Brands Int’l, Inc. Alien Tort Statute & S’holder Derivative Litig.*, 190 F. Supp. 3d 1100, 1112, 1124 (S.D. Fla. 2016).

¹⁴ <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html>

¹⁵ <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

¹⁶ <https://www.supremecourt.uk/cases/uksc-2017-0185.html>; <https://www.supremecourt.uk/cases/uksc-2018-0068.html>

company, related to alleged unethical conduct by its overseas tobacco suppliers. In *Josiya v British American Tobacco Plc* [2021] EWHC 1743 (QB) (25 June 2021), the court declined to dismiss claims that British American Tobacco is liable in tort and for unjust enrichment on the basis that it knew of alleged unlawful and dangerous working conditions in which the tobacco it acquired was produced in Malawi, and facilitated, assisted, or encouraged such conditions to acquire those materials at a lower cost.¹⁷

IV. Legislation Imposing Corporate Accountability For Human Rights

A complex web of legislation for supply-chain liability and forced labor issues regulates business conduct and encourages businesses to adopt measures to combat human rights abuses.

In the United States, multiple federal and state laws implicate human rights issues. Section 1307 of the Tariff Act (19 U.S.C. 1307) prohibits the importation of merchandise mined, manufactured, or produced, wholly or in part, by forced labor, including convict labor, forced child labor, and indentured labor.¹⁸ In October 2020, the U.S. Customs and Border Protection issued its first finding of forced labor in 24 years against importation into the United States of goods from a Chinese company (Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry, and Trade Co., Ltd.) upon finding that the company produced stevia extract using convict, forced, or indentured labor.¹⁹ This finding instructs port directors in the United States to seize the merchandise and commence forfeiture proceedings against importers who failed to eliminate forced labor from their supply chains.²⁰

The Uyghur Forced Labor Prevention Act (Pub.L. 117–78) also relates to issues of forced labor.²¹ This Act responds to allegations of forced labor in the Xinjiang Uyghur Autonomous Region in China, and establishes a rebuttable presumption that *all* goods manufactured in Xinjiang are made with forced labor. Those goods are not entitled to entry to the United States unless the U.S. Customs and Border Protection certifies that the goods were not made with forced labor.

Some states, for example California, also have their own laws to prevent companies from acquiring goods or raw materials through supply chains that involve forced labor. California implemented the California Transparency in Supply Chains Act in 2015.²² This Act requires large retail sellers or manufacturers doing business (not just based) in California to disclose information on their website or through written disclosures regarding their efforts to eradicate human trafficking and slavery within their supply chains.

Similarly, in 2015 the United Kingdom adopted the Modern Slavery Act (2015 c. 30).²³ Section 54 of this Act, titled “Transparency in supply chains,” impacts businesses. The Act requires businesses that supply goods or services, carry on business in the U.K., and (together with their subsidiaries) have annual worldwide revenue of £36m or more, to disclose a “slavery and human trafficking statement.” Businesses must disclose, for example, information as to the organization’s structure, its business and its supply chains, its policies in relation to slavery and human trafficking, and its due diligence processes in relation to slavery and human trafficking in its business and supply chains. There is currently a bill in the House of Lords to update the Modern Slavery Act to include criminal penalties for the falsification of slavery and human trafficking statements, establish minimum standards of transparency in supply chains in relation to modern slavery and

¹⁷ [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2021/1743.html&query=\(josiya\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2021/1743.html&query=(josiya))

¹⁸ <https://www.law.cornell.edu/uscode/text/19/1307>

¹⁹ https://www.cbp.gov/newsroom/national-media-release/cbp-issues-first-forced-labor-finding-1996?fbclid=IwAR1KLiEY7D_Z0BFo1_p6l2JSQpRqnXMtirn5qMR1wc_q_T2fnzsBcdwh70

²⁰ <https://www.federalregister.gov/documents/2020/10/20/2020-23123/notice-of-finding-that-certain-stevia-extracts-and-derivatives-produced-in-the-peoples-republic-of>

²¹ <https://www.congress.gov/117/plaws/publ78/PLAW-117publ78.pdf>

²² <https://oag.ca.gov/SB657>

²³ <https://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted>

human trafficking, and prohibit companies using supply chains which fail to demonstrate minimum standards of transparency.²⁴ The British government announced in 2020 that companies failing to report may also face civil penalties.²⁵

In 2018, Australia adopted a similar Modern Slavery Act (No. 153, 2018) based on the U.K. Act.²⁶ It requires companies based or doing business in Australia that have annual revenue of more than AU \$100 million to make similar disclosures about slavery and human trafficking in their business and supply chains. The Act also implements a government-run central repository of statements and mandatory prescribed criteria for them.

Other countries have also implemented laws requiring businesses to engage in due diligence in their supply chains and to report their findings. In 2017, for example, France passed the Corporate Duty of Vigilance Law (Statute No. 2017-399).²⁷ The law places a due diligence duty on large French companies (with either 5,000 employees within the company and its subsidiaries in France, or 10,000 employees worldwide), and requires them to publish an annual “vigilance plan” related to “the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company.” The French law provides that if the company does not meet its reporting requirement, anyone with an “interest” in the application can bring a civil case against the company to compel compliance, including through fines.

More recently, in 2021, the German parliament passed the Act on Corporate Due Diligence in Supply Chains.²⁸ The Act will take effect in 2023 and will initially cover companies with 3,000 or more employees, and from 2024 onwards will apply to companies with 1,000 or more employees. The Act applies not only to German companies, but to any businesses with subsidiaries, offices, or joint ventures in Germany meeting the employee requirement. These companies must identify risks of human rights violations and environmental destruction at direct suppliers and, if they gain substantiated knowledge of a potential abuse, also at indirect suppliers. Businesses must document any violations to a federal office, which can issue fines if companies violate their due diligence obligations.

Norway similarly adopted the Transparency Act in 2021, requiring large Norwegian companies and large foreign companies that provide goods and services that are taxable in Norway to perform human rights and diligence assessments of their supply chains and to report on their efforts.²⁹ The Norwegian Consumer Authority can issue fines to non-complying businesses.

More legislation is in the pipeline at both the national and regional levels. In December 2021, the Netherlands became the latest European country to announce plans to introduce mandatory human rights and environmental due diligence legislation at a national level.³⁰ At the regional level, in February 2022, the European Union issued a draft regulation on human rights and environmental due diligence, titled the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence.³¹ Once implemented, this legislation will require large EU companies, and some non-European

²⁴ <https://bills.parliament.uk/bills/2892>

²⁵ <https://www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains>

²⁶ <https://www.legislation.gov.au/Details/C2018A00153>

²⁷ <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>

²⁸ <https://www.jdsupra.com/legalnews/new-german-supply-chain-act-new-3113488/>

²⁹ <https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf>

³⁰ <https://www.business-humanrights.org/en/latest-news/dutch-minister-announces-national-corporate-due-diligence-legislation/>

³¹ https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF

companies doing business in Europe, to assess human rights and environmental impacts throughout their operations and supply chains and to take action to prevent, mitigate, and remedy identified human rights and environmental harms.

V. Business Activities Implicating Human Rights Issues

A wide variety of business activities may implicate human rights issues. First, direct business activities can lead to either criminal or civil liability. As the *Lafarge* and *Lundin Energy* cases demonstrate, making payments to, trading raw materials with, or otherwise assisting entities engaged in war crimes can lead to criminal liability for businesses and high-level executives. And as the *Chiquita* cases proceeding in the United States reflect, businesses may face tort liability for activities such as funding terrorist organizations abroad.

Businesses may also face tort liability for the environmental impacts of their activities. This includes tort liability from emissions and pollution from oil and natural gas extraction (as in the *Royal Dutch Shell* cases in the Netherlands and the United Kingdom), or emissions from mining activities (as in the *Vedanta* case). Businesses operating in the energy and mining sectors, as well as any other businesses whose factories or operations may have large environmental impacts on surrounding communities, may be at risk for tort liability.

Companies also should be aware that making materially false or misleading statements or material omissions in connection with human rights reports could lead to securities class actions. Finally, businesses may also be liable for activities across their supply chains. Forced labor and poor working conditions in supply chains (and required due diligence) is an emerging area. Businesses may be liable for unlawful or dangerous working conditions, including for the use of convict, forced, or indentured labor, not only in their own companies and subsidiaries, but also more distantly in the entities from whom they do business in their supply chains. Any large business dealing with multi-step supply chains should assess its obligations to conduct due diligence not only with regard to its direct suppliers, but also with regard to other businesses further down the chain to ensure that suppliers are respecting workers' rights, and are not themselves causing severe environmental damage or health risks to local communities.

Finally, it is worth bearing in mind that corporations may also be victims of human rights violations. The principle right, as noted above, is Article 17 of the Universal Declaration of Human Rights, which is the right of property ownership. Thus, "everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." Protocol 1 to the European Convention on Human Rights similarly states that "every natural or legal person is entitled to the peaceful enjoyment of his possessions."³² Typically, property violations involving businesses would be addressed in other fora such as claims under bilateral investment treaties. However, while the European Court of Human Rights is not a court of first instance, it has heard property rights cases with corporations as claimants. For example, in *Yukos v. Russia* (Application no. 14902/04), the Court found Russia to be in violation of the protection of property under the European Convention on Human Rights based on Russia's disproportionate interference with Yukos' property rights. In effect, by imposing disproportionate financial penalties and tax enforcement proceedings on Yukos (an oil company), Russia had interfered with the company's right to property. And, even outside of Europe, in countries whose legal systems consider corporations to be persons with some or all of the same rights as human persons, *see, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), the right to property may also provide an avenue for corporations to become human rights claimants, as opposed to respondents.

Quinn Emanuel is well positioned to assist businesses with their efforts to address human rights policies and procedures. The firm not only litigates in this space, but our partners are available to work on

³² https://www.echr.coe.int/documents/convention_eng.pdf

compliance and due diligence issues, and to assist businesses in writing or updating compliance policies and procedures.³³

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Kathleen Sullivan

Email: kathleensullivan@quinnemanuel.com

Phone: 213-443-3844

Julianne Hughes-Jennett

Email: jhughesjennett@quinnemanuel.com

Phone: 44 20 7653-2220

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