BUSINESS & HUMAN RIGHTS 2022

Contributing editors
Roger Leese and Anna Kirkpatrick
Clifford Chance

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Our analysis of current policy trends, legal developments and emerging risks connected to international business' approach to and responsibility for human rights, ESG, sustainability and the impacts of climate change.

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Lexology Getting The Deal Through is delighted to publish the third edition of *Business & Human Rights*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Roger Leese and Anna Kirkpatrick of Clifford Chance, for their continued assistance with this volume.

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Getting the Deal Through

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Introduction

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Respecting rights

Businesses are expected to respect human rights and take responsibility for their impacts on people and the environment. A business may have voluntarily committed to respecting human rights throughout its business and operations, but increasingly there are external pressures driving expectations for businesses to take responsibility for harm that they are involved in.

Consistent with the international recognition of the importance of human rights risks, demonstrating adequate respect for human rights can now be a precursor to accessing finance or government credit. Also, respect for rights may comprise a non-negotiable term of business for a major customer. Litigation against businesses increasingly tests boundaries in an effort to seek remedies for harm suffered, and it presents costs and reputational damage even if the cases brought are successfully defended. Businesses need to understand the human rights impacts of everyday corporate decisions associated with the jurisdictions in which they operate or seek to invest and the business partners they engage with.

Drawing on legal expertise from nine jurisdictions, this third edition helps businesses to understand the business and human rights landscape in those countries by setting out the key laws affecting businesses on human rights issues and the major bases for actions against businesses, as well as outlining the stance of several jurisdictions on human rights commitments.

Previous approaches

Society's expectation that corporate entities respect human rights is not new. Civil society has long called for the accountability of corporates in connection with their involvement in disasters that have human rights implications. In 1984, leaking gas from a chemical plant owned by Union Carbide India Limited killed thousands in Bhopal, India; to this day, the fallout from the disaster fuels calls for corporate accountability, continuing to create reputational and litigation risk for the company that acquired Union Carbide (together with its legacy of human rights-related issues) in 2001.

The international community has previously sought to manage these societal pressures. The Organisation for Economic Co-operation and Development (OECD), for example, developed guidelines for the conduct of multinational enterprises in 1978 (the OECD Guidelines). The business community voluntarily committed to corporate social responsibility efforts and developed industry standards to manage human rights issues (eg, the Voluntary Principles on Security and Human Rights (2001) and the United Nations (UN) Principles of Responsible Investment (2005)). However, these commitments were regarded as important but not sufficient.

New approaches

The year 2008 was a pivotal one. The financial crisis highlighted the wide-reaching ramifications for society when corporate culture and responsibility for non-financial impacts fall short. It also marked a recognition by the international community that corporate-related human rights abuses can occur when there are gaps in the governance of companies and other business entities, including multinational, cross-border enterprises. This was also the first time that the differentiated obligations and responsibilities of states and businesses were articulated in international law.

Based on the consensus of all relevant stakeholders (including businesses) and unanimously endorsed by the member states of the UN Human Rights Council, the Three Pillar Framework articulated the standard of conduct for governments required to protect against abuses of human rights under international law (including by businesses), the responsibility of all business – regardless of size, sector, operational context, ownership or structure – to respect internationally respected human rights and the right of victims of human rights abuses to access remedies.

The UN Guiding Principles on Business and Human Rights (UNGPs), unanimously endorsed by the UN Human Rights Council in 2011, provided more detailed guidance on each component of the Three Pillar Framework. In particular, the UNGPs clarified the content of the responsibility on businesses to respect human rights. This responsibility means that businesses should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The responsibility focuses on the impacts that businesses' own operations and supply chains have on people, and therefore differs significantly from earlier versions of corporate social responsibility, which focused on businesses' efforts to promote human rights rather than to reduce the negative impacts that their everyday business operations have on human rights. This was new.

Human rights due diligence

The UNGPs were also novel in providing a framework for the management of human rights impacts by businesses. One of the core concepts at the heart of the corporate responsibility to respect is human rights due diligence (HRDD), which comprises due diligence on a business's potential adverse human rights impacts. This allows companies to meet their responsibility by 'knowing and showing' that they respect human rights.

In brief, as articulated under the UNGPs, HRDD is an iterative process comprising a number of mutually reinforcing steps, whereby every business (not just those that have publicly committed to respecting human rights) should:

- identify and assess its impacts on human rights and analyse how to address those impacts depending on how it is involved in the impact;
- integrate its findings into its internal processes and take appropriate action (including providing remedies where appropriate);
- track the effectiveness of measures taken; and
- communicate how impacts are being addressed to its external stakeholders (including potentially affected persons).

For governments, their policies, regulations, legislation, enforcement and adjudication of laws form the bedrock of their toolkit for the promotion of better protection against corporate-related human rights abuses.

Corporate acceptance

The corporate respect for rights articulated in the UNGPs was based in part on corporates' own acceptance of the responsibility to respect. It is perhaps, therefore, not surprising that businesses' voluntary commitment to human rights under the UNGPs has proliferated since the principles were endorsed, nor is it surprising that businesses have voluntarily begun to investigate and understand the human rights associated with their operations. Whether investing in a country, borrowing from a development finance institution or sponsoring an international sporting event, businesses will increasingly seek to understand the human rights risks of that corporate decision or seek to reflect respect for human rights issues into contractual provisions with business partners.

To assist businesses, there is now a wide range of guidance available on what to look for when addressing the human rights impacts of a business's operations, as well as on when and how to address these. Some guidance is international (the UN Working Group on Business and Human Rights issued a report on HRDD in 2018 (A/73/163)), some is industry-specific (the European Union issued guidance with business and human rights experts for the oil and gas, information and communications technology, and employment sectors) and some is peer-to-peer (organisations such as IPIECA collate the expertise of those within their respective industries to formulate tailored practical guidance).

State acceptance

Given the strong endorsement of the UNGPs by governments, it is not surprising that many states have also committed to promoting the corporate responsibility to respect rights. At least 45 governments have either published a national action plan on business and human rights (NAP) or are developing one and civil society initiatives are pressing for the development of a NAP in 13 other states. Countries are at different stages and also take different approaches, but common to all states' NAPs is a recognition of, and a commitment to implement, the UNGPs.

Governmental commitment to the UNGPs is in line with other state, interstate and regional commitments to address corporates' approaches to non-financial and other corporate responsibility concepts, such as the UN Sustainable Development Goals (each of which relate to human rights), and environmental, social and governance criteria. A notable actor in this respect has been the European Union, which has committed to furthering all of these initiatives under the banner of a revised definition of corporate social responsibility adopted in 2011. This revised definition recognised that enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of maximising shared values for stakeholders and society at large, and of identifying, preventing and mitigating adverse impacts.

Due diligence and reporting legislation

Alongside commitments to address the responsibility to respect, in recent years a number of governments have begun implementing legislation to increase transparency in supply chains by requiring corporate reporting in relation to human rights-related issues – such as modern slavery – and to drive corporate action on human rights issues through mandatory due diligence on human rights.

Since 2015, the United States has required government contractors and certain subcontractors to give confirmation regarding the steps that they have taken and plans they have in place to address human trafficking and forced labour. The California Transparency in Supply Chains Act (2010) places an obligation on certain corporates to report the steps taken to address modern slavery or state that they have taken no such steps. Similar forms of modern slavery reporting legislation have been enacted in the United Kingdom and Australia.

Other legislation goes further and requires reporting on due diligence taken by the company on human rights issues (eg, the French Duty of Vigilance Law (2017), the EU Conflict Minerals Regulation (2017), the Dutch Child Labour Due Diligence Law (2019) and legislation that will soon come into force, such as the German Corporate Due Diligence in Supply Chains Law and the Norwegian Transparency Act). More legislation of this nature is likely, with announcements from Finland and the European Union that will mandate due diligence on human rights – and, increasingly, on environmental issues – in the pipeline.

In addition, human rights frameworks such as the UNGPs are increasingly being referred to as a standard for corporate conduct for the management of environmental impacts as well as human rights impacts. This intersection of the environmental and social pillars of the uptick in environmental, social and corporate governance considerations is prominent in sustainable finance initiatives, particularly in the European Union. For example, the UNGPs and the OECD Guidelines form part of the minimum standards to which investments must adhere if they are to be labelled environmentally sustainable under the EU taxonomy.

Access to remedy

Despite advances with the responsibility to respect, business-related human rights disasters continue. Alongside the developments in corporate approaches to managing human rights risks, civil society and human rights defenders are also developing ways of seeking remedy and accountability directly against corporates, using litigation and, increasingly, other grievance mechanisms, such as making complaints about breaches of the human rights chapter of the OECD Guidelines. As efforts increase to expand the bases on which corporates can be held to account for human rights-related abuses, so too does litigation risk for corporates. The place of human rights has been particularly notable in the context of climate change litigation, where human rights are frequently part of the legal basis for action against corporates for accountability for the effects of carbon emission; for example, as was seen in the Dutch case of *Milieudefensie v Shell* (ECLI:NL:RBDHA:2021:5337).

Risk management

Given all these drivers, businesses now need to understand their exposure to risks arising from adverse human rights impacts connected to their businesses. In light of the internationally recognised corporate respect for human rights and the increasing legal obligations for corporates on human rights issues, improved management of human rights risks is likely to be high on many corporate agendas in the future.

Australia

Amanda Murphy, Lara Gotti and Joshua Banks

Clifford Chance

LEGAL AND POLICY FRAMEWORK

International law

1 Which international and regional human rights treaties has your jurisdiction signed or ratified?

Australia has signed and ratified the following treaties.

- The International Covenant on Civil and Political Rights (ICCPR): ratified on 13 August 1980 and entered into force on 13 November 1980, except article 41, which entered into force in Australia on 28 January 1993; its First Optional Protocol ratified on 25 September 1991 and entered into force on 25 December 1991; and its Second Optional Protocol (regarding the abolition of the death penalty) ratified on 2 October 1990 and entered into force generally on 11 July 1991. Australia has reservations against articles 10(2)(a)(b), 10(3), 14(6) and 20.
- The International Covenant on Economic, Social and Cultural Rights (ICESCR): ratified on 10 December 1975 and entered into force on 10 March 1976. Australia has not ratified the Optional Protocol to the ICESCR.
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): ratified on 30 September 1975 and entered into force on 30 October 1975, except article 14, which entered into force on 4 December 1982. Australia has made a declaration to article 4(a).
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): ratified on 28 July 1983 and entered into force on 27 August 1983; and its Optional Protocol, which entered into force in Australia on 4 December 2008 (by accession). Australia initially had two reservations: the first relating to women in combat roles, which was withdrawn on 14 December 2018; and the second to article 11(2) relating to maternity pay throughout Australia, which remains in place.
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): ratified on 8 August 1989 and entered into force in Australia on 7 September 1989; and its Optional Protocol ratified on 21 December 2017 (with a reservation for postponement of implementation until January 2022). As at the date of publication, not all states and territories have designated the required National Preventive Mechanisms.
- The Convention on the Rights of the Child (CRC): ratified on 17 December 1990 and entered into force on 16 January 1991, with a reservation to article 37(c) regarding separate imprisonment; its Optional Protocol regarding involvement of children in armed conflict ratified on 26 September 2006 and entered into force on 26 October 2006; and its Optional Protocol regarding child prostitution and pornography ratified on 8 January 2007, and entered into force 8 February 2007. Australia has not ratified the Optional Protocol to the CRC on a communications procedure.
- The Convention on the Rights of Persons with Disabilities: ratified on 17 July 2008 and entered into force on 16 August 2008 (with interpretative declarations to articles 12, 17 and 18) and its Optional Protocol, ratified on 21 August 2009 and entered into force on 20 September 2009.

Australia has signed the following treaties:

- the Convention relating to the Status of Refugees (CSR), to which Australia acceded on 22 January 1954 and that entered into force generally on 22 April 1954;
- the Convention relating to the Status of Stateless Persons, to which Australia acceded on 13 December 1973 and that entered into force generally on 6 June 1960;
- the Convention against Discrimination in Education, to which Australia acceded on 29 November 1966 and that entered into force generally on 22 May 1962; and
- the Palermo Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations (UN) Convention against Transnational Organized Crime), which entered into force on 25 December 2003 and was ratified by Australia on 14 September 2005.

Australia has not signed:

- the International Convention for the Protection of All Persons from Enforced Disappearance; or
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

2 Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Australia has ratified seven of the eight core conventions of the International Labour Organization (ILO), these being:

- the Forced Labour Convention: ratified on 2 January 1932 and came into force generally on 1 May 1932;
- the Freedom of Association and Protection of the Right to Organise Convention: ratified on 28 February 1973 and came into force generally on 4 July 1950;
- the Right to Organise and Collective Bargaining Convention: ratified on 28 February 1973 and came into force generally on 18 July 1951;
- the Equal Remuneration Convention: ratified on 10 December 1974 and came into force generally on 23 May 1973;
- the Abolition of Forced Labour Convention: ratified on 7 June 1960 and came into force generally on 17 January 1959;
- the Discrimination (Employment and Occupation Convention): ratified on 15 June 1973 and came into force generally on 15 June 1960; and
- the Worst Forms of Child Labour Convention: ratified on 19 December 2006 and came into force generally on 19 November 2000.

Australia has not ratified the ILO Minimum Age Convention, 1973.

3 How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Australia was a founding member of the UN, was one of eight nations involved in drafting the Universal Declaration of Human Rights and became a member of the UN Human Rights Council (UNHRC) in 2018, and so may be considered an active advocate of human rights at the international level. Despite this, Australia's human rights law compliance record has been the subject of criticism.

Australia has not comprehensively incorporated the provisions of all of the human rights treaties that it has signed into the domestic legal order. Rather, Australia implements its treaty obligations through domestic law (eg, the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth)).

Since the 2015 Universal Periodic Review (UPR), Australia has made progress in its level of compliance with international human rights law and principles. Since the previous review, Australia has:

- ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- made amendments to the Marriage Act 1961 (Cth) that legalised same-sex marriage in Australia from 9 December 2017 (Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)); and
- introduced a Religious Discrimination Bill first in 2019 and again in 2021 – the Religious Discrimination Bill 2021 – based on a recommendation from the 'Religious Freedom Review' report issued on 18 May 2018; however, the bill has been criticised due to its broad scope, which may produce the adverse effect of permitting discrimination on religious grounds (such as in the delivery of healthcare or services).

In 2020, Australia undertook its third-cycle UPR and submitted its national report to the UNHRC on 28 December 2020. On 24 March 2021, the Working Group on the Universal Periodic Review published the outcomes of Australia's UPR, which was adopted at Human Rights Council 47 in July 2021. In June 2021, Australia prepared its 'Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review' addendum. Australia received 344 recommendations, of which it supported 177 at the adoption of its third UPR. Core recommendations from the third UPR include:

- ratification of the International Convention for the Protection of All Persons from Enforced Disappearance;
- ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and
- ratification of the Convention on Migrant Workers.

Following the 2021 UPR, Australia committed to, among others:

- ratify the ILO Forced Labour Protocol 2014;
- consider the ratification of the ICPPED; and
- further consider withdrawing its reservation to article 20 of the ICCPR.

Australia made an additional five voluntary commitments in its third UPR, including commitments to:

- a new national disability strategy for 2021–2030, enabling people with disabilities to fulfil their potential as equal members of the community;
- enabling access to home-based aged care services;
- a new national plan to continue efforts in reducing violence against women and children beyond 2022;
- work in partnership with Aboriginal and Torres Strait Islander Australians on decisions that affect them; and
- continue to work towards a referendum to recognise Aboriginal and Torres Strait Islander Australians in the Constitution.

In 2021, the Australian Human Rights Commission in collaboration with the University of New South Wales Australian Human Rights Institute released its 'At the Crossroads: 10 years of implementing the UN Guiding Principles on Business and Human Rights in Australia' report. Despite the significant progress Australia has made, the report identified key areas for improvement, including:

- combating modern slavery;
- addressing the adverse human rights impacts of climate change; and
- respecting the land rights of Aboriginal and Torres Strait Islander Australians, and ensuring such victims have access to remedy.

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

Not in its current form. Australia has publicly confirmed that it directly and continuously opposes the draft International Human Rights Law on the Activities of Transnational Corporations and Other Business Enterprises (now in its third draft, released in August 2021).

Australia was not a member of the UNHRC when it passed the 27 June 2014 resolution that established the intergovernmental working group (IGWG) with the mandate to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (a treaty on business and human rights). Australia is also not a member of, and has not provided any written submissions to, that working group.

Australia announced that it was not participating in the sixth session of the IGWG on transnational corporations and other business enterprises with respect to human rights in October 2020, a decision that Australia says reflected its continued opposition to the process and ongoing concerns regarding the content of the revised draft treaty. Australia did not participate in the seventh session of the IGWG in October 2021.

Australia has expressed concern regarding the text of the proposed draft treaty, including its scope, ambiguous definitions and application, and inconsistency with other international laws and standards, including international human rights laws. Australia has said that the treaty as drafted cannot provide a practical and principled approach to avoid and address adverse effects of business activities on human rights. Further, Australia says consultations have not meaningfully engaged with or reflected the concerns repeatedly expressed by a number of governments – including Australia – and other key stakeholders.

Instead, Australia has confirmed its commitment to the UN Guiding Principles on Business and Human Rights (UNGPs), which it says provide an important framework for ensuring better standards and practices by states and businesses with respect to business and human rights.

National law

5 Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

Almost all of the international human rights treaties that Australia has signed have been implemented (to some extent) by national legislation.

- The ICESCR is implemented in Australia through the Fair Work Act 2009 (Cth), the Native Title Act 1993 (Cth), the Australian Human Rights Commission Act 1986 (Cth) and the Disability Discrimination Act 1992 (Cth).

- The CERD is implemented in Australia through the Native Title Act 1993 (Cth) and the Racial Hatred Act 1995 (Cth).
- The ICCPR is implemented in Australia through the Human Rights (Sexual Conduct) Act 1994 (Cth), the Racial Hatred Act 1995 (Cth), the Australian Law Reform Commission Act 1996 (Cth), the Australian Human Rights Commission Act 1984 (Cth) and the Disability Discrimination Act 1992 (Cth).
- The CEDAW is implemented in Australia through the Sex Discrimination Act 1984 (Cth) (as amended).
- The CAT is implemented in Australia through the Criminal Code Act 1995 (Cth) (the Criminal Code (Cth)).
- The CRC is implemented in Australia through the Family Law Reform Act 1995 (Cth).
- The CSR is implemented in Australia through the Migration Act 1958 (Cth) and the Migration Legislation Amendment (Transitional Movement) Act 2002 (Cth).

The Criminal Code (Cth) was amended by the International Criminal Court (Consequential Amendments) Act 2002 (Cth) to enforce the Rome Statute of the International Criminal Court in Australia (Division 268 of Chapter 8 of the Criminal Code (Cth) concerning war crimes, genocide and crimes against humanity). The Criminal Code (Cth) also satisfies Australia's obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Division 271 of Chapter 8 of the Criminal Code (Cth) concerning trafficking, slavery, and slavery-like practices). Actions may be brought against bodies corporate under the Criminal Code (Cth) (Division 12 of Part 2.5).

6 Has your jurisdiction published a national action plan on business and human rights?

Not yet. At Australia's second-cycle UPR at the UN, it was recommended that Australia adopt a National Action Plan (NAP) to implement the UNGPs. In its official response to the UPR, Australia committed to 'undertake a national consultation on the implementation of the UN Guiding Principles on Business and Human Rights during 2016'. Australia achieved this UPR recommendation by hosting business roundtables to consider the development of an Australian NAP and establishing an expert multi-stakeholder advisory group on the implementation of the UNGPs. After extensive engagement, in July 2017, the advisory group unanimously recommended that Australia should develop a NAP on business and human rights.

However, in October 2017, the advisory group received a letter from the Foreign Minister advising that the government was 'not proceeding with a [NAP] at this time'. It appears that little progress has been made on this issue since 2017, despite calls for the government to renew its efforts to do so (see Australia's third UPR, 'Joint NGO Submission on behalf of the Australian NGO Coalition', April 2020 and Thailand's recommendation (146.120) in Australia's third UPR). In response, Australia noted Thailand's recommendation but did not make any commitments.

Australia has not indicated that its position has changed since announcing that it would not be proceeding with a NAP in 2017.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

The Modern Slavery Act 2018 (Cth) (MSA) established modern slavery reporting requirements for Australian entities with annual consolidated revenue of AU$100 million or more. Since 1 January 2019, an estimated 3,000 entities (including commercial and not-for-profit entities) have been required to report on risks of modern slavery practices. 'Australian entities' includes companies, trusts and corporate limited partnerships that are resident in Australia for income tax purposes, as well as entities formed or incorporated in Australia and entities that have their central management and control in Australia. The MSA also applies to foreign entities carrying on business in Australia at any time during a reporting period.

Following previous covid-19 interruptions to reporting deadlines, the MSA reporting periods have returned to the normal schedule.

In New South Wales, the Modern Slavery Act 2018 (NSW) came into force on 1 January 2022 after undergoing significant amendments due to overlap with the Commonwealth MSA. Consequently, the Modern Slavery Act 2018 (NSW) does not impose supply chain reporting obligations on commercial organisations, although it does establish an Anti-Slavery Commissioner and a Modern Slavery Committee, which are tasked with promoting public awareness. They also provide advice on steps that can be taken by organisations to remediate or monitor risks of modern slavery taking place in their supply chains, including encouraging organisations to develop their capacity to avoid such risks.

The Corporations Act 2001 (Cth) (the Corporations Act) requires that disclosure statements for financial products that have an investment component must contain information regarding the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of a financial investment (section 1013D(1)(l)). This disclosure requirement applies to superannuation products, managed investment products and investment life insurance products.

The Australian Securities and Investments Commission (ASIC) Regulatory Guides (RG) RG 228 and RG 247 were updated in 2019 to provide guidance on climate-risk disclosure, following the issuance of ASIC Report 593 on 'Climate risk disclosure by Australia's listed companies'. RG 228 provides that, to satisfy the content for prospectuses under section 710 of the Corporations Act, a prospectus may need to include disclosure of any external threats to the business, including climate change risks. For listed entities, ASIC RG 247 states that '[c]limate change is a systemic risk that could have a material impact on the future financial position, performance or prospects of entities', and may need to be disclosed in an operating and financial review issued in accordance with section 299A(1)(c) of the Corporations Act.

Entities listed on the Australian Securities Exchange (ASX) are also required to report on compliance with the ASX Corporate Governance Principles and Recommendations (CGPRs) in their annual reports. The ASX CGPRs contain principles and recommendations that relate to human rights, including that listed entities should:

- instil a culture of acting lawfully, ethically and responsibly (Principle 3);
- recognise and manage risk (Principle 7);
- have a diversity policy (Recommendation 1.5);
- articulate and disclose their values (Recommendation 3.1); and
- disclose whether they have any material exposure to economic, environmental or social sustainability risks, including climate change risks, and if so, how they manage or intend to manage such risks (Recommendation 7.4).

8 What is the nature and extent of the required reporting or disclosure?

The MSA requires reporting entities to report annually on modern slavery risks in their operations (including investment arrangements) and supply chains by preparing a modern slavery statement. There are seven mandatory criteria for the content of a modern slavery statement that must be covered. The Commonwealth government has issued

detailed guidance on how to meet these criteria in the Guidance for Reporting Entities, which is complemented by additional supplementary guidance material, including guidance regarding reporting during the covid-19 pandemic. Entities are required to report on the potential for the entity to cause, contribute to or be directly linked to modern slavery through their operations and supply chains – the MSA does not require the entity to certify that it is 'slavery free' or report on specific cases of modern slavery. The focus is on downstream supply chains, and entities are not required to report on upstream use of their products by consumers or customers.

ASIC RG 65 contains guidelines for disclosure of information regarding the extent to which labour standards, or environmental, social or ethical considerations are taken into account in investment decisions for clients. This includes providing sufficient details of the methodology for taking these standards or considerations into account (if there is one) and the weight given to them.

Recommendation 7.4 of the ASX CGPRs requires listed companies to provide greater transparency regarding their exposure to environmental and social risks, including risks relating to climate change. This includes making disclosures regarding the risks of transition to a lower-carbon economy as well as physical risks, such as food and water security. If a company does not comply with Recommendation 7.4, it must provide the reasons why (based on the 'if not, why not' compliance requirement that underpins the CGPRs).

9 | Which bodies enforce these requirements, and what is the extent of their powers?

Modern slavery statements must be submitted to the Australian Border Force for publication on an online central register within six months of the end of the relevant reporting period. If an entity's statement is not compliant with the MSA, the Assistant Minister for Customs, Community Safety and Multicultural Affairs (the responsible minister) may request remediation of the statement. If not remediated, the responsible minister may publicly identify the entity as being non-compliant. There are no financial penalties or other sanctions currently imposed for breach of the MSA, although this may be reviewed after three years.

Breach of the product disclosure statement (PDS) disclosure guidelines is monitored by ASIC, which may take enforcement action in relation to a particular PDS if it considers the information contained in it to be misleading or deceptive, or that it does not meet the specific content requirements. If a PDS is defective, the issuer may be required to undertake remedial action, including the provision of refunds to investors (ASIC RG 168).

Failure to properly report on compliance with the ASX CGPRs may result in a breach of ASX Listing Rule 4.10.3, which requires an entity to include a corporate governance statement that complies with the CGPRs in its annual report, or provide a link to the corporate governance statement on its website. The ASX conducts monitoring and surveillance to detect possible breaches of the Listing Rules. The ASX Surveillance Group will refer concerns regarding compliance with the form and content requirements for annual reports to the entity's listing adviser, which will follow up with the entity.

Western Australia has recently introduced a novel supplier debarment regime through the Procurement (Debarment of Suppliers) Regulations 2021 (WA). The debarment regime commenced on 1 January 2022 and will operate to preclude suppliers who engage in unlawful and irresponsible business practices from seeking or being awarded a contract to supply goods, services, community services and works to the Western Australian government. The regime identifies three categories of debarment conduct based on seriousness, each with different durations of debarment. Category A debarment conduct is the most serious and includes contravention of specific legislation relating to (among others) human trafficking, unlawful employment under the Migration Act 1958 (Cth) and grave non-compliance with occupational health and safety legislation. Category B conduct includes non-compliance with the modern slavery reporting requirements of the MSA and other breaches of industrial legislation, awards, agreements, workers compensation, and occupational health and safety legislation. The third category, other debarment conduct, relates to other conduct that would be likely to have a material adverse effect on the integrity of procurement or the reputation of the state. The regime also applies to similar conduct that takes place in other jurisdictions outside Australia.

A maximum period of debarment of five years applies to Category A conduct, while a two-year debarment applies to Category B or other debarment conduct. The Western Australian government has published a 'Guide for suppliers', a 'Guide for Western Australian Government agencies' and a list of frequently asked questions. The debarment regime may act as an indirect means of enforcing compliance with a range of other legislative provisions, including those that relate to human rights.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Australia is a signatory to, or member of, a number of voluntary principles and standards, and the government encourages businesses to comply with these, including the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the United Nations (UN) Global Compact, the International Code of Conduct Association (for private security companies) and the Voluntary Principles on Security and Human Rights. Australia has established an Australian national contact point for the OECD Guidelines, which has procedures for resolving complaints of non-observance made against multinational enterprises under the OECD Guidelines. Institutional investors may become voluntary signatories to the UN Principles for Responsible Investment (PRI). Currently, 257 entities based in Australia are signatories to the PRI, which are a 'voluntary and aspirational set of investment principles' that provide a range of possible actions for investors to incorporate environmental, social and governance issues into their investment practice.

In respect of climate change, many Australian businesses voluntarily comply with the Recommendations of the Task Force on Climate-related Financial Disclosures (the TCFD Recommendations). ASIC RG 247 encourages listed entities to consider making disclosures based on the TCFD Recommendations and specifies that 'climate-change-related risk disclosures in the OFR and in any voluntary disclosures (such as those recommended by the TCFD) should not be inconsistent'. Since 2020, the PRI has required signatories to adopt and report under the TCFD Recommendations.

In relation to the resources industry specifically, Australia has announced that it will become an implementing member of the Extractive Industries Transparency Initiative and is also an active participant in the Kimberley Process, which requires certification of rough diamonds to prevent trade in conflict diamonds.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

The fourth mandatory reporting criterion under the Modern Slavery Act 2018 (Cth) (MSA) requires companies to report on what actions the reporting entity is taking to assess and address the risks of modern

slavery practices taking place, including due diligence and remediation processes. The modern slavery statement should explain how the entity (and any entities it owns or controls) is conducting due diligence to identify, prevent, mitigate and account for how it addresses modern slavery risks. There is no obligation to undertake due diligence, but if the company does not undertake human rights due diligence, it must report on this in the modern slavery statement.

There are no other direct statutory or regulatory human rights-related due diligence requirements in Australia, including in relation to non-financial matters such as environmental, social and governance, climate change or diversity. Indirectly, the Corporations Act (2001) (Cth) incentivises companies to undertake due diligence in respect of the issuance of prospectuses by providing a due diligence defence against liability for misleading or deceptive statements contained in a prospectus. Similar due diligence defences are available in other Australian federal and state legislation, which may indirectly relate to human rights, such as section 16 of the Autonomous Sanctions Act 2011 (Cth) and section 27 of the Model Workplace Health and Safety Act (adopted by the Australian Capital Territory, New South Wales, the Northern Territory and Queensland).

12 | What is the nature and extent of the required due diligence?

The MSA Guidance for Reporting Entities describes four key components of human rights due diligence in accordance with the United Nations Guiding Principles on Business and Human Rights 15 and 17, which are:

- identifying and assessing actual and potential human rights impacts;
- integrating findings across the entity and taking appropriate action to address impacts;
- tracking performance to check whether impacts are being addressed; and
- publicly communicating the entity's activities in this regard.

The required due diligence process should be appropriate to the entity's size, sector, operational context, ownership and structure.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

If a reporting entity's statement fails to address the mandatory criteria in the MSA (including the fourth criterion relating to reporting on due diligence processes), it will not be compliant with the MSA and the Assistant Minister for Customs, Community Safety and Multicultural Affairs (the responsible minister) may request remediation of the statement. If not remediated, the responsible minister may publicly identify the entity as being non-compliant. There are no financial penalties or other sanctions currently imposed for breach of the MSA, although this may be reviewed in the future.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

As a signatory to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines), Australia encourages Australian companies and companies operating in Australia to comply with the OECD Guidelines. This extends to the OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Risk Areas. This guidance provides a framework for detailed due diligence as a basis for responsible global supply chain management of tin, tantalum, tungsten (their ores and mineral derivatives) and gold.

Participation in the Extractive Industries Transparency Initiative and the Kimberley Process necessitates that companies undertake due diligence of their supply chains, including in-country due diligence, to ensure they meet the requirements of these voluntary regimes.

CRIMINAL LIABILITY

Primary liability

15 | What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

A body corporate may be found guilty of offences under the Criminal Code Act 1995 (Cth) (the Criminal Code (Cth)) in respect of federal offences, or under the criminal legislation of an Australian state and territory, depending on the nature of an offence. The focus below is on the attribution of liability to corporations pursuant to the Criminal Code (Cth), although similar provisions exist in the criminal law of each Australian state and territory.

As a general rule, offences that are attributable to an individual can also apply to body corporates, subject to the general principles of corporate criminal responsibility set out in Chapter 2, Part 2.5, Division 12 of the Criminal Code (Cth). An offence generally consists of physical and fault elements (section 3.1 of the Criminal Code (Cth)), as outlined below.

Physical element: an offence will be attributed to a body corporate if it was committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority (section 12.2 of the Criminal Code (Cth)).

Fault element: if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence (section 12.3 of the Criminal Code (Cth)). Such authorisation or permission may be established by proving that:

- the body corporate's board of directors, or a high managerial agent of the body corporate, intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

According to Division 11 of the Criminal Code (Cth), a body corporate may be held liable for attempt (section 11.1), complicity (section 11.2), joint commission (section 11.2A), incitement (section 11.4) and conspiracy (section 11.5).

Offences that carry terms of imprisonment under the Criminal Code (Cth) can result in pecuniary penalties being issued to companies, by virtue of sections 4B(2) and 4B(3) of the Crimes Act 1914 (Cth).

The Criminal Code (Cth) specifically identifies the following as human rights offences for which a body corporate can be found liable, provided that it is an Australian company or it carries on activities principally in Australia:

- child sex offences outside Australia (Division 272); and
- offences involving child abuse material outside Australia (Division 273).

However, generally each of the human rights offences captured in the Criminal Code (Cth) can apply to corporate entities as well as employees, agents or officers of the entity.

The Australian Law Reform Commission (ALRC) report on Australia's corporate criminal liability regime was tabled in Federal Parliament on 31 August 2020. The report made 20 recommendations including the following.

- Section 12.2 of the Schedule to the Criminal Code (Cth) should be amended such that a physical element of an offence is taken to be committed by a body corporate if committed by an officer, employee or agent of the body corporate acting within actual or apparent authority (Recommendation 6).
- A corporation should be considered at fault when an employee, officer or agent of the corporation has the relevant state of mind for the particular criminal offence (Recommendation 7).
- The Australian government, together with state and territory governments, should develop a national debarment regime (Recommendation 15).
- The Crimes Act 1914 (Cth) should be amended to empower the court to order a pre-sentence report for a corporation convicted under Commonwealth law (Recommendation 16) and, when sentencing a corporation, to consider victim impact statements (Recommendation 17).
- The government should consider applying the new model of 'failure to prevent' offences to misconduct overseas by Australian corporations (Recommendation 19).

16 What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

Section 12.3(3) of the Criminal Code (Cth) provides a due diligence defence in circumstances where the misconduct was committed by a high managerial agent of the body corporate. Where a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, the body corporate will not be liable if it proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

Section 12.5 of the Criminal Code (Cth) provides a limited mistake of fact defence to bodies corporate in the case of strict liability (ie, an offence that has a physical element but no fault element). The body corporate will not be liable if it proves that, at or before the time of the conduct constituting the physical element, the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence and the body corporate proves that it exercised due diligence to prevent the conduct.

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

Directors and officers may be held criminally liable for the body corporate's commission of, or involvement or complicity in, human rights abuses in the following circumstances:

- concurrent liability: where both the individual and the body corporate may be separately liable as principals in respect of the same offence or contravention (a form of direct liability);
- accessorial liability: where the individual is liable as an accessory to an offence or contravention for which the body corporate is principally liable (a form of indirect liability) – this could occur where a director or officer has aided, abetted, solicited, counselled, incited or procured the commission of the offence by the corporation; and
- managerial liability: where the individual is deemed to be liable as a principal for an offence or contravention because of that individual's role and status in the management of the body corporate (a form of deemed liability).

For more information, see the ALRC report, 'Principled Regulation: Federal Civil and Administrative Penalties in Australia' (Final Report No. 95, 2002).

Piercing the corporate veil

18 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

The courts may only disregard the separate legal personalities of corporate entities within a group in exceptional circumstances. The courts' occasional decision to pierce the corporate veil is not grounded in any common or unifying principle. The methods of piercing the corporate veil usually relied upon are:

- fraud: where the parent controls the subsidiary and intentionally uses the subsidiary to evade a legal or fiduciary obligation;
- sham or façade: where the parent and corporate controller incorporates or uses the corporate form as a mask to hide its own real purpose;
- agency: where the shareholder of a company has such a degree of effective control that the company is held to be an agent of the shareholder and the acts of the company are deemed to be the acts of the shareholder;
- group enterprises: where there is sufficient common ownership and common enterprise between corporate entities in a group; for example, where a corporate group operates in a way so as to make each individual entity indistinguishable, where there are overlapping directors, officers and employees, or where there is a partnership between companies in a group; and
- unfairness or justice: where piercing the corporate veil would bring about a fair or just result.

Various statutory provisions also permit the piercing of the corporate veil in limited circumstances; for example, where a business engages in the slavery-like offences of servitude and forced labour, another company may be held liable under Divisions 270 and 271 of the Criminal Code (Cth) for '(a) taking any part in the management of the business; and (b) exercising control or direction over the business; and (c) providing finance for the business'.

If the corporate veil is pierced, the same defences and remedies as would be available to the subsidiary company are applicable and depend on the cause of action. In the context of corporate criminal human rights offences specifically, section 12.3(3) of the Criminal Code (Cth) provides a due diligence defence in circumstances where the misconduct was committed by a manager with the requisite level of authority to have deemed liability of the body corporate and section 12.5 provides a limited mistake of fact defence to bodies corporate in the case of strict liability (ie, an offence that has a physical element but no fault element).

In terms of remedies, the remedies available are typically penalties imposed on the perpetrator of the offence, which are prescribed for each offence pursuant to the Criminal Code (Cth).

Secondary liability

19 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Businesses may be held liable for human rights abuses committed by third parties, such as employees or agents of the business, if the physical element of the offence is committed by an employee or agent 'acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority' (section 12.2 of the Criminal Code (Cth)) and the fault element of the offence is established on the part of the business (section 12.3 of the Criminal Code (Cth)). In determining whether the employee or agent was 'acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority', the courts distinguish between 'a mode, albeit improper, of doing that which the employee is employed to do and conduct which is outside the scope of the employee's employment': *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715, 721A (Gleeson CJ).

Where a business is held liable for human rights abuses committed by third parties, the due diligence and limited mistake of fact defences apply. The remedies available for corporate human rights offences are typically penalties imposed on the perpetrator of the offence, which are prescribed for each offence pursuant to the Criminal Code (Cth).

Prosecution

20 | Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

As a general rule, at the federal level, there is a statutory right to commence a criminal prosecution unless legislation specifically indicates otherwise. That right is recognised in section 13 of the Crimes Act 1914 (Cth) and has been said to be 'a valuable constitutional safeguard against inertia or partiality on the part of authority' (per Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477). However, the Criminal Code (Cth) provides that the Attorney-General's written consent is required to bring proceedings under the following Divisions of the Criminal Code (Cth):

- 268 (genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court);
- 270 (slavery and slavery-like offences);
- 272 (child sex offences outside Australia);
- 273B (protection of children); and
- 274 (torture).

Notably, an attempt at a private prosecution of Aung San Suu Kyi in 2018 for crimes against humanity failed because it did not have the written consent of the Attorney-General (see High Court decision *Taylor v Attorney-General (Cth)* [2019] 372 ALR 581).

In practice, almost all Commonwealth prosecutions are commenced by Commonwealth officers. Section 9(5) of the Director of Public Prosecutions Act 1983 (Cth) grants the Director of Public Prosecutions the power to take over a private prosecution. The main federal prosecution authority in Australia is the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is responsible for prosecuting businesses for criminal offences under Commonwealth laws. Each state and territory also has its own prosecution authority that is responsible for prosecuting offences committed against the criminal law of that particular state or territory.

The CDPP applies a three-stage test when considering whether to commence a prosecution, outlined in its prosecution policy, which considers whether there is a prima facie case, whether there are reasonable prospects of success and whether there is public interest in proceeding with the prosecution.

21 | What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

The CDPP describes the procedure for commencing prosecution of a Commonwealth offence as follows.

- Investigation: the CDPP has no investigative powers. The federal law enforcement authorities that have the power to investigate companies and refer matters to the CDPP for criminal prosecution include the Australian Federal Police, the Australian Securities and Investments Commission, and the Australian Taxation Office. The investigator takes statements from witnesses and collects evidence to be used in criminal prosecution. The investigator must gather sufficient evidence to prepare a brief to the CDPP for the purposes of seeking the CDPP's views as to whether there is enough evidence to substantiate a criminal charge.
- Brief assessment or decision to charge: the CDPP prosecutors then assess the brief in accordance with the Prosecution Policy of the Commonwealth. This stage can involve the CDPP requesting that further investigation be undertaken by the referring agency.
- Charging or commencing proceedings: if, during the brief assessment stage, the CDPP decides that charges should be laid, an initiating process (such as a prosecution notice or complaint and summons) will be sent to the defendant notifying them of the charge and the date that they are first required to attend court.

CIVIL LIABILITY

Primary liability

22 | What civil law causes of action are available against businesses for human rights abuses?

There are no specific civil law causes of action available in Australia for human rights abuses committed by a business. However, businesses may be liable for breaching various federal, state or territory legislation that is human rights-related, including anti-discrimination laws, native title laws, privacy laws, environmental laws, aged care laws, anti-bribery and corruption laws, labour laws and workplace health and safety laws. As companies have a separate legal identity from their members and directors, they possess their own legal capacity and can be directly liable for breaches under these statutes (and also for civil claims under general law). All Australian states and territories allow civil claims to be brought for wrongful death.

To establish a breach of a civil law obligation, the elements of the unlawful act must be made out on the balance of probabilities, corporate liability for that act must be established (either directly, through primary liability or vicarious liability) and there must be no available defence. Defences to breaches of legislation are generally found within the relevant piece of legislation and the remedies available for breach are typically penalties that are prescribed within the relevant piece of legislation.

Director and officer liability

23 | In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

In general terms, directors and officers may be held liable in circumstances where the company incurs a debt while insolvent or where it

undertakes a share capital transaction that causes insolvency (section 588G of the Corporations Act 2001 (Cth) (the Corporations Act)). Directors can also be liable for improper payment of dividends (section 254T, Corporations Act). However, these circumstances do not relate to involvement or complicity in human rights abuses and so are unlikely to be of relevance in such cases. There is currently no other Australian legislation that pierces the corporate veil in the case of an alleged human rights abuse committed by a business.

Directors and officers can be held personally liable for breaches of the duties that they owe to the company under general law and under statute, including the duty to act with care and diligence, the duty to act for proper purposes and the duty to act in good faith in the interests of the company. The Corporations Act includes civil penalty provisions for breaching these duties (sections 180 and 181). Only the Australian Securities and Investments Commission (ASIC) or the company affected by the contravention of a civil penalty provision can seek a pecuniary penalty order for breach of these provisions (section 1317J, Corporations Act). To date, there has been no instance where a director or officer has been found to have breached his or her duties in relation to an alleged human rights abuse by a company in Australia.

However, a director was found to have breached his duties as a director by allowing a company (the Australian Wheat Board) to make payments to the Iraqi government between 1999 and 2003 in violation of United Nations sanctions relating to the Oil-for-Food Programme (*ASIC v Flugge & Geary* [2016] VSC 779). Directors have also been found to have breached their duties by causing harm to the corporation's interests that was 'not confined to financial harm' and included reputational damage (*ASIC v Cassimatis (No. 8)* [2016] 336 ALR 209; *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52); therefore, it has been suggested that where corporate reputation suffers as a result of human rights violations in offshore subsidiaries and supply chains, by extension, a director may be held liable for breach of his or her duties (R Cermak, 'Australian directors face increased legal risk where corporate reputation suffers as a result of human rights violations in offshore subsidiaries and supply chains', Australian Institute of Company Directors, 2018).

Piercing the corporate veil

24 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

Departure from the separate entity doctrine is only possible in extreme circumstances. To date, there has been no instance where a parent company has been found to have been liable under civil law for an alleged human rights abuse (including a breach of human rights-related legislation) by its subsidiary in Australia.

Secondary liability

25 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Companies may attract civil liability for commission of a tort or inequity by means of primary liability (where the act or omission of a person is directly attributable to the company) or vicarious liability (for actions of directors, officers or employees when acting within the scope of their employment) under general law. Theoretically, a company may be held liable for human rights abuses committed by its employees, contractors and security forces, but there are no direct civil law causes of action in Australia for human rights abuses. Companies may be held liable for human rights-related breaches of legislation that are committed by employees and contractors.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

Departure from the separate entity doctrine is only possible in very limited circumstances, such as where the company structure has been used to perpetrate a fraud by its members (*Re Darby* [1911] 1 KB 95) or used with the sole or dominant purpose of enabling another person to avoid an existing legal obligation (*Gilford Motor* case [1933] Ch 935). To date, there has been no instance of a shareholder being found to be liable under civil law for an instance of human rights abuse (including a breach of human rights-related legislation) by a company in Australia.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

The jurisdiction of an Australian court to adjudicate any matter before it (regardless of whether it is a criminal, civil or human rights claim) generally depends on whether:

- the court has jurisdiction to issue the initiating process;
- the claim raises a cause of action that the court has jurisdiction to determine;
- the court has jurisdiction over the defendant; and
- the court has jurisdiction to grant the remedy sought.

Other, more specific jurisdictional criteria vary widely between the procedural rules of each court (analysis of which is outside the scope of this chapter).

The presumption against extraterritoriality is also relevant to jurisdiction over most human rights claims, which often have an international element. Australian statutes are generally restricted in their operation to activities that take place within the relevant jurisdiction, meaning that statutes are presumed to have no extraterritorial application. However, the presumption against extraterritorial application may be rebutted if (1) by express words, the statute applies extraterritorially; or (2) the statute implies a contrary intention.

In relation to point (1), where an Australian court hears a claim arising under legislation of that kind, it will have jurisdiction to make determinations about events and circumstances occurring outside Australia and to order remedies in respect of those events or circumstances. In relation to human rights offences, the Criminal Code Act 1995 (Cth) (the Criminal Code (Cth)) asserts a mixture of territorial and extraterritorial jurisdiction over behaviours that amount to international and transnational crimes. While section 14.1 preserves the general presumption of territoriality at common law (that is, the default position is that the conduct or result of an offence must occur wholly or partly in Australia), Division 15 describes four situations in which conduct is an offence, even if it was committed wholly outside Australia. Category A and Category C offences do not relate to human rights. Category B crimes, which include slavery-like offences, may be committed by a business anywhere in the world if, at the time of the alleged offence, the accused body corporate was incorporated under Australian law. Category D crimes, which include genocide, crimes against humanity, war crimes and slavery-type offences, do not require the body corporate to be incorporated under Australian law and, therefore, apply to any business anywhere in the world.

Australia has no specific civil cause of action that permits affected individuals or organisations to directly pursue (and, therefore, no jurisdiction for courts to entertain) civil claims for human rights violations by companies.

28 | What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

The courts apply the following jurisdictional principles.

- *Forum non conveniens* can be applied to Australian proceedings on the basis that the trial in Australia is clearly inappropriate because the matter has little to do with the local forum.
- Anti-suit injunctions can be sought by a foreign defendant if it has commenced proceedings in its own jurisdiction.
- The comity principle: Australian courts will consider whether the service of the initiating process in a foreign court's territorial jurisdiction may raise questions that challenge the authority of foreign courts and government.
- Subject to a number of exceptions, estoppel by res judicata and issue estoppel can be created by an existing judgment of a foreign court.
- Effective service of the initiating process. Australian courts retain an overriding, flexible discretion to set aside an initiating process against a foreign defendant on a variety of grounds, including where a document has not been served in a proper manner. In practice, service has not been set aside even where the irregularity is quite substantial.

Class and collective actions

29 | Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

Yes. Part IVA of the Federal Court of Australia Act 1976 (Cth) (the FCA Act) and Division 9.3 of the Federal Court Rules 2011 (Cth) provide a regime for commencing class actions in the Federal Court, including in relation to human rights actions. For example, in 2016, 15,500 seaweed farmers brought a class action in the Australian Federal Court against an oil field operator, PTTEP Australasia, alleging negligence by the company.

A class action may be commenced under Part IVA of the FCA Act provided that the following thresholds are satisfied:

- seven or more persons have claims against the same person;
- the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances;
- the claims of all of those persons give rise to a substantial common issue of law or fact; and
- the complaint originating process is filed.

Class action statutory frameworks similar to the federal regime are also in force in Victoria (Supreme Court Act 1986 (Vic), Part 4A), New South Wales (Civil Procedure Act 2005 (NSW), Part 10) and Queensland (Civil Proceedings Act 2011 (Qld), Part 13A). In addition to the Australian statutory class action regimes, the following procedures enable courts to deal with similar claims together:

- traditional representative proceedings;
- joining two or more persons as plaintiffs;
- a test case to determine common issues; and
- consolidating separately commenced proceedings.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

There are no specific mechanisms for public interest litigation for human rights cases against businesses in Australia. However, public interest litigation is increasingly used in Australia to effect change. Some legal aid commissions do undertake public interest litigation; for example, the Public Interest Advocacy Centre conducts test cases and strategic litigation in the public interest to change the system in areas including discrimination and human rights; Legal Aid NSW provides legal aid for some public interest human rights matters; and the Human Rights Law Centre runs and intervenes in High Court cases in key human rights areas, such as the voting rights of prisoners and marriage equality. The High Court does have a public interest function in hearing matters before it. This arises under section 35 of the Judiciary Act 1903 (Cth), which gives the High Court the discretion to grant an application for special leave to appeal to the High Court where the relevant proceedings involve a question of law that is of public importance, whether because of its general application or otherwise (the public interest test).

The development of public interest litigation has arguably been somewhat stifled in Australia by procedural factors such as the law of standing and the indemnity rule, barriers that do not exist in other jurisdictions, as well as broader sociopolitical factors such as Australia's federal constitutional arrangements, the absence of a national human rights law, and the limits placed on lawyers' use of the media by their ethical and professional codes of conduct. In terms of procedural barriers, the law of standing generally requires that the person who brings the action has a level of personal stake or interest in the matter being litigated. Historically, only the Attorney-General had standing to take proceedings in the public interest; however, there are an increasing number of exceptions to this general rule. The indemnity rule that 'costs follow the event' means that, in Australia, the losing party pays the winning party's litigation costs. In many cases, this may put a prohibitively high financial burden on public interest litigants. Innovations such as protective costs orders, which limit the costs recoverable from a proceeding, as well as the rise in litigation funding of public interest matters, assist in enabling public interest litigation in Australia.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

Australian national contact point

The Australian national contact point (AusNCP) helps parties to resolve complaints about conduct by multinational companies that violates the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines). The OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries and include specific recommendations concerning enterprises' respect for human rights.

Export Finance Australia

Export Finance Australia (EFA) (previously the Export Finance and Insurance Corporation) is the Australian government's export credit agency. Export credit agencies such as EFA play a significant role as providers of finance in the developing world, so their work closely interacts with human rights issues. EFA has policies that restrict support for entities involved in human rights abuses and a mechanism for

resolving complaints submitted by persons or organisations concerned about, affected or likely to be affected by EFA's activities, including any project supported by EFA finance. EFA's general counsel manages the complaints mechanism.

Australia also has the following state-based grievance mechanisms; however, they are not available to hear business-related human rights complaints.

- The Australian Human Rights Commission is an independent third party that can enquire into and conciliate human rights complaints against Commonwealth bodies and agencies.
- From 1 January 2020, the Queensland Human Rights Commission has the power to receive and conciliate human rights complaints about Queensland public entities.
- The Office of the Commonwealth Ombudsman (the Ombudsman) can investigate complaints about actions and decisions of Australian government agencies to assess whether they are wrong, unjust, unlawful, discriminatory or unfair. State or territory government ombudsmen investigate complaints about the relevant state or territory government body. Protecting individuals in their dealings with government is a key human rights objective of an Ombudsman investigation; therefore, although human rights protection is not an express Ombudsman function (with the exception of the Victorian Ombudsman, which has an express function to investigate human rights complaints against Victorian public bodies) and although the complaints are not always portrayed as human rights claims, that dimension will always be present, overtly or subtly, in complaints to the Ombudsman.
- Several other state-based bodies (such as the various human rights commissions and anti-discrimination bodies) can investigate complaints about unlawful discrimination, including complaints against private entities, but they either do not investigate human rights complaints generally or only investigate human rights complaints about government entities, rather than businesses.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

AusNCP

Complaints can be made by individuals or entities via a form on the AusNCP website. Complaints can be made directly against foreign or Australian multinational enterprises operating in Australia and Australian multinational enterprises operating overseas. A 2017 independent review criticised the AusNCP's performance (particularly in relation to accessibility), having only handled 16 complaints in 17 years. The final report contained a number of reform recommendations aimed at ensuring that the AusNCP is 'fully utilised in future', many of which were implemented in 2018.

EFA

A complaint needs to be submitted via email or EFA's online form. Complaints are not brought against businesses directly; rather, they are service-based complaints received by EFA about the service it has provided as a credit agency. Complaints are not published online or recorded in EFA's annual reports, which means the extent to which the complaints mechanism is used in practice is unknown. EFA has indicated that it has historically experienced very low use of the complaints mechanism.

Remedies

33 | What remedies are provided under these mechanisms?

AusNCP

National contact points focus on bringing parties together for mutually beneficial dialogue (good offices), which may include mediation that increases awareness of the OECD Guidelines and encourages resolution. Following either the rejection of a complaint or the conclusion of good offices, the examiner will prepare a final statement that includes recommendations to the enterprise or other relevant bodies. The examiner may consider a range of recommendations, such as:

- encouraging the enterprise to improve its compliance with its own stated corporate policies or the OECD Guidelines;
- strengthening its due diligence arrangements (including staff training) to ensure risks are assessed and addressed in supply chains; and
- creating options to address adverse impacts of activities.

EFA

No information on remedies is available.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

AusNCP

An independent person (the examiner) manages complaints. Pursuant to the AusNCP procedures, the examiner can examine the substance and validity of complaints; try to resolve complaints; issue determinations on whether an enterprise's actions were consistent with the OECD Guidelines; and make recommendations to improve an enterprise's observance of the OECD Guidelines. The determination and recommendations are not enforceable.

EFA

There is no legislative basis (and therefore guidance) for EFA's complaints mechanism and EFA provides little publicly available information about the mechanism. EFA's webpage on the complaints mechanism advises that, upon receipt of a complaint, it will investigate the complaint and endeavour to provide a written response to the complainant within 10 business days. The outcomes of EFA complaints are not enforceable; however, complaints not resolved by EFA can be referred to the Ombudsman for review of EFA's decision or conduct. The Ombudsman has extensive powers to investigate complaints.

Publication

35 | Are these processes public and are decisions published?

AusNCP

There is no default position in respect of the good offices process being public; however, given it is essentially a mediation process, it is guided by what the parties themselves agree to being confidential or public. The examiner's final statement is published on the AusNCP website, reported to the OECD, and provided to relevant Australian government agencies and other relevant bodies. The examiner will follow up on a case and, where further engagement from the AusNCP is warranted (eg, owing to lack of implementation of the recommendations), he or she will publish a further statement with a summary of updates received from the parties and any commentary on the matter that he or she considers relevant, including the extent to which recommendations or outcomes have been implemented.

EFA

The EFA complaints mechanism is not public and EFA's decisions are not published or recorded in its annual reports.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

Australia has formally agreed to be subject to the following complaints mechanisms for the core United Nations human rights treaties:

- the First Optional Protocol to the International Covenant on Civil and Political Rights (complaints made to the Human Rights Committee);
- the International Convention on the Elimination of All Forms of Racial Discrimination (complaints made to the Committee on the Elimination of Racial Discrimination);
- the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (complaints made to the Committee on the Elimination of Discrimination against Women);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (complaints made to the Committee against Torture); and
- the Optional Protocol to the Convention on the Rights of Persons with Disabilities (complaints made to the Committee on the Rights of Persons with Disabilities).

Other multilateral stakeholder complaints or grievance mechanisms associated with Australia include:

- the Bangladesh Accord;
- Fair Wear Foundation;
- the Roundtable on Sustainable Palm Oil;
- the Forest Stewardship Council Certification Scheme (formal complaints processing);
- the Rainforest Alliance;
- Social Accountability International;
- the Ethical Trading Initiative;
- the International Council of Toy Industries;
- Gavi (the Vaccine Alliance);
- the Asian Development Bank;
- Climate Investment Funds;
- the Global Environment Facility;
- the International Finance Corporation;
- the Private Infrastructure Development Group; and
- the World Bank Group.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

Corporate criminal responsibility

The Australian Law Reform Commission (ALRC) report dated April 2020 on Australia's corporate criminal responsibility regime was tabled in Federal Parliament on 31 August 2020. The ALRC report recommended that the federal government introduce a 'failure to prevent' offence for serious transnational human rights offences that may be committed by Australian corporations overseas, including slavery, human trafficking and crimes against humanity (Recommendation 19). The report also suggested that the government perform a holistic review of the national business and human rights framework. Implementation of some or all the recommendations of the ALRC report will assist in enhancing Australia's corporate criminal responsibility regime.

Protection of cultural heritage and indigenous rights

The protection of cultural heritage in Australia and that of the rights of Aboriginal and Torres Strait Islander Australians was brought into the spotlight in 2020. Mining company Rio Tinto's destruction of the Juukan Gorge in May 2020, which was legal under Western Australia's Aboriginal Heritage Act 1972 (WA), and the subsequent Federal Parliament inquiry highlighted the need for more effective business and human rights regulations in Australia. 'Never Again', the interim report of the inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia, was tabled in Federal Parliament on 9 December 2020.

The report made seven recommendations, including that:

- Rio Tinto provide restitution to the traditional owners of the site, the Puutu Kunti Kurrama and Pinikura people, to restore and remediate the site and impose a stay in relation to another 1,700 sites the company currently has permission to destroy pending a detailed review (Recommendation 1);
- the Western Australian government impose a similar moratorium on the approval of the destruction of other sites by mining companies and replace the Aboriginal Heritage Act 1972 with stronger heritage protections as a matter of priority (Recommendation 2); and
- the Australian government urgently review the adequacy of the federal Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Recommendation 7).

The government of Western Australia has introduced the Aboriginal Cultural Heritage Bill 2021 (WA), which has passed both Houses of Parliament and is now awaiting assent. The bill will embed the principles of free, prior and informed consent into agreement-making processes. This means that there must be full disclosure of feasible alternative options for proposed projects to ensure that the traditional owners' consent is, in fact, fully informed. Consent must be given voluntarily and the process cannot involve any coercion, intimidation or manipulation. Despite the new act, concerns still remain as to whether Aboriginal heritage sites will be protected.

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Australian businesses benefit from creating reconciliation action plans, using the United Nations (UN) Declaration on the Rights of Indigenous Peoples (A/RES/61/295) as a basis for the realisation within their organisation of the rights of Aboriginal and Torres Strait Islander Australians and pledging their support for the 'Uluru Statement from the Heart', which calls for the establishment of Aboriginal and Torres Strait Islander voices in the Australian Constitution.

Australia's human rights scorecard released 2021

The UN Human Rights Council (UNHRC) completed the third Universal Periodic Review (UPR) of Australia's human rights compliance record in 2021. Australia submitted its National Report to the UNHRC on 28 December 2020. As part of the third-cycle review, a number of states questioned Australia's progress on various issues, including the reduction of the incarceration rate of Aboriginal and Torres Strait Islander citizens and measures to reduce gender-based violence against women and children. Australia's leading human rights experts, non-governmental organisations and community groups prepared a report, 'Australia's Human Rights Scorecard', endorsed by over 200 organisations, to inform the UPR process.

The outcome of the UPR exposed the strengths and weaknesses in Australia's human rights compliance record. Particular areas where Australia has been called upon to take further action relate to closing the gap with Aboriginal and Torres Strait Islander Australians and addressing the overrepresentation of such peoples in the criminal justice system, as well as implementing a human rights-based approach to migration and border management. Other actions recommended to be taken by Australia include:

- developing a national action plan for its fourth-cycle UPR;
- adopting a bill of rights or human rights act;
- tackling climate change and implementing the goals of the Paris Agreement; and
- taking action to advance gender equality and combat violence against women, including establishing an effective mechanism to report cases of domestic violence and provide victims with assistance.

Canada

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LEGAL AND POLICY FRAMEWORK

International law

1 Which international and regional human rights treaties has your jurisdiction signed or ratified?

Canada has ratified or acceded to seven United Nations (UN) treaties related to human rights and six Optional Protocols:

- the International Convention on the Elimination of All Forms of Racial Discrimination (1965), ratified on 14 October 1970, in force on 13 November 1970;
- the International Covenant on Civil and Political Rights (1966), acceded to on 19 May 1976, in force on 19 August 1976; its Optional Protocol (1976), acceded to on 19 May 1976, in force on 19 August 1976; and its Second Optional Protocol, acceded to on 25 November 2005, in force on 25 February 2006;
- the International Covenant on Economic, Social and Cultural Rights (1966), acceded to on 19 May 1976, in force on 19 August 1976;
- the Convention on the Elimination of All Forms of Discrimination against Women (1979), ratified on 10 December 1981, in force on 9 January 1982; and its Optional Protocol, acceded to on 18 October 2002, in force on 18 January 2003;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), ratified on 24 June 1987, in force on 24 July 1987;
- the Convention on the Rights of the Child (1989), ratified on 13 December 1991, in force on 12 January 1992; its Optional Protocol on the Involvement of Children in armed conflict (2000), ratified on 7 July 2000, in force on 12 February 2002; and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2005), ratified on 14 September 2005, in force on 14 October 2005; and
- the Convention on the Rights of Persons with Disabilities (2006), ratified on 11 March 2010, in force on 10 April 2010; and its Optional Protocol, acceded to on 14 December 2018, in force on 2 January 2019.

Canada is also a party to the following international human rights treaties:

- the Convention on the Prevention and Punishment of the Crime of Genocide (1948), ratified on 3 September 1952, in force on 2 December 1952;
- the Convention Relating to the Status of Refugees (1951), acceded to on 4 June 1969, in force on 2 September 1969, with reservation: 'With reference to Articles 23 and 24 of the Convention: Canada interprets the phrase "lawfully staying" as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence will be accorded the same treatment with respect to the matters dealt with in Articles 23 and 24 as is accorded visitors generally';
- the Convention on the Political Rights of Women (1953), acceded to on 30 January 1957, in force on 30 April 1957, with reservation: 'Inasmuch as under the Canadian constitutional system legislative jurisdiction in respect of political rights is divided between the provinces and the Federal Government, the Government of Canada is obliged, in acceding to this Convention, to make a reservation in respect of rights within the legislative jurisdiction of the provinces';
- the International Slavery Convention (1926), ratified on 6 August 1928 and amended by the Protocol of 7 December 1953, in force on 6 August 1928;
- the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), ratified and in force on 10 January 1963;
- the Convention on the Nationality of Married Women (1957), ratified on 21 October 1959, in force on 19 January 1960;
- the Convention on the Reduction of Statelessness (1961), acceded to on 17 July 1978, in force on 15 October 1978;
- the Protocol Relating to the Status of Refugees (1966), acceded to and in force on 4 June 1969; and
- the UN Convention against Transnational Organized Crime (2000), ratified on 13 May 2002, in force on 29 September 2003; its Protocol to prevent, suppress and punish trafficking in persons, especially women and children (2000), ratified on 13 May 2002, in force on 25 December 2003; and its Protocol against the smuggling of migrants by land, sea and air (2000), ratified on 13 May 2002, in force on 28 January 2004.

Canada has further ratified the following treaties as a member state of the Organization of American States:

- the Convention on the Nationality of Women (1933), acceded to on 23 October 1991, in force on 23 October 1991;
- the Inter-American Convention on the Granting of Political Rights to Women (1948), ratified and in force on 23 October 1991; and
- the Inter-American Convention on the Granting of Civil Rights to Women (1948), ratified and in force on 23 October 1991.

2 Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Canada has signed and ratified all eight of the International Labour Organization's Fundamental Conventions as set out below:

- the Forced Labour Convention, 1930 (No. 29), ratified and in force on 13 June 2012; and its Protocol of 2014, ratified on 17 June 2019, in force on 17 June 2020;

- the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ratified on 23 March 1972, in force on 23 March 1973;
- the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified on 14 June 2017, in force on 14 June 2018;
- the Equal Remuneration Convention, 1951 (No. 100), ratified on 16 November 1972, in force on 16 November 1973;
- the Abolition of Forced Labour Convention, 1957 (No. 105), ratified on 14 July 1959, in force on 14 July 1960;
- the Discrimination in respect of Employment and Occupation Convention, 1958 (No. 111), ratified on 26 November 1964, in force on 26 November 1965;
- the Minimum Age Convention, 1973 (No. 138), ratified on 8 June 2016, in force on 8 June 2017; and
- the Worst Forms of Child Labour Convention, 1999 (No. 182), ratified on 6 June 2000, in force on 6 June 2001.

3 How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Human Rights Watch describes Canada as 'a vibrant multi-ethnic democracy that enjoys a global reputation as a defender of human rights' with a 'strong record on core civil and political rights protections guaranteed by the Canadian Charter of Rights and Freedoms'. However, Human Rights Watch also identifies human rights issues particularly in relation to Canada's indigenous communities.

Canada participates actively in UN-led human rights assessments. In May 2017, the UN Working Group on Business and Human Rights met with representatives of the federal government, Canadian businesses with global operations, business associations, non-governmental organisations and civil society to assess Canadian implementation of human rights obligations under the UN Guiding Principles on Business and Human Rights (UNGPs). The Working Group recognised the various initiatives Canada has taken to promote compliance with the UNGPs while identifying weaknesses. One of the Working Group's conclusions was that, despite the existence of both judicial and non-judicial mechanisms for the resolution of conflicts between companies and communities related to business and human rights in Canada, victims of human rights abuses continue to have inadequate access to timely remedy. In May 2018, Canada participated in the UN Human Rights Council's universal periodic peer review process, which included recommendations for advancing compliance with the UNGPs.

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

Canada has not made any official statement in support of an international legally binding instrument to regulate the activities of transnational corporations. Nor has Canada participated in any of the drafting activities of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, which was given the mandate by the UN Human Rights Council to develop this treaty.

National law

5 Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

The international human rights treaties to which Canada is a party were brought into force in accordance with Canada's international treaty ratification process.

The federal government, provinces and territories have not enacted domestic legislation within their respective spheres of legislative competence to implement any of the international human rights obligations so as to place duties on business enterprises or create causes of action against business enterprises.

Canadian courts have shown an inclination to interpret domestic laws in a manner consistent with international law, particularly in the interpretation of the Canadian Charter of Rights and Freedoms and in their review of administrative decisions even where Canada's international commitments have not been implemented domestically by statute (*Baker v Canada (Minister of Citizenship and Immigration*) [1999] 2 SCR 817).

6 Has your jurisdiction published a national action plan on business and human rights?

No. However, Canada does have a corporate social responsibility (CSR) strategy focused on the Canadian extractive sector: 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Mining Sector Abroad' (the CSR Strategy). The CSR Strategy sets out the Canadian government's commitment to promoting responsible business conduct (RBC) abroad and the government's expectation that Canadian companies will conduct their global operations in accordance with internationally recognised guidelines including the UNGPs. After a public consultation process, the government is expected to publish a renewed RBC government strategy for all Canadian companies with global operations by the end of 2021 or in early 2022.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

Under Canadian securities laws, public companies must disclose all information, including information about environmental and social issues that are material to an investor. The Toronto Stock Exchange and TSX Venture Exchange further require that material information be immediately disclosed in accordance with their timely disclosure policies.

Canada has implemented procurement-related requirements for suppliers contracting with the Canadian federal government. All clothing and textile suppliers contracting with the federal government are required to self-certify that they conduct their business in accordance with fundamental human and labour rights, including freedom from child labour, forced labour, and discrimination and abuse. Further to Canada's commitment to preventing human trafficking in federal procurement supply chains, the government recently amended the Code of Conduct for Procurement applicable to suppliers to integrate human and labour rights expectations.

There is also growing political momentum in Canada to impose statutory reporting and compliance obligations on Canadian companies for modern slavery and human trafficking in supply chains. In November 2021, a private bill (Bill S-211: An Act to Enact the Fighting against Forced Labour and Child Labour in Supply Chains Act and to Amend the

Customs Tariff) was reintroduced in the Canadian Senate. It is anticipated that some form of supply chain legislation will be on the current government's legislative agenda.

8 | What is the nature and extent of the required reporting or disclosure?

Aside from environmental and social matters determined to be material, Canadian securities regulators have not specifically mandated the disclosure of environmental and social issues in a reporting issuer's public disclosure record. Certain industry associations, such as the Mining Association of Canada, require members to report on their corporate social responsibility performance.

Canada's transparency reporting legislation, the Extractive Sector Transparency Measures Act (ESTMA), imposes mandatory reporting obligations on oil, gas and mining companies. Quebec has similar legislation: the Act Respecting Transparency Measures in the Mining, Oil and Gas Industries. Under the ESTMA, all reporting companies are required to report on an annual basis all payments made to governments in Canada and abroad, including indigenous governments, and state-owned entities where the payments are made in relation to the commercial development of oil, gas or minerals and the payment amount is C$100,000 or more to a single payee.

9 | Which bodies enforce these requirements, and what is the extent of their powers?

Canadian securities regulators are responsible for enforcing disclosure requirements imposed on securities issuers.

The federal department Natural Resources Canada administers the ESTMA and, in cases of wilful non-compliance, may recommend prosecution to the Director of Public Prosecutions. If the entity is found guilty, the ESTMA provides for fines of up to C$250,000 per day per offence.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

As part of 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Mining Sector Abroad', the Canadian government has specifically endorsed the Global Reporting Initiative international reporting standard. However, in the absence of statutory requirements, Canadian companies are able to choose a reporting framework that best enables them to meet the information demands of their stakeholders and any reporting obligations mandated by law, policy or membership with an industry association.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

There are no express statutory obligations in Canada requiring businesses to engage in corporate due diligence in respect of human rights matters.

12 | What is the nature and extent of the required due diligence?

There are no express statutory obligations in Canada requiring businesses to engage in corporate due diligence in respect of human rights matters.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

There are no express statutory obligations in Canada requiring businesses to engage in corporate due diligence in respect of human rights matters.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

Canadian businesses may choose to align with a number of different voluntary international regimes that promote or require human rights-related due diligence activities, including:

- the United Nations Guiding Principles on Business and Human Rights;
- the Voluntary Principles for Security and Human Rights;
- the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises; and
- the OECD Due Diligence Guidance for Responsible Business Conduct.

Canada is the home jurisdiction of a number of businesses that are internationally active in mining, energy and other extractive industries. As a result, a number of sector-specific voluntary regimes that emphasise human rights-related due diligence are applicable to Canadian businesses, including:

- the Mining Association of Canada's Towards Sustainable Mining initiative;
- the International Council on Mining and Metals' performance expectations; and
- the World Gold Council Responsible Gold Mining Principles Assurance Framework.

CRIMINAL LIABILITY

Primary liability

15 | What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

Canadian corporations are subject to the federal Criminal Code. There are no specific offences under the Criminal Code for which corporations can be held criminally liable for human rights abuses conducted in foreign jurisdictions. Additionally, the Criminal Code does not have general extra-territorial application; the acts constituting the offence would need to be in Canada.

Generally, businesses can be found guilty of offences by application of the tests outlined under sections 22.1 and 22.2 of the Criminal Code for negligence and other offences. Under these provisions, an organisation may be guilty if one of the organisation's senior officers was a directing mind that committed the act and had the necessary state of mind. A senior officer is defined as a 'representative who plays an important role in the establishment of an organisation's policies or is responsible for managing an important aspect of the organisation's activities' and can include directors, executives, employees, agents or contractors.

For an offence requiring negligence (section 22.1), the prosecution must first prove that a representative or representatives acting within the scope of their authority were parties to the offence. Second, the prosecution must prove that the conduct of the senior officer responsible for

the organisation's activities relating to the offence departed markedly from the standard of care that could reasonably be expected to prevent the representative from being a party to the offence.

For offences other than negligence (section 22.2), the prosecution must first prove that one of the senior officers at least had the intent to benefit the organisation. Second, the prosecution must prove one of three bases for liability:

- the senior officer, acting within the scope of his or her authority, was a party to the offence;
- the senior officer had the mental state for the offence, acted within the scope of his or her authority and directed the work of other representatives to perform the offence; or
- the senior officer, knowing that a representative of the organisation was or was about to be a part of the offence, did not take reasonable measures to stop the commission of the offence.

16 | What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

There are no cases addressing defences related to criminal human rights offences committed in the course of business, particularly for offences committed abroad. However, corporations may assert that:

- there is a lack of jurisdiction, due to territorial or forum issues;
- the individual involved in the offence was not a senior officer or representative of the corporation;
- the individual involved did not depart markedly from the standard of care reasonably expected;
- the individual was not acting within the scope of his or her authority; or
- the individual did not commit the act intentionally, in any part, to benefit the organisation.

Director and officer liability

17 | In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

There are no specific offences under the Criminal Code for which directors and officers can be held criminally liable for human rights abuses conducted by corporations in foreign jurisdictions.

However, directors and officers can be held criminally liable as senior officers when they participate in the organisation's commission of or involvement in offences under the Criminal Code. They would likely be jointly charged with the offence alongside the organisation. Otherwise, directors and officers of an organisation cannot be criminally liable for acts of the organisation solely because of their position as such.

Pursuant to section 21 of the Criminal Code, a director or officer is a party to an offence committed by an organisation when he or she:

- actually commits the offence;
- does or omits to do anything for the purpose of aiding any person to commit the offence; or
- abets any person in committing the offence.

Piercing the corporate veil

18 | When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

Courts may pierce the corporate veil under rare circumstances. First, the court must find that the subsidiary is an alter ego of the parent. A subsidiary will not be found to be the alter ego of the parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. Second, the court must find that the corporation was created or used for a fraudulent or improper purpose.

Parent companies may also be liable where a senior officer of the parent corporation, along with the foreign-operating subsidiary, is a party to the offence.

With regard to defences, a plaintiff must demonstrate that a parent corporation and its subsidiary are not truly operating as separate corporations. Additionally, in very limited circumstances, courts will pierce the corporate veil when a refusal to do so would yield a result that is flagrantly opposed to justice. When a corporation is convicted of a criminal offence, it may be fined and its representatives imprisoned, depending on the offence at issue. Further, sentencing judges have the discretion to impose probation orders on organisations, pursuant to section 732.1(3.1) of the Criminal Code, including compliance with 'any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence'.

Secondary liability

19 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

An organisation may be held responsible for the negligent or other acts or omissions of its representatives under section 22.1 or 22.2 of the Criminal Code if the responsible senior officer departs markedly from the expected standard of care, or has intent or knowledge of the criminal conduct.

In accordance with Canada's trade obligations under the Canada–United States–Mexico Agreement (which replaced the North American Free Trade Agreement), on 1 July 2020, amendments to Canada's Customs Tariff and the Schedule to the Customs Tariff took effect. These amendments prohibited 'goods mined, manufactured or produced wholly or in part' by forced or compulsory labour from being imported into Canada. Compliance with this new import prohibition requires companies importing goods into Canada to conduct ongoing due diligence and review of their supply chains to ensure the absence of forced labour at each step of production.

Prosecution

20 | Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

The Crown can exercise its discretion to prosecute. When determining whether to exercise its discretion, the Crown will consider the public interest and whether there is a reasonable prospect of conviction.

No provision in the Criminal Code explicitly authorises private prosecutions, but private citizens can institute criminal proceedings for summary or indictable offences. However, private citizens generally pursue civil litigation.

21 What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

When commencing a prosecution, the Crown must comply with criminal procedures pursuant to the Criminal Code and common law. Criminal procedures differ from province to province. There are no special rules or considerations related to the prosecution of human rights cases in the criminal context.

CIVIL LIABILITY

Primary liability

22 What civil law causes of action are available against businesses for human rights abuses?

For human rights abuses stemming from conduct within Canada, businesses may be liable under human rights legislation. Each jurisdiction in Canada has its own human rights legislation. The legislative framework in each jurisdiction is similar. To establish liability, a complainant must prove that he or she has been discriminated against based on a prohibited ground. Prohibited grounds generally include race, religion, age, sex, sexual orientation, gender, gender identity or expression, family status, disability, criminal convictions, ethnic origin and political association.

Once a complainant establishes prima facie discrimination, a business can avoid liability under human rights legislation if it can establish that the action or standard in question:

- is for a purpose or goal rationally connected to the function being performed;
- was established in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
- is reasonably necessary to accomplish its purpose or goal, because the respondents cannot accommodate persons with the characteristics of the complainant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.

Remedies under human rights legislation are broad. Most adjudicative bodies can award any remedy that will prevent and correct the discriminatory behaviour.

There have only been a handful of civil actions commenced in Canada against Canadian businesses stemming from alleged human rights violations committed outside of Canada, such as *Nevsun Resources Ltd v Araya* (2020 SCC 5). None of the cases have been decided on the merits yet. The causes of action in the cases currently before Canadian courts are based in tort law, including negligence, either alone or in combination with other torts such as battery, unlawful confinement, conspiracy or negligent infliction of mental distress.

Director and officer liability

23 In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

In general, under Canadian law, directors and officers are not personally liable for what they do on behalf of a corporation. As such, they would typically not be held personally liable for the human rights violations or the tortious conduct, including negligence, of the corporation. Directors and officers may be liable, however, if their conduct is wrongful in itself or exhibits a separate interest from that of the corporation so as to make the act complained of their own. In other words, the director or officer must have engaged in misconduct in his or her personal capacity. The plaintiff must prove that the specific conduct of the director or officer was either tortious or discriminatory, separate and apart from the interests of the corporation.

The defences available to a director or officer are the same as those available to the corporation. A director or officer may take the position that there is no prima facie discrimination. However, where prima facie discrimination has been established, with regard to defences available to an officer or director, a plaintiff must demonstrate that a parent corporation and its subsidiary are not truly operating as separate corporations.

The remedies available as against an officer or director would be the same broad remedies that are available against a corporation.

Piercing the corporate veil

24 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

Canadian legislation prevents the piercing of the corporate veil except for in limited circumstances. Generally, to succeed in piercing the corporate veil, a plaintiff must demonstrate that a parent corporation and its subsidiary are not truly operating as separate corporations. Additionally, in very limited circumstances, courts will pierce the corporate veil when a refusal to do so would yield a result that is flagrantly opposed to justice.

Secondary liability

25 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

In Canada, a business can be held liable for the acts of its employees, agents or any person for whom it is responsible under limited circumstances. Corporations are generally vicariously liable for acts of their employees committed in the course of their employment.

The issue of liability for human rights abuses committed by third parties abroad remains unclear in Canada. A number of cases currently before Canadian courts will likely clarify whether Canadian businesses can be held liable for the acts of third parties connected to their business ventures.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

The issue of shareholder liability for a business's human rights abuses has not been considered by Canadian courts.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

Constitutional distribution of legislative powers and courts' jurisdiction

Human rights claims against corporations can be brought before criminal or civil courts. As per the Constitution Act 1867, while provinces make laws in relation to civil rights, criminal law remains under the authority of the Parliament of Canada. However, the administration of justice, both of civil and of criminal jurisdiction, is under provincial jurisdiction.

As such, provincial courts try most civil and criminal offences, with the superior courts dealing with the most serious cases. Canada's court system is divided into three levels: provincial and territorial or lower courts; superior courts; and appeal courts for the review of judicial decisions.

Jurisdiction in the specific context of civil actions alleging human rights violation abroad

Canada has no specific legislation that confers substantive jurisdiction to the provincial superior courts over civil actions for torts that violate customary international law. Legal action against a Canadian company for its alleged activities abroad may be brought in the jurisdiction or jurisdictions in which it carries on business. Jurisdiction over an *ex juris* parent corporation through an *in juris* subsidiary can only be asserted in very specific cases. The few reported cases where this has occurred suggest that the subsidiary must be involved in illegal activities *in juris* before the corporate veil of the parent corporation can be tackled.

28 What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

Forum non conveniens

In civil law, the exception of *forum non conveniens* allows a court to decline jurisdiction if it considers that the authorities of another state are in a better position to settle the dispute. The doctrine is also well established at common law, having long been confirmed by the courts.

Adoption of the law of nations

As confirmed in *R v Hape* (2007 SCC 26), Canadian courts may adopt prohibitive rules of customary international law as common law rules to base their decisions upon them, without the need for legislative action but provided there is no valid legislation that conflicts with the customary rule. In *Bil'In v Green Park International Inc* (2009 QCCS 4151), the court added that violations of the Geneva Conventions could constitute war crimes and result in civil liability. It held that international law defined the standard of care and that a violation of international law is a violation of provincial law as well.

In *Nevsun Resources Ltd v Araya* (2020 SCC 5), the Supreme Court of Canada was asked to consider whether a civil claim based on customary international law prohibitions could proceed. The claim was brought against a Canadian mining company by Eritrean workers seeking damages for alleged violations of customary international law prohibitions against forced labour and slavery in connection with a mining operation in Eritrea. By a 5:4 majority, the Supreme Court of Canada permitted the claim to proceed to trial on the basis that customary international law was part of Canadian law, and therefore it was not plain and obvious that such a claim would fail. In October 2020, plaintiffs reached an out-of-court settlement with Nevsun Resources. In Canada, criminal jurisdiction is exclusively a matter of domestic legislation and therefore no criminal liability can arise based solely on customary international law or the law of nations.

Piercing the corporate veil

In civil law, section 317 of the Civil Code of Quebec allows the corporate veil to be lifted in cases such as fraud, abuse of rights or contravention of a rule of public order. Recent decisions in common law provinces (such as *Yaiguaje v Chevron Corporation* (2018 ONCA 472)) reaffirmed the narrow scope of the doctrine, which is limited to situations where it is necessary to give effect to statutes and to prevent the corporation from being used as a shield for fraud.

Direct duty of care

Claims in negligence against parent corporations for the actions of a foreign subsidiary have been permitted to proceed in cases where the parent assumed control of a specific function of the subsidiary. In particular, in *Choc v Hudbay Minerals Inc* (2013 ONSC 1414), which involved allegations of human rights violations at Hudbay's Guatemalan mining project, the Ontario Superior Court of Justice allowed that there might be a cause of action based on the existence of a prima facie duty of care and therefore refused to dismiss on the basis that there was no cause of action pled.

Companies' liability for extraterritorial abuses

Two decisions (*Araya v Nevsun Resources Ltd* (2017 BCCA 401) and *Garcia v Tahoe Resources Inc* (2017 BCCA 39)) extended the possibility that Canadian companies might be held liable for human rights violations taking place overseas. The courts dismissed appeals requesting that the cases be heard in host countries, highlighting the risk that victims may not have access to a fair trial.

Class and collective actions

29 Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

Class action proceedings

British Columbia, Manitoba, Ontario, Newfoundland, Quebec and Saskatchewan have enacted legislation governing class action proceedings. In other provinces and territories, the principles allowing representative action in *Western Canadian Shopping Centres Inc v Dutton* (2001 SCC 46) apply. In common law provinces and federal courts, five requirements must be met to certify a class action:

- the pleadings must disclose a reasonable cause of action;
- there must be a class capable of clear definition;
- there must be issues of law or fact common to all class members;
- a class action must be the preferable procedure to advance the litigation of the class members; and
- the representative plaintiff must adequately represent the interests of the class.

In civil law in Quebec, the requirements are similar and provided in section 575 of the Code of Civil Procedure.

Cross-border class actions

Certain provinces (British Columbia, Newfoundland and New Brunswick) allow the certification of classes that include extra-provincial residents where such residents specifically opt in to the class proceeding. In practice, other provinces have also certified classes that include extra-provincial residents where claims have a significant nexus to the province (*Abdula v Canadian Solar* (2012 ONCA 211); *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* (2015 ONSC 1634); *Airia Brands v Air Canada* (2015 ONSC 5332)); therefore, a jurisdiction challenge can defeat the action entirely.

Recent class action lawsuits

To date, no cross-border class actions brought in Canada against companies for human rights violations committed abroad have been successful. In *Anvil Mining Ltd v Canadian Association Against Impunity* (2012 QCCA 117), the Court of Appeal of Quebec dismissed a complaint filed by a Canadian non-governmental organisation (NGO) on behalf of victims of human rights violations, stating that the law did not recognise Quebec's jurisdiction to hear this class action. However, more recently, in *DALI Local 675 Pension Fund (Trustees) v Barrick Gold* (2019 ONSC 4160), the Ontario Superior Court of Justice granted a motion for leave

to commence a C$3 billion securities class action against the Canadian mining company Barrick Gold for losses caused by environmental damage abroad and lack of disclosure of environmental risk. The motion for leave to appeal was dismissed in October 2020 in *DALI Local 675 Pension Fund (Trustees) v Barrick Gold Corporation* (2020 ONSC 6304). A similar class action lawsuit was, however, dismissed in Quebec in *Nseir v Barrick Gold Corporation* (2020 QCCS 1697). Plaintiffs are appealing the decision with no decision yet reached as at December 2021. In addition, a class action against Hershey for selling products in Canada allegedly tainted by the worst forms of child labour was filed in Ontario in 2018. However, in 2020, plaintiff Mark Reynolds asked the court to discontinue his action in Ontario to proceed with the same action in British Columbia in *Reynolds v Hershey* (2020 ONSC 2416). The results of these proceedings remain unknown at the present time.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

Legislation

Sections 22.1 and 22.2 of the Criminal Code provide a mechanism for criminal liability that applies to companies. However, Canada has yet to enact a statute providing a cause of action for claims alleging violations of international law. In the absence of civil regimes specifically designed for human rights abuses, claimants bring their claims on the basis of general tort law principles.

Access to human rights tribunals

Provincial or territorial human rights agencies may have the necessary authority to intervene in specific cases of human rights complaints against a privately run business, investigating the complaint and representing the claimant before the tribunal. Some provinces, such as Ontario, also eliminated the gatekeeper role of human rights commissions and introduced direct access to human rights tribunals. Finally, across Canada, damages awarded by human rights tribunals have been escalating in recent years, encouraging the use of judicial solutions.

Class actions

Civil and common law class actions provide a collective mechanism for judicial redress in cases of violations of public or collective rights, including human rights cases against businesses. Provinces also manage programmes or public bodies that support legal proceedings (eg, Quebec's Collective Action Fund). Finally, NGOs may have a sufficient interest to file complaints against human rights violations.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

In 2018, the federal government announced the Canadian Ombudsperson for Responsible Enterprise (CORE) to supplement the Canadian National Contact Point (NCP) and the Canadian Extractive Sector Corporate Social Responsibility Counsellor.

CORE's mandate was outlined through an Order in Council (No. 2019-1323). Simply put, CORE is responsible for addressing complaints related to allegations of human rights abuses arising from a Canadian company's activity abroad. CORE only has jurisdiction over extractive and garment industries for now, but this will likely expand.

Canada's NCP, as required under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines), continues to fulfil its mandate of dialogue facilitation or mediation for all sectors.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

CORE

Launched in March 2021, CORE now has a web portal to enable public submissions. There is also be an option to make submissions by mail, for those who do not have access to a computer or the internet. The procedures for making complaints and how those complaints will be dealt with is outlined in the new 'Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise', which can be found on CORE's website.

NCP

Any stakeholder that believes an enterprise's actions are not consistent with the OECD Guidelines may lodge a formal request for review with the NCP of the relevant country. Should the country not adhere to the OECD Guidelines, the specific instance may be submitted to the NCP in the company's home country. When submitting a formal request to the NCP, there are minimum form requirements, namely the requester's background information, information about the request for review, the expected outcome and a declaration of consent.

Remedies

33 | What remedies are provided under these mechanisms?

CORE

If a Canadian company has not acted in good faith during the course of a review process, CORE may make recommendations to the government, including:

- withdrawal of trade advocacy support provided to the Canadian company;
- refusal by the government to provide future trade advocacy support to the Canadian company; and
- refusal by Export Development Canada (the Canadian funding agency) to provide future financial support to the Canadian company.

After a review is completed, CORE prepares a report, which can include recommendations (to the Canadian company or others) that could include any of the following:

- referral to the NCP;
- the parties to enter into arbitration;
- referral to criminal or regulatory authorities if any evidence is of concern;
- financial compensation;
- a formal apology; and
- changes to a Canadian company's policies.

CORE may also issue a declaration that an allegation of human rights abuse is founded or unfounded. However, there are not yet any concrete examples of such results from CORE.

NCP

At the conclusion of the procedures, the NCP will make the results of the procedures publicly available in the form of a published final statement. The final statement may include:

- issues raised;
- reasons why the NCP decided that the issues raised merited further examination;

- procedures that the NCP undertook to assist the parties;
- whether the parties participated in good faith; and
- recommendations to the parties (including potentially reporting back to the NCP).

Recent examples are as follows.

- On 19 May 2015, the Canadian NCP received a request for review from a labour union in Mali alleging that a Canadian multinational enterprise, Endeavour Mining, had breached the Concepts and Principles and General Policies chapters of the OECD Guidelines. Although no agreement was reached, the company agreed to undertake certain changes. In its final statement published on 24 October 2017, the NCP made a series of recommendations to Endeavour Mining and asked that the company report in writing to the Canadian NCP. The company followed up and, in 2019, the NCP closed the file.
- On 26 February 2016, the Canadian NCP received a request for review from a group of five former employees of the Société Minière et Industrielle du Kivu in liquidation in the Democratic Republic of the Congo (DRC), alleging conduct in the DRC by Banro Corporation being inconsistent with the OECD Guidelines. In its final statement, though mediation was not offered to the parties, the NCP made a series of recommendations, including that the company must make all efforts to engage with the DRC government to resolve the issues raised. Despite many attempts on the part of the NCP, Banro Corporation did not follow up or explain its evolving situation, including incorporation in the Cayman Islands from Canada. As a result of the company's lack of collaboration, the case was closed with the publication of a follow-up statement on 21 March 2019.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

CORE

CORE's role is focused on investigations, informal resolution of disputes, and making public recommendations. CORE is empowered to investigate independently but the CORE mandate is to pursue collaborative fact-finding, wherever possible. Expansion of the authority of CORE to demand documents and testimony is being considered. Where companies do not cooperate in the process, CORE has the ability to recommend denial or withdrawal of trade advocacy and future Export Development Canada financial support.

NCP

NCPs are a voluntary, non-judicial grievance mechanism based on dialogue facilitation or mediation. The NCP does not have investigative powers and does not render enforceable decisions.

Publication

35 | Are these processes public and are decisions published?

CORE

To improve transparency, CORE will publicly report at various stages of an investigation process and when monitoring recommendations.

NCP

At the conclusion of the process in question, the NCP will make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information.

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NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

Most non-judicial, non-state-based grievance mechanisms are industry and stakeholder based. Many of the bodies governing these mechanisms are international with Canadian corporate membership. These bodies may be industry-specific (eg, mining), wider sector-specific (eg, multiple supply chain-based sectors) or multi-industry. These initiatives cover a wide variety of rights and interests, including environmental protection, fair labour, indigenous rights, rights to life, liberty and security, freedom of expression, freedom of association, and collective bargaining.

In addition to international organisations, there are a number of Canadian-specific organisations with similar mechanisms. The most sophisticated Canadian initiatives exist in the areas of environmental protection and indigenous rights, specifically within the extractives sector. For example, the Mining Association of Canada requires members to participate in their Towards Sustainable Mining (TSM) initiative. TSM requires mandatory facility assessments (the only programme in the world to do this in the mining sector), and mandatory annual, publicly available and externally verified reports analysed by reference to 23 predetermined indicators of sustainable mining. TSM is now being adopted and applied in other jurisdictions, including Argentina, Botswana, Brazil, Colombia, Finland, Norway, the Philippines and Spain.

Means of enforcement of non-judicial, non-state-based grievance mechanisms vary from investigation or audit (eg, Social Accountability International) and mediation (eg, the Fair Labor Association and the Ethical Trading Initiative) to the withdrawal of certification or membership (eg, Voluntary Principles for Security and Human Rights), or less formal guidelines that technically fall short of a grievance mechanism. In Canada, guidelines are particularly prevalent in relation to indigenous

rights and in particular the right to free, prior and informed consent, which occupies a unique context in Canada because of its constitutional protection of indigenous rights. Initiatives such as the Boreal Leadership Council (comprising parties with an interest in Boreal forest conservation, including conservation groups, First Nations groups, resource companies and financial institutions) are instrumental in promoting understanding, successful negotiation and, ultimately, protection of indigenous rights.

UPDATE AND TRENDS

Recent developments

37 What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

The recent Supreme Court of Canada decision in *Nevsun Resources Ltd v Araya* (2020 SCC 5) (*Nevsun*) was a key development relating to business and human rights. In *Nevsun*, the Supreme Court of Canada was asked to consider whether a civil claim based on customary international law prohibitions could proceed. The claim was brought against a Canadian mining company by Eritrean workers seeking damages for alleged violations of customary international law prohibitions against forced labour and slavery in connection with a mining operation in Eritrea. By a 5:4 majority, the Supreme Court of Canada permitted the claim to proceed to trial on the basis that customary international law was part of Canadian law, and therefore it was not plain and obvious that such a claim would fail. While the plaintiffs reached an out-of-court settlement with Nevsun Resources in October 2020, the decision in *Nevsun* has made it easier for plaintiffs to seek remedies from Canadian courts in respect of violations of customary international law prohibitions.

Another significant development was the introduction of a private members' bill (Bill S-216: An Act to Enact the Modern Slavery Act and to Amend the Customs Tariff), which was stalled due to elections in the autumn of 2021. If this initiative re-emerges in relatively the same form, which is likely, it would introduce a federal Modern Slavery Act in Canada.

If enacted and brought into force, the proposed Modern Slavery Act would oblige businesses that are subject to its provisions to file public reports annually on what they are doing to prevent and reduce the risk of forced labour or child labour being used at any stage in the production of goods in their supply chain, whether in Canada or overseas. The proposed act would contain enforcement provisions and penalties – including for directors and officers' liability – and would amend the Customs Tariff to prohibit the importation of goods manufactured or produced, in whole or in part, by forced labour or child labour.

The proposed Modern Slavery Act would apply to all entities listed on a Canadian stock exchange. The proposed act would also apply to any entity that has a place of business or does business in Canada if it has assets in Canada and meets two of the following three conditions:

- it has assets of at least C$20 million;
- it has revenues of at least C$40 million; and
- it has 250 employees or more.

Finland

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Krogerus

LEGAL AND POLICY FRAMEWORK

International law

1 | Which international and regional human rights treaties has your jurisdiction signed or ratified?

Finland has committed to the core international human rights instruments of the United Nations (UN) as follows:

- the International Convention on the Elimination of All Forms of Racial Discrimination (entered into force 1970);
- the International Covenant on Economic, Social and Cultural Rights (entered into force 1976) and its Optional Protocol (entered into force 2014);
- the International Covenant on Civil and Political Rights, its Optional Protocol (entered into force 1976) and its Second Optional Protocol, aiming at the abolition of the death penalty (entered into force 1991);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 1989) and its Optional Protocol (entered into force 2014);
- the Convention on the Elimination of All Forms of Discrimination against Women (entered into force 1986) and its Optional Protocol (entered into force 2001);
- the Convention on the Rights of the Child (entered into force 1991) and its Optional Protocols on:
    - the involvement of children in armed conflict (entered into force 2002);
    - the sale of children, child prostitution and child pornography (entered into force 2012); and
    - communications procedure (entered into force 2016); and
- the Convention on the Rights of Persons with Disabilities (entered into force 2016) and its Optional Protocol (entered into force 2016).

In addition, Finland has committed to the following Council of Europe human rights treaties:

- the Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 1990);
- the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 1991);
- the European Charter for Regional or Minority Languages (entered into force 1998);
- the Framework Convention for the Protection of National Minorities (entered into force 1998);
- the European Social Charter (revised) (entered into force 2002);
- the Council of Europe Convention on Action against Trafficking in Human Beings (entered into force 2012);
- the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (entered into force 2011); and
- the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (entered into force 2015).

Moreover, Finland has committed to a number of other international human rights treaties, including:

- the Convention on the Reduction of Statelessness (entered into force 2008);
- the European Convention on Nationality (entered into force 2008);
- the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights (entered into force 1999);
- the European Agreement relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights (entered into force 1991);
- the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 1972);
- the Convention against Discrimination in Education (entered into force 1972);
- the Convention relating to the Status of Stateless Persons (entered into force 1969); and
- the Convention relating to the Status of Refugees (entered into force 1969).

2 | Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Finland has ratified the eight core conventions of the International Labour Organization:

- the Forced Labour Convention (entered into force 1936);
- the Freedom of Association and Protection of the Right to Organise Convention (entered into force 1950);
- the Right to Organise and Collective Bargaining Convention (entered into force 1951);
- the Equal Remuneration Convention (entered into force 1963);
- the Abolition of Forced Labour Convention (entered into force 1960);
- the Discrimination (Employment and Occupation) Convention (entered into force 1970);
- the Minimum Age Convention, 1973 (entered into force 1976); and
- the Worst Forms of Child Labour Convention (entered into force 2000).

3 | How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Compliance with international human rights law in Finland is generally at a good level. Finland has adopted a number of international human

rights treaties and conventions. The fundamental rights included in the Constitution of Finland (731/1999) are in line with the European Convention on Human Rights (ECHR) and the human rights included in the international human rights conventions. The Constitution of Finland guarantees the inviolability of human dignity and the individual's freedom and rights, and promotes fairness in society.

The third National Action Plan on Fundamental and Human Rights 2020–2023 promoting the obligation of the authorities to guarantee the observance of fundamental and human rights was accepted by the Finnish government in June 2021. In drawing up the national action plans (NAPs), particularly the government's human rights policies, recommendations to Finland from international treaty monitoring bodies, the views of the overseers of legality and the special ombudsmen, and the concerns raised by non-governmental organisations (NGOs) have been taken into consideration. An innovative aspect of the third NAP is that fundamental and human rights indicators were introduced, which provide a new instrument for monitoring fundamental and human rights both in the short term and the long term.

However, some gaps in Finland's compliance with human rights policies are still observed by treaty monitoring bodies and NGOs. The majority of the European Court of Human Rights' findings of violations of the ECHR against Finland have concerned the length of the proceedings and other conditions for the right to a fair trial. Moreover, the Finnish Human Rights Centre has pointed out that many of the concerns raised by the latest Universal Periodic Review mechanism of the UN Human Rights Council relate to Finland's outdated Act on Legal Recognition of the Gender of Transsexuals (563/2002), which requires sterilisation or infertility as a condition for the legal recognition of gender reassignment. Another concern raised is violence against women.

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

Finland supports the UN Guiding Principles on Business and Human Rights (UNGPs), but opposes the legally binding international treaty on transnational corporations and other business enterprises with respect to human rights because of its scope and wording. In 2018, the main concerns of Finland were that the scope of the treaty remains limited only to multinational activities and the UNGPs have not been duly taken into account. Since 2018, there have been no official statements from the Ministry for Foreign Affairs of Finland as to whether it supports the adoption of a binding treaty or not.

National law

5 Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

Not directly. Pursuant to section 22 of the Constitution of Finland, the public authority has the obligation to guarantee the observance of fundamental rights and human rights. Therefore, the obligation only applies to businesses to the extent that they perform public functions.

In addition to the above obligation, the Non-Discrimination Act (1325/2014) prohibits all discrimination on the basis of gender, age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics, and applies to both public and private activities in several contexts. On the basis of this act, employers must assess and promote equality in their activities.

The Act on Equality between Women and Men (609/1986), in turn, contains provisions on non-discrimination on the basis of gender and gender expression. Moreover, this act seeks to promote equality between women and men, particularly in working life. Employers have a legal duty to promote equality between women and men within working life in a purposeful and systematic manner, as well as to prepare a gender equality plan if they regularly employ at least 30 employees.

6 Has your jurisdiction published a national action plan on business and human rights?

The government approved the NAP for the implementation of the UNGPs on 17 September 2014.

The third NAP on fundamental and human rights covering 2020–2023 was accepted by the Finnish government in June 2021.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

There are no general human rights-related reporting and disclosure requirements, but certain obligations are contained in special statutes. Moreover, the debate in Finland around the future Corporate Social Responsibility Act has been quite lively in recent years and has gained new momentum after the European Parliament delivered its recommendations to the European Commission on corporate due diligence and corporate accountability in March 2021.

Pursuant to Chapter 3a, sections 1 and 2 of the Accounting Act (1336/1997), which implements the obligation to disclose non-financial and diversity information set out in Directive 2014/95/EU, a public-interest business entity whose average number of employees during the financial year has exceeded 500 must include in its management report a statement of non-financial information regarding how the business handles:

- environmental matters;
- social and employee-related matters;
- respect for human rights;
- anti-corruption; and
- bribery.

The EU Conflict Minerals Regulation (2017/821/EU) became effective across the European Union on 1 January 2021. In Finland, the regulation was incorporated into the Act on the Placing on the Market of Conflict Minerals and Their Ores (1196/2020), which was approved by the President of the Republic, Sauli Niinistö, on 30 December 2020. EU importers of certain conflict minerals (tin, tantalum, tungsten and gold) must now comply with and report on supply chain due diligence obligations, in case the conflict minerals are imported from conflict-affected areas in annual volumes above certain thresholds.

8 What is the nature and extent of the required reporting or disclosure?

A copy of the management report must be filed for registration with the Finnish Patent and Registration Office (PRH). In addition to filing for registration, a reporting entity may independently publish the management report (eg, on the internet). Non-financial and diversity information regarding employees as well as information on issues such as human rights and anti-corruption must be disclosed to the extent necessary to understand the implications of the business entity's activities.

As regards conflict minerals, EU importers must make the reports available to the Finnish Safety and Chemicals Agency (Tukes) on an

annual basis, in accordance with article 7 of the EU Conflict Minerals Regulation (2017/821/EU).

9 | Which bodies enforce these requirements, and what is the extent of their powers?

The PRH supervises compliance with the obligation to file annual accounts and management reports for registration. If the obligation is neglected, the PRH may demand, with a conditional fine, that the business entity submit the duly drafted annual accounts and management report for registration.

As regards conflict minerals, Tukes is the competent authority to carry out checks to ensure compliance with the requirements. Compliance checks will begin in 2022. If an EU importer fails to comply with the regulation, Tukes may order it to fulfil its obligations, prohibit it from placing the conflict minerals on the market or impose a conditional fine.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Pursuant to the National Action Plan (NAP) for the implementation of the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs), the government encourages all companies – not just those bound by the Accounting Act – to publish the non-financial data on the social impact of their activities, and promotes the distribution of information on the UNGPs and the related Interpretive Guide. In addition to the UNGPs, non-financial and diversity information reports can be based on international reporting frameworks, including the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, and the UN Global Compact.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

Currently, there are no other mandatory human rights-related due diligence requirements apart from those set out in the Act on the Placing on the Market of Conflict Minerals and Their Ores (1196/2020) (the Conflict Minerals Act), which brought Finland's conflict minerals regime into line with EU regulations. Businesses importing conflict minerals (tin, tantalum, tungsten and gold) from conflict-affected areas into the European Union that exceed certain volume thresholds are subject to the due diligence requirements.

12 | What is the nature and extent of the required due diligence?

Pursuant to the Conflict Minerals Act, EU importers of conflict minerals must publicly report on their supply chain due diligence policies and practices. The aim is to generate public confidence in the measures that businesses are taking.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

The Finnish Safety and Chemicals Agency (Tukes) is the competent authority to ensure compliance with the due diligence requirements set out in the Conflict Minerals Act. If an EU importer fails to comply with the conflict minerals regulations, Tukes may order it to fulfil its obligations, prohibit it from placing the conflict minerals on the market or impose a conditional fine.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

International standards – including the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, and the United Nations Global Compact – should be adhered to. In addition, a 2018 publication entitled 'Human rights impacts of own operations: Insights for due diligence', produced by the Ministry of Economic Affairs and Employment, aims to support Finnish businesses in taking appropriate steps to carry out due diligence to prevent, mitigate or remedy adverse human rights impacts of their own operations, as outlined in the United Nations Guiding Principles on Business and Human Rights (UNGPs).

Moreover, the Finnish grocery trade, non-governmental organisations, labour organisations and public officials have published a shared vision on how to implement the UNGPs in the grocery trade's supply chains.

CRIMINAL LIABILITY

Primary liability

15 | What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

Pursuant to Chapter 9 of the Criminal Code of Finland (39/1889), a corporate fine can only be imposed for certain offences, which are generally related to white-collar crimes. In addition to financially motivated crimes, corporate criminal liability is also applied to many offences relating to sexual rights, offences against public authority and public order, terrorist offences, and narcotics offences. As regards human rights violations, a corporate fine may be imposed for human trafficking and extortionate work discrimination.

Any illegal act committed by any individual is not imputable to the corporation. The first prerequisite for corporate criminal liability is that the individual:

- is acting on behalf of the corporation or for the benefit of it and belongs to its management;
- is in a service or employment relationship with the corporation; or
- has acted as an assignee on the basis of a mandate from a representative of the corporation.

The second prerequisite for corporate criminal liability is that the individual who is part of a corporation's statutory organ or other management, or who exercises actual decision-making authority therein, has been an accomplice in an offence or allowed the commission of the offence. Moreover, a corporation may also be subject to corporate criminal liability if the necessary due diligence for preventing the offence has not been observed in the operations of the corporation.

In some cases, finding a guilty individual can be difficult or even impossible even though it is obvious that the offence has been committed by someone inside the corporation. Thus, a corporation can be sentenced to a corporate fine even when the individual offender cannot be identified or otherwise prosecuted and convicted.

A corporate fine is imposed as a lump sum and ranges from €850 to €850,000.

16 What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

In Finnish court practice, corporate criminal liability has been applied almost exclusively for work safety offences, impairment of the environment and security markets offences. In recent years, the scope of application of corporate criminal liability has broadened to cover new offences, but there is no case law on corporate criminal liability involving human rights offences.

When defending against corporate criminal liability, corporations may, in a general sense, argue that the prerequisites for imposing a corporate fine are not met or that the court should waive punishing the corporation.

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

The general rule is that a person whose conduct constitutes a crime is liable for the criminal offence. Like any individual, directors and officers are personally liable for crimes committed intentionally or through negligence. There are no special rules or considerations for violations of human rights.

With regard to offences where an individual has acted on behalf of the corporation or for the benefit of it, both the individual and the corporation must be sentenced for a crime. In addition, pursuant to Chapter 5, section 8 of the Criminal Code, a director or an officer may be sentenced for an offence committed while operating a corporation, even if he or she does not fulfil the special conditions stipulated for an offender in the statutory definition of the offence in the Criminal Code but the corporation does.

Piercing the corporate veil

18 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

In Finnish criminal law, the concept of piercing the corporate veil does not exist in the context of disregarding the separate legal personalities within a group of companies.

As a rule, a parent company is not liable for criminal acts or omissions of its subsidiary. Therefore, each legal entity that has legal rights and responsibilities is solely responsible for its own obligations regardless of the parent company's control over it.

Secondary liability

19 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

An offence is deemed to have been committed during the operations of a corporation if the offender has acted on behalf of or for the benefit of the corporation and belongs to its management, is in a service or employment relationship with the corporation, or has acted as an assignee on the basis of a mandate from a representative of the corporation. Thus, a corporation can be held liable for human rights abuses committed by an individual belonging to one of the above-listed groups.

Businesses are not legally obligated to ensure that human rights are respected, for example, in the activities or operations of a subcontractor that they use. However, it can be seen as a moral obligation for a business to ensure that its subcontractors do not violate human rights.

It is established in the Criminal Code of Finland that, in addition to actively committing a crime, an omission is punishable if the offender neglected to prevent a crime from happening and the offender had, for example, a contractual duty or a status-based duty to prevent the crime from happening. A business may therefore be sentenced for certain offences, such as human trafficking, not only through active commission but also through omission. Further, if a business is considered to have a duty to prevent a human rights offence – for example, due to a status or a contract – the business could, in theory, also be fined for neglecting to prevent a human rights offence caused by its subsidiary or subcontractor. This has not been addressed in Finnish case law, but the threshold for sentencing can be considered to be relatively high.

Prosecution

20 Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

Criminal prosecution for a suspected offence is primarily commenced by the state authority, which is the public prosecutor. The public prosecutor who is competent and responsible in the geographical area where the suspected offence was committed has the right to institute proceedings in a large majority of criminal cases and also has a duty to do so.

In general, an injured party has only a secondary right to bring charges, which means that only if the prosecutor has decided to waive prosecution, or the criminal investigation authority or the prosecutor has decided that a criminal investigation should not be conducted or an investigation should be interrupted or concluded, the injured party may bring a charge. The injured party must make a request for bringing a charge to the prosecutor or the police for the geographical area in which charge for the offence may be brought.

In addition, certain complainant offences, such as breach of domestic peace or offence against copyright, are only investigated by the police if the injured party demands that the suspected offender be punished. Consequently, the public prosecutor does not have the same right of initiative in the complainant offences as in the offences subject to public prosecution.

21 What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

If there is reason to suspect that an offence has been committed, the police or other pre-investigation authority (such as customs) must conduct a criminal investigation. In the investigation, it must be established what has happened, who the parties are and what kind of damage has been caused by the suspected offence. Once the criminal investigation is completed, the pre-trial investigation authority will send its report to the prosecutor. The prosecutor conducts a consideration of charges and decides whether or not to bring charges for the suspected offence.

The procedure for commencing a prosecution of human rights cases follows the same procedure as any prosecution. There are no special rules or considerations for human rights offences.

CIVIL LIABILITY

Primary liability

22 | What civil law causes of action are available against businesses for human rights abuses?

Civil liability can be based on either contract or tort.

A prerequisite for contractual liability is a breach of contract. It is increasingly common that contractual parties are required to comply with human rights regulations and adhere to their environmental, social and governance policies. Therefore, a human rights violation may often constitute a breach of contract.

Non-contractual liability is, in general, based on the Tort Liability Act (412/1974). An individual or a legal entity who intentionally or negligently has caused injury or damage to another is liable for damages. Compensation covers both direct and indirect damage and losses. The injured party has the burden of proof on the harm, the defect, the causality between the defect and the harm, and the negligence. In contrast, a business should, to defend itself against a claim for damages, demonstrate that the above factors are not proven.

Liability may also be based on certain other statutes such as the Employment Contracts Act (55/2001), the Non-Discrimination Act (1325/2014) or the Act on Equality between Women and Men (609/1986) (the Equality Act).

Pursuant to the Employment Contracts Act, the employer is liable for loss caused to the employee intentionally or through negligence in breach of the employer's legal or contractual obligations.

The Non-Discrimination Act prohibits all illegal discrimination on the basis of personal characteristics, and applies to both public and private activities in several contexts. On the basis of section 23 of the Non-Discrimination Act, a party that has been discriminated against is entitled to receive compensation from the discriminating business entity. The compensation must be equitably proportionate to the severity of the discriminating act.

The objective of the Equality Act is to prevent discrimination based on gender or gender expression, to promote equality between women and men, and thus to improve the status of women, particularly in working life. A person who has been discriminated against is entitled to receive compensation from the person who violated the prohibition.

Moreover, the obligation to guarantee the observance of fundamental rights and human rights only applies to businesses to the extent that they perform public functions. Pursuant to the Constitution of Finland (731/1999), businesses performing public functions are liable for damage incurred in breach of legal duties through an unlawful act or omission of a civil servant or other person performing a public task. Again, the injured party is entitled to claim full compensation under the Tort Liability Act.

Director and officer liability

23 | In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

Management liability can be based either on the relevant Companies Act, which in the case of limited liability companies would be the Limited Liability Companies Act (624/2006), or on tort.

Pursuant to the Limited Liability Companies Act, the management of a limited liability company must act with due care and promote the interests of the company. A breach of the obligation to act within the interests of the company will trigger liability towards the company. It is likely that involvement or complicity in human rights abuses would constitute a breach of the obligation to act with due care within the interests of the company and, to the extent that damage would be caused to the company by the breach, management liability is likely.

Management is also liable to shareholders and third parties for any loss or damage caused deliberately or negligently while in office in violation of any other provisions of the Limited Liability Companies Act than the general duty to act in the interests of the company or of the company's articles of association. The Limited Liability Companies Act does not contain specific provisions regarding compliance with human rights and such provisions are generally not included in the articles of association. Hence, it is somewhat unlikely that individual liability for the management towards shareholders or third parties could be based on the Limited Liability Companies Act.

Even though the liability of the board members is joint, the liability for damage is considered separately for each board member. Whether or not a board member has acted with due care is evaluated both objectively and subjectively. The standard is the due care a person would have taken in similar circumstances as well as taking into account the experience, education and other personal factors of each board member.

To the extent that a director would be personally involved in human rights abuses and especially if found guilty of a criminal offence, it is likely that he or she would be liable in tort.

Piercing the corporate veil

24 | When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

The statutory laws of Finland do not recognise a general rule of piercing the corporate veil. As a rule, a parent company is not liable for the acts or omissions of its subsidiary. Therefore, each legal entity that has legal rights and responsibilities is solely responsible for its own obligations regardless of the parent company's control over it.

However, special legislation deviates from the general rule of limited liability of the parent company with regard to obligations concerning certain activities. Such deviations are included in the Act on Compensation for Environmental Damage (737/1994), the Competition Act (948/2011) and the Bankruptcy Act (120/2004), for instance. Thus, under this legislation, a parent company may be held liable for some corporate obligations in addition to the formally liable subsidiary.

Moreover, with its landmark ruling KKO 2015:17, the Supreme Court of Finland accepted the concept of piercing the corporate veil without the support of legislation – although only as an exception – and found that a Finnish company that exercised control over an Estonian company was jointly liable with its subsidiary. The Supreme Court held that the corporate veil can be pierced when the use of corporate group structure, intercompany relationships or shareholder control has clearly been exercised in an artificial and reprehensible manner, causing damage to the corporation's creditors or evasion of a legal obligation. In theory, piercing the corporate veil might be possible in human rights violations as well, although this has not yet been addressed in Finnish case law.

Secondary liability

25 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

In Finland, situations regarding piercing the corporate veil have only been addressed in specific areas of legislation. As regards the vicarious liability in an employer–employee relationship, the main rule under Finnish law is that an employer is liable to compensate third parties for damage caused by an employee through an error or act of negligence relating to the employee's work. To the extent that the employer is liable

for damages to third parties, the employer may be entitled to claim compensation from the individual employee. Nonetheless, if the degree of negligence on the part of the employee is very low, the employee is not liable for the damage at all. There are no special rules or considerations regarding human rights violations, so the employer is principally liable for any damage caused by an employee to a third party in the course of his or her work. If, however, damage caused by an employee does not relate to his or her work, the employer is not liable for it.

In addition, it was established in ruling KKO 2015:17 of the Supreme Court of Finland that veil piercing may, in exceptional cases, be possible without the support of any statutory provision. Based on that ruling, the veil can be pierced when the use of the corporate group structure, intercompany relationships or shareholder control has clearly been exercised in an artificial and reprehensible manner, causing damage to the corporation's creditors or evasion of a legal obligation. Consequently, veil piercing could, in exceptional cases, be possible in human rights violations if the preconditions arising from the case law can be considered to be met.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

The main rule is that a limited liability company is a legal entity distinct from its shareholders, and shareholders have no personal liability for the obligations of the company. Pursuant to the Limited Liability Companies Act, shareholders are, however, liable towards the company, other shareholders and third parties if they have contributed to a breach of this act or the company's articles of association, and thereby caused damage intentionally or through negligence. The Limited Liability Companies Act does not contain specific provisions regarding compliance with human rights and such provisions are generally not included in the articles of association. Hence, it is somewhat unlikely that liability for the shareholders could be based on this act.

In addition, certain special legislation – such as tax, environmental liability and insolvency legislation – contains exceptions to the principle of the shareholders' limited liability and allows veil piercing. In addition, in its ruling KKO 2015:17, the Supreme Court of Finland found that a shareholder may be held liable for the company's obligations in exceptional cases. Nonetheless, the ruling can be considered to have set a relatively high threshold for piercing the corporate veil where it is not explicitly provided for by the law. On an exceptional basis, shareholders could be held liable for human rights violations if the preconditions arising from the case law can be considered to be met.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

In Finland, the general courts deal with both criminal and civil cases. Finland is divided into a number of judicial districts, each with a district court that functions as a court of first instance. A competent district court, as a first instance court, has general jurisdiction over human rights claims against businesses in both criminal and civil cases.

As a rule, the competent district court is defined by the domicile of the business when hearing a claim against a Finnish business entity under private law or against a business performing public functions under public law. In addition, there are several provisions under which a civil case can also be heard in a district court other than the one in whose territory the business is domiciled. In civil cases in which one of the parties is not based in Finland but in another EU member state, the jurisdiction of Finnish courts is governed by Regulation (EU) No. 1215/2012 (the Brussels I Regulation). Primarily, all persons must be sued in the member state where they are domiciled.

In criminal cases, a charge for an offence is primarily heard before the district court of the place of commission of the offence. There are no special rules or considerations for human rights offences or violations.

28 What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

Pursuant to article 6 of the Brussels I Regulation, if the defendant is domiciled outside the European Union, the jurisdiction of the Finnish courts is determined by the laws of Finland. To this extent, the Code of Judicial Procedure (4/1734) states that a Finnish court is competent to consider an international civil case if the case is connected to Finland, unless the ruling to be given by the Finnish court clearly has no legal relevance for the parties. A Finnish court itself must consider whether it is competent to consider an international civil case.

In criminal cases, the jurisdiction of the Finnish courts is decided on the basis of whether the crime is subject to Finnish law. Charges for an offence committed outside Finland are generally considered in the court of the place where the defendant lives, is residing or is found, or in the court of the place of residence of the injured party.

Pursuant to the Criminal Code of Finland (39/1889), Finnish law applies, first, to offences committed outside Finland by a Finnish offender or directed at a Finnish victim. The act may be punishable by imprisonment for more than six months under Finnish law. Second, Finnish law applies to an offence committed outside Finland (which may be punishable by imprisonment for more than six months) if the state in whose territory the offence was committed has requested charges to be brought in a Finnish court.

Moreover, Finnish law applies to international offences, including crimes against humanity, war crimes and genocide, committed outside Finland where the act is punishable according to an international treaty or regulation binding on Finland. Under the Criminal Code, Finnish courts can also exercise universal jurisdiction for nuclear explosive offences or preparation of an endangerment offence, human trafficking, aggravated human trafficking and terrorist offences.

Pursuant to the Criminal Procedure Act (689/1997), unless otherwise provided elsewhere in law, charges for an offence committed outside Finland are considered in the court of the place where the person who is charged lives, is residing or is found, or in the court of the place of residence of the injured person.

Class and collective actions

29 Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

No. In Finland, only a civil case between a consumer and a business may be heard as a class action if several persons have claims against the same respondent, based on the same or similar circumstances. The Consumer Ombudsman, as a claimant, has the exclusive standing to bring a class action in a court and to exercise the right of a party on behalf of the class.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

No. The Finnish legal system does not provide for any mechanisms of public interest litigation.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

The available mechanisms are as follows.

- Finland is committed to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines). The Finnish National Contact Point (NCP) consists of the Ministry of Economic Affairs and Employment together with the Committee on Corporate Social Responsibility.
- The Ombudsman for Equality monitors compliance with the Act on Equality between Women and Men (609/1986) (the Equality Act) and provides instructions and guidance on questions related to this act. The Ombudsman for Equality is an independent law enforcement authority operating in connection with the Ministry of Justice. The Ombudsman for Equality can escalate a matter to the National Non-Discrimination and Equality Tribunal.
- The Non-Discrimination Ombudsman is an autonomous and independent authority. The duty of the Non-Discrimination Ombudsman is to promote equality and to prevent discrimination. The Non-Discrimination Ombudsman also works towards improving the rights, living conditions and status of groups at risk of discrimination, such as foreign nationals. The Non-Discrimination Ombudsman further supervises the removal from the country of foreign nationals and is the National Rapporteur on Trafficking in Human Beings.
- The National Non-Discrimination and Equality Tribunal (the Tribunal) supervises compliance with the Non-Discrimination Act (1325/2014) and the Equality Act, both in private activities and in public administrative and commercial activities. The courts and the relevant ombudsman may request a statement from the Tribunal in matters that are significant with regard to the interpretation of the Non-Discrimination Act or the Equality Act. In addition, any person who suspects that he or she has been discriminated against under the Non-Discrimination Act and the Equality Act can submit a petition to the Tribunal.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

The procedures for filing complaints are as follows.

- The NCP: any party may submit a complaint to the NCP if the party suspects that a multinational enterprise has not observed the OECD Guidelines. The complaint will be processed by the Ministry of Economic Affairs and Employment together with the Committee on Corporate Social Responsibility. The complaint should indicate which enterprise it concerns and which point of the OECD Guidelines has not been observed.
- The Ombudsman for Equality: any person who suspects that he or she has been discriminated against under the Equality Act can receive instructions and guidance from the Ombudsman for Equality by filling in an electronic contact form or via email. The Ombudsman for Equality may initiate an inquiry procedure if it suspects that the case involves conduct that is in violation of the Equality Act.
- The Non-Discrimination Ombudsman: any person who has experienced or observed discrimination on the basis of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics can refer to the Non-Discrimination Ombudsman. The Non-Discrimination Ombudsman can be contacted by filling in an electronic contact form, or by telephone, email or letter.
- The Tribunal: any person who suspects that he or she has been discriminated against under the Non-Discrimination Act or the Equality Act can submit a written petition to the Tribunal. Among other things, a petition must include the detailed facts and grounds on which the petition is based. When preparing a petition for the Tribunal, the offices of the Non-Discrimination Ombudsman or the Ombudsman for Equality can be of assistance.

Remedies

33 | What remedies are provided under these mechanisms?

The remedies provided under these mechanisms are as follows.

- The NCP: if the NCP decides to examine the complaint, it first offers an opportunity for settlement to the parties to reach an amicable agreement through mediation, where it will act as an administrator. If the parties reach an amicable agreement, the NCP will monitor the agreement's execution. If the parties fail to reach an amicable agreement or a party refuses mediation, the NCP will continue to examine the complaint. Eventually, the NCP will publish a final statement, which will include its opinion on whether the company has acted in accordance with the OECD Guidelines or not. The final statement may also include recommendations on how the OECD Guidelines should be applied.
- The Ombudsman for Equality: if the Ombudsman for Equality notices that the obligations of the Equality Act are not being observed or that the regulations of the Equality Act are being violated, the Ombudsman for Equality must strive to prevent this by providing guidance and advice. Moreover, the Ombudsman for Equality can bring a case on illegal activity before the Tribunal. If the Ombudsman for Equality discovers that an employer has neglected its obligation to prepare a gender equality plan, despite receiving guidance and advice, it may request the employer to prepare the plan within a reasonable period and, again, may bring the case to the Tribunal, if necessary.
- The Non-Discrimination Ombudsman: depending on the situation, the Non-Discrimination Ombudsman may promote conciliation between the parties, provide training, investigate individual cases or take measures to help victims of discrimination. In individual cases, the Non-Discrimination Ombudsman may issue a reasoned opinion to prevent actions that breach the Non-Discrimination Act. The Non-Discrimination Ombudsman may also bring a case to the Tribunal if the Non-Discrimination Ombudsman believes that the decision of the Tribunal would be particularly important for the legal protection of an individual or for developing the interpretation of the Non-Discrimination Act.
- The Tribunal: unlike the Ombudsman for Equality and the Non-Discrimination Ombudsman, the Tribunal can issue a legally binding decision and prohibit a party from continuing or repeating discrimination or victimisation, and can impose a conditional fine to enforce compliance with its commands and order payment of the fine. A Tribunal decision may be appealed to the competent administrative court.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

The NCP has conciliatory and investigative powers as it seeks to provide parties with an amicable solution. The powers of the Ombudsman for Equality and the Non-Discrimination Ombudsman are advisory and investigative, as they can only issue non-binding recommendations and general guidelines. The Tribunal, in turn, is an independent judicial body appointed by the government and has the power to issue legally binding decisions.

Publication

35 | Are these processes public and are decisions published?

As a general rule, the OECD Guidelines state that NCPs should operate with transparency. However, procedural efficiency requires that confidentiality be appropriately secured when complaints are processed. The Finnish NCP acknowledges the need to protect sensitive business information and other confidential information in complaint processing. The NCP will publish final statements either anonymised or with the full party details.

Standard rulings, statements and guidelines prepared by the Ombudsman for Equality and the Non-Discrimination Ombudsman are published online, usually fully anonymised. Generally, anyone can also request access to an official document prepared by state-based authorities. However, obtaining such a document may be subject to a charge if the requested document includes confidential personal information and requires deletion of the confidential information.

The Tribunal publishes anonymised descriptions of its decisions online. Again, anyone can generally request access to an official document prepared by state-based authorities. However, obtaining the document may be subject to a charge if the document includes confidential personal information that must be deleted.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

A number of Finnish foundations and companies are committed to the United Nations Global Compact. As at January 2021, five Finnish companies have signed the Bangladesh Accord, three Finnish companies are members of the International Code of Conduct Association and one Finnish company is a member of the Fair Labor Association.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

In June 2019, the government of Finland set a goal to adopt corporate social responsibility legislation that would be based on a due diligence obligation covering both domestic and transnational activities. A 'Judicial Analysis on the Corporate Social Responsibility Act', commissioned by the Ministry of Economic Affairs and Employment, was published on 30 June 2020. The analysis explores possible regulatory options and their scope of application, supervision and sanctions under the planned Corporate Social Responsibility Act. The Ministry of Economic Affairs and Employment organised a consultation round on the content of the judicial analysis and received 44 comments before the deadline on 30 September 2020. Further preparation of the act will be decided and announced separately.

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LEGAL AND POLICY FRAMEWORK

International law

1 | Which international and regional human rights treaties has your jurisdiction signed or ratified?

United Nations human rights treaties signed or ratified by Germany, in addition to the Universal Declaration of Human Rights

Name	Signature date	Ratification date
Convention on the Prevention and Punishment of the Crime of Genocide	Not signed	Acceded on 24 November 1954
International Convention on the Elimination of All Forms of Racial Discrimination	10 February 1967	16 May 1969
International Covenant on Economic, Social and Cultural Rights	9 October 1968	17 December 1973
International Covenant on Civil and Political Rights	9 October 1968	17 December 1973
Optional Protocol	Not signed	Acceded on 25 August 1993
Second Optional Protocol aiming to the abolition of the death penalty	13 February 1990	18 August 1992

Reservation:
Germany formulates a reservation concerning article 5, paragraph 2(a) to the effect that the competence of the Committee shall not apply to certain presented forms of communications

Name	Signature date	Ratification date
Convention on the Elimination of All Forms of Discrimination against Women	17 July 1980	10 July 1985
Optional Protocol	10 December 1999	15 January 2002
Declaration: The right of peoples to self-determination shall be interpreted in accordance with the Charter of the United Nations and of the two International Covenants of 19 December 1966 on Civil and Political Rights and on Economic, Social and Cultural Rights		
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	13 October 1986	1 October 1990
Optional Protocol	20 September 2006	4 December 2008
Declaration: The implementation of national prevention mechanisms is postponed slightly due to the distribution of competences between national and federal states levels		
Convention on the Rights of the Child	26 January 1990	6 March 1992
Optional Protocol on the involvement of children in armed conflict	6 September 2000	13 December 2004
Optional Protocol on the sale of children, child prostitution and child pornography	6 September 2000	15 July 2009
Optional Protocol on a communication procedure	28 February 2012	28 February 2013
Declaration: The Federal Republic of Germany declares that it considers a minimum age of 17 years to be binding for the voluntary recruitment of soldiers into its armed forces and specifies further details on the protection of underage (voluntary) recruits		
Convention on the Rights of Persons with Disabilities	30 March 2007	24 February 2009
Optional Protocol	30 March 2007	24 February 2009
International Convention for the Protection of All Persons from Enforced Disappearance	26 September 2007	24 September 2009

EU treaties

Name	Details
EU Charter of Fundamental Rights	Legally binding on the European Union with the entry into force of the Treaty of Lisbon in December 2009 and now with the same legal value as EU treaties

Important European Council human rights treaties signed or ratified by Germany

Name	Signature date	Ratification date
Convention for the Protection of Human Rights and Fundamental Freedoms (with several further protocols)	4 November 1950	5 December 1952
European Social Charter	18 January 1961	27 January 1965
Framework Convention for the Protection of National Minorities	11 May 1995	10 September 1997

2 | Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Germany has ratified all eight core conventions.

Name	Ratification date	Date in force
The Forced Labour Convention, 1930 (No. 29)	13 June 1956	13 June 1957
The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	20 March 1957	20 March 1958
The Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	8 June 1956	8 June 1957
The Equal Remuneration Convention, 1951 (No. 100)	8 June 1956	8 June 1957
The Abolition of Forced Labour Convention, 1957 (No. 105)	22 June 1959	22 June 1960
The Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	15 June 1961	15 June 1962
The Minimum Age Convention, 1973 (No. 138)	8 April 1976	8 April 1977
The Worst Forms of Child Labour Convention, 1999 (No. 182)	18 April 2002	18 April 2003

3 | How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

The federal government regularly releases its own human rights report concerning its work to protect human rights both domestically and abroad. The report, which is structured by topic area, presents all of Germany's treaties and explains the measures taken (eg, national laws) to implement the aims of its policy regarding human rights.

In its latest annual report, which was adopted in December 2021, the German Institute for Human Rights (GIHR) assessed the situation over the previous year. The GIHR limited itself to the following topics that were of high human rights relevance during the reporting period:

- racism and right-wing extremism;
- regulation of corporate supply chains;
- protection against discrimination of all kinds;
- family reunification for refugees;
- the rights of children and people with disabilities; and
- global vaccine justice.

The GIHR emphasises that the human rights situation was once again significantly influenced by the covid-19 pandemic. Although the GIHR's report acknowledges that Germany has taken action over the past year to address some of the problems that were previously identified, the GIHR sees a need for further action in all areas to effectively protect human rights. For example, the report states that the German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act), passed in June 2021, is not sufficient to fulfil the requirements set out by the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs) as only large and thus too few companies fall under the act's scope of application. In addition, the GIHR criticises that the Supply Chain Act does not create additional civil liability.

4 | Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

The federal parliament's Research Services stated that the federal government did not comment on the first draft of the treaty by the end of February 2019 as the office had requested. The government explained that Germany must receive a negotiation mandate from the European Union permitting it to comment because the treaty would bind the European Union as well as Germany. The government's silence on the draft treaty and the drafting process can be understood as neither an explicit rejection nor support of the treaty.

National law

5 | Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

In Germany, several rules protect human rights in the commercial sector. The legal origins of these rules are not always clear. While some of the rules derive from international or regional treaties, other rules have been enacted due to domestic political developments within Germany.

Existing laws

The most important of these German domestic rules are as follows.

- The General Act on Equal Treatment generally prohibits discrimination based on racial or ethnic origin, sex, religion or belief, disability, age, or sexual identity within the employment and general civil law fields.
- The Act on Youth Employment Protection prohibits child labour and employment of individuals under a certain age who are required to attend school full time (the Law provides certain exceptions; for example, children who are at least 13 years old may undertake light work).
- The Act on the Equal Participation of Women and Men in Management requires that, in the case of companies listed on the stock exchange and subject to co-determination by employees (eg, under the Employee Co-Determination Act), the supervisory board must be composed of women at a minimum ratio of 30 per cent. Further, if the management board in these cases consists of more than three persons, at least one woman must be a member of the management board. The supervisory board of companies that are listed on the stock exchange or that are subject to co-determination rights shall stipulate target values for the percentage of women acting on the supervisory board and the management board as the above targets do not apply.
- The Network Enforcement Act (NetzDG), enacted in October 2019, requires businesses operating in the social media field (such as Facebook) to delete reported hate posts and to satisfy certain reporting obligations. The NetzDG is considered a human rights regulation of business because it imposes obligations on businesses to protect users' personality rights.

Supply Chain Act

On 11 June 2021, parliament passed the Supply Chain Act after months of intense political debate.

The Supply Chain Act establishes multiple requirements to protect human rights and address environmental issues in companies and their associated supply chains. The Supply Chain Act primarily aims at preventing violations of human rights, such as child, forced and slave labour. The act stipulates due diligence obligations for enterprises in respect of employees' rights, including occupational health and safety

standards. Furthermore, the Supply Chain Act includes companies' obligations in respect of organisational and trade union rights, discrimination and unequal treatment, and compliance with environmental standards and other environmental rights. The protected rights are further specified in an extensive catalogue of public international law treaties. As a result, private law enterprises are now effectively obliged to take steps (eg, implementing risk assessment and management as well as reporting mechanisms) to ensure that the human and environmental rights within the scope of the applicable public international law treaties are protected.

As of 1 January 2023, the Supply Chain Act will apply to all companies, irrespective of their legal form and including subsidiaries of foreign companies that are registered in Germany and employ at least 3,000 employees in Germany (from 2024: 1,000). The Supply Chain Act will also apply to branches of companies from other countries if they employ at least 3,000 people (from 2024: 1,000) in Germany. The legislative materials suggest that the scope of application shall be evaluated and possibly expanded after 2024.

Companies are required to effectively implement adequate risk management measures including an obligation to regularly analyse the potential risk of a violation of human rights or environmental obligations within their supply chains and implement a commensurate risk management system. Based on this risk analysis, companies must implement measures to prevent, minimise and remedy identified risks. Further obligations include the adoption of a policy statement on the company's human rights strategy and the implementation of preventive measures in each company's own business units as well as towards suppliers within its field of influence. These substantive obligations are supported by an obligation to transparently document and report, on an annual basis, on the actual and potential negative impacts of the relevant business activities on human and environmental rights. The Supply Chain Act also provides for the implementation of an adequate grievance mechanism by a company or industry association that allows injured third parties to report non-compliance incidents. Finally, German workers' councils were granted far-reaching informational rights under the act.

A company's due diligence obligations apply not only to the company itself but also to its suppliers. Obligations generally extend throughout the entire supply chain, encompassing all products and services purchased as well as all steps necessary for the manufacturing of any products or the provision of its relevant services. The extent of obligations depends on the degree of knowledge of the relevant risks and the influence that the company has over the supplier in question. Hence, the due diligence obligations in respect of a direct supplier are generally stricter than in respect of indirect suppliers as the company usually has more insights in relation to direct suppliers. With regard to indirect suppliers, companies are only required to investigate potential violations by such a supplier if they have a substantiated knowledge of potential violations. However, such knowledge might already be presumed if the sector or region in which the supplier operates has a tendency to risk violations of human, environmental or workers' rights.

The issue of whether the Supply Chain Act should provide for civil liability was controversial during the legislative process. Eventually, the German parliament decided to explicitly rule out any civil law liability arising from violations of due diligence obligations under the Supply Chain Act. However, a company could still incur civil law liability under the general rules of the German Civil Code.

Further, the Supply Chain Act states that failure to comply with due diligence obligations may be sanctioned with a fine. In particularly severe cases of non-compliance, the fine can amount to 2 per cent of the annual turnover of the company. In addition, companies can be excluded from the award of public contracts.

The competent authority, the Federal Office of Economics and Export Control (BAFA), has control and enforcement powers. BAFA can impose specific obligations to act on the companies concerned.

European initiatives

In 2020, the European Commission (EC) announced its plans to pass EU legislation on mandatory human rights and environmental due diligence (mHREDD) in 2021. However, the publication of the EC's draft law has been postponed several times and is now expected for February or March 2022. The question of whether directors' duties shall be part of the upcoming EU legislation has been the subject of controversial discussions.

Several experts expect the EU legislation to be issued as a directive, which will then have to be transposed into German law. In this case, changes to the Supply Chain Act are very likely. However, some press reports also mentioned that the legal act might be drafted as an EU regulation, which would be directly applicable in all EU member states. Contradicting national legislation would then have to be withdrawn.

Against the backdrop of the EC's announcement, on 10 March 2021, the European Parliament published a resolution with recommendations to the EC on corporate due diligence and corporate accountability including a proposal for a directive on mHREDD. Although these recommendations are not binding on the EC, they are suitable for exerting political pressure on the EC. When compared to the Supply Chain Act, the European Parliament's proposal establishes even stricter rules (eg, does not differentiate between direct and indirect suppliers).

In addition, the EC recently published a proposal for an EU Batteries Regulation, which contains due diligence obligations for raw materials for batteries. Once this regulation is passed by the EU legislator, it will be directly applicable in Germany.

Further, in November 2021, the EC published a proposal for an EU Deforestation Regulation to ban products linked to deforestation from the EU market, which would impose due diligence obligations on companies. Those products include beef, palm oil, soy, cocoa and coffee. Once the regulation is passed at the EU level, it will be directly applicable in Germany.

Specific laws for the public sector

Some human rights laws, such as the Disability Equality Act and the Federal Equality Act, only apply to the public sector.

Constitution

Lastly, the German Constitution's establishment of certain fundamental rights constitutes a very important source of human rights protection in Germany. Primarily, those fundamental rights defend the individual from state actions. However, the German Constitutional Court has construed these fundamental rights to also be important in the general civil law, in that these rights provide individuals with a right to seek relief for violations from other individual actors (a construct of the indirect third-party effect (see the landmark ruling of the German Constitutional Court of 15 January 1958)).

6 Has your jurisdiction published a national action plan on business and human rights?

Yes. There is a National Action Plan (NAP) for the implementation of the UNGPs covering the period from 2016 to 2020. The NAP is an advisory document. The Interministerial Committee for Business and Human Rights (the Committee), under the supervision of the Federal Foreign Office, was established to monitor and implement the plan. The Committee brings together representatives from different ministries through regular meetings. It discusses the action plan's implementation and progress, oversees monitoring processes, and discusses further

(legislative) steps that may be necessary. According to the NAP, by 2020, at least 50 per cent of all businesses located in Germany with over 500 employees should have integrated human rights due diligence into their business processes. As this has not happened, on 11 June 2021, the German parliament passed the Supply Chain Act. The act enters into force on 1 January 2023 and obliges large companies that have their registered office or a branch office in Germany to conduct adequate due diligence in relation to human rights. Among other measures, such companies will be required to carry out a risk analysis, establish an internal complaints procedure, and take preventive measures and remedial action (eg, the termination of the business relationship as a last resort).

Although the term of the current NAP expired at the end of 2020, no succeeding document has yet been adopted as at December 2021. In its coalition agreement published in November 2021, the new German government announced that it aims to revise the NAP in light of the new Supply Chain Act. The new government also intends to work towards a European Action Plan on Business and Human Rights according to the coalition agreement.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

The EU Conflict Minerals Regulation, which became effective on 1 January 2021, makes the import of certain conflict minerals (tin, tantalum, tungsten and gold) subject to several restrictions to prevent human rights violations. Importers of these conflict minerals into the European Union are obliged to, inter alia, disclose their supply chain information to their immediate downstream purchasers. Furthermore, importers must carry out audits via an independent third party and make these audit results available to the relevant authorities.

In the context of slavery and child labour, the German Criminal Code (StGB) requires individuals to notify the relevant authorities of any ongoing or foreseeable future criminal violations, such as certain cases of forced labour or human trafficking. The law does not establish a reporting obligation for individuals with respect to past criminal conduct. At present, the StGB does not apply to associations (whether they are companies or other groups), but only to individuals. However, in its coalition agreement, the new German government stated that it aims to amend the rules for corporate liability, which may include the establishment of a corporate criminal law.

The German Commercial Code (HGB) requires major companies to disclose a non-financial statement containing information on environmental, social and employee matters, and respect for human rights (sections 289b et seq and 315b et seq of the HGB). These provisions transpose the European Non-Financial Reporting Directive (NFRD), which covers disclosure of non-financial and diversity information, into German law. On 21 April 2021, the European Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD) amending the existing reporting requirements set out by the NFRD. The proposal, inter alia:

- extends the scope to all large companies and all companies listed on regulated markets;
- requires the audit of reported information;
- introduces more detailed reporting requirements and a requirement to report according to mandatory EU sustainability reporting standards; and
- requires companies to digitally tag the reported information, so that it is machine-readable and feeds into the European single access point.

The proposed CSRD further envisages the adoption of EU sustainability reporting standards that shall be developed by the European Financial Reporting Advisory Group. According to the proposal, the first set of standards would be adopted by October 2022. If the CSRD is adopted, the German legislator would be obliged to implement the new rules into German national law, which would most likely result in an amendment of the HGB.

The German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act), passed in June 2021, enters into force on 1 January 2023 and includes internal documentation as well as external reporting obligations for companies that fall within its scope of application. First, companies must continuously document the fulfilment of the due diligence obligations set out by the Supply Chain Act within the company. This documentation must be kept for at least seven years. Second, companies must prepare an annual report on the fulfilment of their due diligence obligations in the previous financial year and make it publicly available free of charge on their websites no later than four months after the end of the financial year for a period of seven years.

8 What is the nature and extent of the required reporting or disclosure?

The non-financial statement must be made publicly available (eg, available on the internet).

Importers of conflict minerals into the European Union are obliged to, inter alia, disclose their supply chain information to their immediate downstream purchasers. Furthermore, importers must carry out audits via an independent third party and make these audit results available to the relevant authorities.

The StGB requires individuals to notify the relevant authorities of any ongoing or foreseeable future criminal violations, such as certain cases of forced labour or human trafficking.

The HGB requires major companies to disclose a non-financial statement containing information on environmental, social and employee matters, and respect for human rights.

In addition, importers must report on their supply chain due diligence policies and practices for responsible sourcing.

The Supply Chain Act requires companies to publish an annual report and make it publicly available free of charge on the company's website for a period of seven years. The report must, at minimum, state:

- whether the company has identified any human rights and environment-related risks or violations;
- what the company has done to fulfil its due diligence obligations;
- how the company assesses the impact and effectiveness of those measures; and
- what conclusion the company draws from the assessment for future measures.

9 Which bodies enforce these requirements, and what is the extent of their powers?

The non-financial statements required by sections 289b et seq and 315b et seq of the HGB require a specific review by auditors and, in the case of stock corporations, by their supervisory board.

EU member states are responsible for control and enforcement of the EU Conflict Minerals Regulation. In Germany, the Federal Institute for Geosciences and Natural Resources is responsible. It can require information from EU importers, and take and enforce measures to detect, eliminate and prevent violations of the EU Conflict Minerals

Regulation. Penalty payments can also be imposed for this purpose. Initially, there are no administrative offences.

Prosecutors have the authority to prosecute individuals who fail to report ongoing or planned criminal offences to the authorities, such as certain cases of slavery and child labour. Prosecutors may also prosecute any grossly negligent failure to report a crime as a criminal offence. The StGB provides for a financial penalty or imprisonment of up to 5 years for individuals convicted of this crime.

Either the Federal Financial Supervisory Authority (with regard to capital market-oriented enterprises) or the Federal Office of Justice (for all other enterprises) have jurisdiction over a company's failure to disclosure its non-financial statement. Such a failure constitutes an administrative offence punishable by a fine of up to €10 million, 5 per cent of the company's annual total revenue or twice the economic advantage derived by the company from the non-disclosure, whichever is higher.

According to the Supply Chain Act, the annual report must be submitted to the Federal Office of Economics and Export Control (BAFA), which checks whether the report has been provided at all and whether the company complied with the above-mentioned requirements. If the company did not comply, the BAFA may demand that the company rectify the report within a reasonable period of time. Non-compliance with the reporting requirements constitutes a regulatory offence subject to administrative fines of up to 2 per cent of the annual group turnover. Besides this, companies can be excluded from the award of public contracts for up to three years.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Pursuant to the National Action Plan, the government expects companies to provide a report on human rights that includes information on the actual and potential effects of the company's actions on human rights issues and how the company is responding to these issues in an appropriate manner. This information can be based on international frameworks such as the United Nations (UN) Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines) or the UN Global Compact.

According to the Supply Chain Act, the BAFA will publish cross-sector or sector-specific information, assistances and recommendations on compliance with the reporting obligations under the act. Those recommendations are, however, not legally binding on the companies that fall within the scope of application of the Supply Chain Act, although it can be expected that companies will try to act in line with these recommendations.

With regard to the reporting obligations under the EU Conflict Minerals Regulation, companies may refer to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Moreover, the Responsible Minerals Initiative (RMI) recently announced that it will release new global standards for all-minerals due diligence in 2022. The new RMI Standard is designed to be aligned with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and can help companies adhere to regulatory requirements such as the EU Conflict Minerals Regulation and the pending EU Batteries Regulation.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

Act on Corporate Due Diligence Obligations in Supply Chains

On 11 June 2021, the German parliament passed the German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act) after months of intense political debate.

The Supply Chain Act establishes multiple requirements to protect human rights and address environmental issues in companies and their associated supply chains. As of 1 January 2023, the Supply Chain Act will apply to all companies, irrespective of their legal form and including subsidiaries of foreign companies that are registered in Germany and employ at least 3,000 employees in Germany (from 2024: 1,000). The Supply Chain Act will also apply to branches of companies from other countries if they employ at least 3,000 people (from 2024: 1,000) in Germany. The legislative materials suggest that the scope of application shall be evaluated and possibly expanded after 2024.

Companies are required to effectively implement adequate risk management measures including an obligation to regularly analyse the potential risk of a violation of human rights or environmental obligations within their supply chains and implement a commensurate risk management system. Based on this risk analysis, companies must implement measures to prevent, minimise and remedy identified risks. Further obligations include the adoption of a policy statement on the company's human rights strategy and the implementation of preventive measures in each company's own business units as well as towards suppliers within its field of influence. These substantive obligations are supported by an obligation to transparently document and report, on an annual basis, on the actual and potential negative impacts of the relevant business activities on human and environmental rights. The Supply Chain Act also provides for the implementation of an adequate grievance mechanism by a company or industry association that allows injured third parties to report non-compliance incidents. Finally, German workers' councils were granted far-reaching informational rights under the act.

A company's due diligence obligations apply not only to the company itself but also to its suppliers. Obligations generally extend throughout the entire supply chain, encompassing all products and services purchased as well as all steps necessary for the manufacturing of any products or the provision of its relevant services. The extent of obligations depends on the degree of knowledge of the relevant risks and the influence that the company has over the supplier in question. Hence, the due diligence obligations in respect of a direct supplier are generally stricter than in respect of indirect suppliers as the company usually has more insights in relation to direct suppliers. With regard to indirect suppliers, companies are only required to investigate potential violations by such a supplier if they have a substantiated knowledge of potential violations. However, such knowledge might already be presumed if the sector or region in which the supplier operates has a tendency to risk violations of human, environmental or workers' rights.

EU Conflict Minerals Regulation

The EU Conflict Minerals Regulation, which became effective on 1 January 2021, requires EU importers of conflict minerals to adopt a supply chain policy for minerals and metals from conflict-affected areas and communicate this policy to their suppliers and the public. The supply chain policy must be consistent with EU legal standards and must, inter alia, establish a supply chain traceability system.

EU Batteries Regulation

Moreover, the European Commission (EC) is currently working on a new EU Batteries Regulation, which would be directly applicable in Germany. This proposal contains some very detailed supply chain due diligence requirements. According to the current draft, economic operators placing rechargeable industrial batteries and electric-vehicle batteries with internal storage and a capacity above 2kWh on the market shall, inter alia:

- adopt and clearly communicate to suppliers and the public a company policy for the supply chain of raw materials (cobalt, natural graphite, lithium, nickel);
- incorporate policy standards in their supply chain;
- establish and operate a system of controls and transparency over the supply chain;
- incorporate its supply chain policy into contracts and agreements with suppliers; and
- establish a grievance mechanism as an early-warning risk-awareness system.

These actions must be used to:

- identify and assess the adverse impacts associated with certain risk categories (eg, air, water, soil, biodiversity, health and labour rights, including child labour, human rights and community life);
- establish a risk management plan; and
- implement a strategy to respond to the identified risks to prevent or mitigate adverse impacts.

Supply chain due diligence policies must be verified by an independent notified body and certain transparency requirements must be met.

EU Deforestation Regulation

In November 2021, the European Union published a proposal for a regulation on deforestation-free products, introducing new due diligence obligations aimed at tackling deforestation and forest degradation. According to the proposal, the regulation aims to minimise consumption of products coming from supply chains associated with deforestation or forest degradation to increase EU demand for and trade in legal deforestation-free commodities and products. The draft regulation, inter alia, includes due diligence obligations for operators that include the collection of information and documents, and risk assessment and risk mitigation measures.

EU mandatory human rights and environmental due diligence

The European Commissioner for Justice (the Commissioner), Didier Reynders, has repeatedly announced his intention to introduce a legislative initiative on mandatory human rights and environmental due diligence (mHREDD). The Commissioner has observed that there is a need for 'real regulation, with obligations and with liability'. Against this backdrop, the EC has committed to publishing a proposal for a directive on sustainable corporate governance, including mHREDD with respect to impacts across supply chains. The proposed mHREDD law will potentially impact a broad range of businesses from all sectors. It is likely that it will apply to EU-domiciled companies, as well as non-EU companies that do business in the single market. However, it is also likely to affect companies that do not do business in the single market but are in the global value chains of companies required to comply with the law. These companies will be under increased pressure to demonstrate that they are managing human rights and environmental risks effectively within those value chains.

This initiative is strongly supported by the European Parliament. On 10 March 2021, the European Parliament adopted a resolution that sets out principles for proposed new legislation on corporate due diligence and accountability for human rights, environmental and governance impacts within businesses' operations and through value chains. This resolution concludes that voluntary due diligence standards for companies are insufficient in driving meaningful improvements and that legislative measures are needed to ensure that businesses take appropriate steps to prevent and mitigate adverse impacts on human rights, the environment and good governance that are associated with their operations and their value chains. This would be achieved under the terms for legislation suggested by the European Parliament by requiring relevant undertakings to map their value chains and develop due diligence strategies, leaving the details of requirements to EU member states. Stakeholder engagement, transparency and disclosure would facilitate accountability of undertakings in this regard. The European Parliament's approach departs from the expected scope of the EC's proposal for legislation on due diligence in specifying 'good governance' as part of the due diligence requirements. The European Parliament's draft wording also provides expansive definitions of the scope of the requirement as including the entire value chain.

The resolution refers to and reflects elements of international standards that deploy the concept of due diligence, such as the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines). This is in line with the EC's stated intention to build on those frameworks when crafting its legislative proposals, in part to ensure coherence. Bodies such as the Office of the High Commissioner for Human Rights have observed the need for careful transposition of concepts in such standards into legislative forms. There are aspects of the European Parliament's proposed wording for legislation that require careful attention to ensure coherence (examples being the definition of 'business relationships' and the consequences of such associations, the mixing of 'potential' with 'actual' impacts when discussing matters such as remediation, and the use of 'indirect' and 'direct' terminology).

To ensure a level playing field for EU businesses, the European Parliament suggests that proposals would extend not only to defined categories of EU businesses but also to equivalent categories of non-EU businesses operating in the European single market by the supply of goods or services. The due diligence requirements would extend to all large undertakings governed by the law of an EU member state or established in the territory of the European Union (including those providing financial products and services) as well as all publicly listed small and medium-sized undertakings, and high-risk small and medium-sized undertakings. Last-minute amendments were sought to exclude small and medium-sized enterprises from the scope of the proposals but were rejected.

Under the European Parliament's proposals, EU member states would be responsible for implementing and enforcing measures imposed pursuant to the proposed law. The proposals include civil liability of undertakings for adverse human rights, environmental and good governance impacts. While adherence to the due diligence requirements would not itself operate as a defence, an undertaking able to demonstrate that it exercised due care or that harm would have occurred regardless should not incur liability.

Access to remedy would be supported by requirements for businesses to provide grievance mechanisms for raising concerns about adverse impacts on human rights, the environment and good governance, reporting on reasonable concerns raised through such mechanisms and oversight on remediation. Beyond the proposed due diligence legislation itself, the resolution notes that victims of business-related adverse impacts are often not sufficiently protected by the law of the country where harm is caused. The European Parliament proposes that protective provisions on governing law in any legislation are considered mandatory provisions in line with article 16 of the regulation that caters for the law applicable to non-contractual obligations within

the European Union (Rome II). Provisions of Rome II that restrict the proposed law's approach on governing law would not apply.

The European Parliament also calls on the EC to propose a negotiating mandate for the European Union to constructively engage in negotiations concerning an international treaty on business and human rights, proposals for which have been under consideration for several years pursuant to a resolution of the UN Human Rights Council.

The aim of the European Parliament's resolution is to influence the EC, which has the sole right of legislative initiative within the European Union. The Commissioner, who leads the EC's work on corporate governance and supply chain due diligence, has been following developments in the European Parliament closely. He is reported to have said: 'We envisage a holistic approach, where due diligence is part of sustainable corporate governance.'

After being rescheduled several times in 2021, the EC's proposal for mHREDD legislation is now expected in February or March 2022.

12 | What is the nature and extent of the required due diligence?

Supply Chain Act

Under the Supply Chain Act, companies concerned are obliged to implement appropriate risk management procedures. As part o risk management, companies must carry out a risk analysis to identify potential risks relating to their own business area as well as to direct suppliers. Indirect suppliers must be included in the risk management system if the company has a substantiated knowledge of potential violations caused by the indirect suppliers. Such knowledge is presumed if the sector or region in which the supplier operates has a tendency to risk violations of human, environmental or workers' rights. If the company identifies risk, it must immediately take preventive measures, including the adoption of a policy statement.

If the risk analysis leads the company to the conclusion that the violation of protected legal positions has already occurred or is about to occur, the company must take remedial measures. Possible measures range from the elaboration and implementation of a joint risk response plan to the termination of the business relationship as a last resort. The closer the company is to the threatened or actual violation, the greater its efforts must be to end the violation. In addition, companies are obliged to introduce an internal complaints procedure without delay.

EU Conflict Minerals Regulation

Regarding conflict minerals, as well as the reporting obligations, importers must establish a management system, assess risks, respond to identified risks and carry out third-party audits.

EU importers of metals and minerals must:

- set up the necessary company management system;
- identify and assess relevant supply chain risks, in particular based on available third-party audit reports concerning the smelters and refiners in that chain, and, by assessing (as appropriate) the due diligence practices of those smelters and refiners;
- conduct third-party audits or otherwise demonstrate smelter and refiner compliance;
- disclose compliance information to authorities and downstream companies; and
- publicly report on due diligence efforts.

There are exceptions to these obligations for metals derived only from recycled or scrap sources.

EU Batteries Regulation

The EC is currently working on a new EU Batteries Regulation, which would be directly applicable also in Germany. This proposal contains some very detailed supply chain due diligence requirements.

The due diligence requirements are set out in article 39 of the draft Sustainable Batteries Regulation and apply to 'economic operators that place rechargeable industrial batteries and electric-vehicle batteries with internal storage and a capacity above 2kWh on the market' (ie, Applicable Economic Operators).

For the purposes of the Sustainable Batteries Regulation, 'economic operator' is defined as 'the manufacturer, the authorised representative, the importer, the distributor or the fulfilment service provider who is subject to obligations in relation to manufacturing batteries, making them available or placing them on the market or putting them into service in accordance with the present Regulation'.

The concept of 'placing on the market' is defined as 'making available a battery for the first time on the Union market'. The term is commonplace in EU product regulation and the definition in the Sustainable Batteries Regulation aligns with that of wider product regulations.

In practical terms, the operation of placing a product on the market is:

> *reserved either for a manufacturer or an importer, ie, the manufacturer and the importer are the only economic operators who place products on the market. When a manufacturer or an importer supplies a product to a distributor or an end-user for the first time, the operation is always labelled in legal terms as "placing on the market". Any subsequent operation, for instance, from a distributor to distributor or from a distributor to an end-user is defined as making available.*

Applicable Economic Operators must:

- set up the necessary company management system;
- identify and assess relevant supply chain risks, based on third-party verification reports where available;
- have its supply chain due diligence policies verified by a notified body;
- disclose compliance information to authorities and downstream companies; and
- publicly report on due diligence efforts.

Applicable Economic Operators must also keep documentation demonstrating its respective compliance with those obligations, including the results of the third-party verification carried out by notified bodies.

EU Deforestation Regulation

The draft EU Deforestation Regulation, published in November 2021, aims to minimise the consumption of products that come from supply chains associated with deforestation or forest degradation (beef, palm oil, soy, cocoa and coffee) and to increase EU demand for and trade in legal and deforestation-free commodities and products.

It includes specific due diligence obligations for operators (ie, natural or legal persons who, in the course of commercial activity, place relevant commodities and products on EU markets or export them from the EU market). The due diligence obligations for operators include the collection of information and documents, and conducting risk assessments as well as risk mitigation measures.

First, operators must collect information, documents and data demonstrating that the relevant commodities and products are deforestation-free, have been produced in accordance with the relevant legislation of the country of production and are covered by due diligence statements made by the operators. The explanatory memorandum to the proposed regulation clarifies that 'relevant legislation' entails labour, environmental and human rights applicable in the country of production at both a national and an international level. Such rights should be taken into account by operators when assessing compliance with the regulation. In this regard, the explanatory memorandum highlights

that the rights of indigenous people and the EU Charter of Fundamental Rights (including the right to life, protection of personal data, freedom to conduct a business, right to property and environmental protection) are relevant in the context of deforestation. This shows, that even though the proposed regulation does not include human rights in the due diligence requirements but rather focuses on environmental aspects, the draft regulation nevertheless serves the protection of human rights.

To fulfil these requirements, the operator shall collect, organise and keep for five years the following information of the relevant commodities supported by evidence:

- description;
- quantity;
- identification of the country of production;
- geo-localisation coordinates, latitude and longitude of all plots of land where the relevant commodities and products were produced, as well as the date or time range of production;
- name, emails and address of any business or person by whom they have been supplied with the relevant commodities or products;
- adequate and verifiable information that the relevant commodities and products are deforestation-free; and
- adequate and verifiable information that the production has been conducted in accordance with the relevant legislation of the country of production.

Based on that information, the operators must conduct a risk analysis to establish whether there is a risk that the relevant commodities and products intended to be placed on or exported from the EU market are non-compliant with the requirements of the draft regulation. If the operators cannot demonstrate that the non-compliance is negligible, the commodities and products shall neither be placed on the EU market nor be exported from it. The risk assessment shall, inter alia, take into account:

- the assignment of risk to the relevant country or parts thereof;
- the presence of forests in the country and area of production;
- concerns in relation to the country of production and origin; and
- the complexity of the relevant supply chain.

Operators shall have in place adequate and proportionate policies, controls and procedures to mitigate and manage effectively the risks of non-compliance of relevant identified commodities and products. According to the draft regulation, those measures shall include:

- model risk management practices and reporting, record-keeping, internal control and compliance management, including for operators that are not small or medium-sized enterprises;
- the appointment of a compliance officer at the management level; and
- an independent audit function to check the internal policies, controls and procedures for all operators that are not small or medium-sized enterprises.

The risk assessment measures shall be documented and reviewed, at minimum, on an annual basis and made available to the competent authorities upon request.

EU mHREDD

The Commissioner, Didier Reynders, has repeatedly announced his intention to introduce a legislative initiative on mHREDD. The Commissioner has observed that there is a need for 'real regulation, with obligations and with liability'. Against this backdrop, the EC has committed to publishing a proposal for a directive on sustainable corporate governance, including mHREDD with respect to impacts across supply chains. The proposed mHREDD law will potentially impact a broad range of businesses from all sectors. It is likely that it will apply to EU-domiciled companies, as well as non-EU companies that do business in the single market. However, it is also likely to affect companies that do not do business in the single market but are in the global value chains of companies required to comply with the law. These companies will be under increased pressure to demonstrate that they are managing human rights and environmental risks effectively within those value chains.

This initiative is strongly supported by the European Parliament. On 10 March 2021, the European Parliament adopted a resolution that sets out principles for proposed new legislation on corporate due diligence and accountability for human rights, environmental and governance impacts within businesses' operations and through value chains. This resolution concludes that voluntary due diligence standards for companies are insufficient in driving meaningful improvements and that legislative measures are needed to ensure that businesses take appropriate steps to prevent and mitigate adverse impacts on human rights, the environment and good governance that are associated with their operations and their value chains. This would be achieved under the terms for legislation suggested by the European Parliament by requiring relevant undertakings to map their value chains and develop due diligence strategies, leaving the details of requirements to EU member states. Stakeholder engagement, transparency and disclosure would facilitate accountability of undertakings in this regard. The European Parliament's approach departs from the expected scope of the EC's proposal for legislation on due diligence in specifying 'good governance' as part of the due diligence requirements. The European Parliament's draft wording also provides expansive definitions of the scope of the requirement as including the entire value chain.

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Under the European Parliament's proposals, EU member states would be responsible for implementing and enforcing measures imposed pursuant to the proposed law. The proposals include civil liability of undertakings for adverse human rights, environmental and good governance impacts. While adherence to the due diligence requirements would not itself operate as a defence, an undertaking able to demonstrate that it exercised due care or that harm would have occurred regardless should not incur liability.

The European Parliament also calls on the EC to propose a negotiating mandate for the European Union to constructively engage in

negotiations concerning an international treaty on business and human rights, proposals for which have been under consideration for several years pursuant to a resolution of the UN Human Rights Council.

The aim of the European Parliament's resolution is to influence the EC, which has the sole right of legislative initiative within the European Union. The Commissioner, who leads the EC's work on corporate governance and supply chain due diligence, has been following developments in the European Parliament closely. He is reported to have said: 'We envisage a holistic approach, where due diligence is part of sustainable corporate governance.'

After being rescheduled several times in 2021, the EC's proposal for mHREDD legislation is now expected in February or March 2022.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

The Federal Agency for Geosciences and Resources is the enforcement authority of the EU Conflict Minerals Regulation. The agency checks importers on the basis of data handed out by customs. If a company fails to comply with the regulation, the regulation authorises the enforcement agency to impose a financial penalty of up to €50,000.

The Federal Office of Economics and Export Control (BAFA) has been tasked to enforce the Supply Chain Act. It is responsible for reviewing company reports and investigating complaints. Violations or non-compliance may result in fines of up to 2 per cent of the annual group turnover. In addition, companies may be excluded from public contracts for a certain period of time in the case of serious infringements.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

Pursuant to the National Action Plan, the government expects companies to provide a report on human rights that includes information on the actual and potential effects of the company's actions on human rights issues and how the company is responding to these issues in an appropriate manner. This information can be based on international frameworks such as the UNGPs, the OECD Guidelines or the UN Global Compact.

According to the Supply Chain Act, the BAFA will publish cross-sector or sector-specific information, assistances and recommendations on compliance with the reporting obligations under the act. Those recommendations are, however, not legally binding on the companies that fall within the scope of application of the Supply Chain Act, although it can be expected that companies will try to act in line with these recommendations.

With regard to the reporting obligations under the EU Conflict Minerals Regulation, companies may refer to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Moreover, the Responsible Minerals Initiative (RMI) recently announced that it will release new global standards for all-minerals due diligence in 2022. The new RMI Standard is designed to be aligned with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and can help companies adhere to regulatory requirements such as the EU Conflict Minerals Regulation and the pending EU Batteries Regulation.

CRIMINAL LIABILITY

Primary liability

15 | What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

The most general types of criminal charges for human rights violations are in the German Criminal Code (StGB) under:

- sections 223, 224 and 229, which address personal injuries;
- sections 211, 212 and 222, which criminalise homicides;
- section 232b, which addresses forced labour;
- section 233, which criminalises labour exploitation;
- section 239, which criminalises unlawful imprisonment; and
- section 240, which criminalises coercion.

Criminal charges under these provisions are often combined with section 13 of the StGB if the charge's main allegation constitutes a criminal omission. In the commercial sector, there are also special rules setting out criminal liability. One such provision is found in section 331 of the German Commercial Code (HGB), which establishes reporting obligations.

However, in Germany, current rules establishing criminal liability generally only apply to individuals and not to enterprises as legal entities. The primary reason for this concept lies in the German criminal law principle requiring individual guilt.

Under certain circumstances, businesses can be fined up to €10 million if a corporate representative commits an (administrative) offence, thereby breaching the firm's human rights duties (section 30 of the Act on Regulatory Offences (OWiG)). However, technically, this fine does not address criminal conduct. An example of such an administrative offence is non-compliance with the due diligence obligations set out by the German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act), passed in June 2021 and entering into force on 1 January 2023. Non-compliance, if committed intentionally or negligently, constitutes an administrative offence sanctioned with a fine of up to €800,000 (and in certain cases up to €8 million) or fines of to up to 2 per cent of the average annual turnover, in the case of a company with an average annual turnover of more than €400 million. The calculation of the annual turnover is based on the worldwide turnover of all natural and legal persons as well as all associations of persons in the last three financial years. Companies may also be excluded from public procurement.

The former governing parties initially intended to expand the types of criminal charges that can be asserted against companies under corporate criminal law. In October 2020, the Act on Strengthening Integrity in Business was introduced in the German parliament, but the legislative initiative failed in June 2021 as the former government was not able to settle political differences. At this point, it remains unclear if the new German government will start a new attempt. The coalition agreement only states that the new government intends to revise the rules on corporate sanctions, including the number of sanctions, to improve the legal certainty of companies with regard to compliance obligations and to create a precise legal framework for internal investigations.

16 | What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

Within large enterprises, individuals charged with crimes frequently assert the defence that they lacked any knowledge of the human rights violation. This type of defence is used against any type of criminal charge

that requires the prosecutor to demonstrate that the defendant acted with a requisite criminal intent. However, this defence is not applicable to the many criminal offences that can be premised on an individual's negligent conduct. In particular, where the criminal law establishes a duty to supervise someone, an individual cannot assert a defence of ignorance.

Director and officer liability

17 | In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

Under the current law, corporate entities cannot be found to be criminally liable and a director or an officer cannot be found to be jointly responsible for any criminal conduct if he or she has not incurred any liability in his or her individual capacity.

Instead, most criminal laws are targeted at directors and officers in their individual capacities and based on their individual actions. Pursuant to the StGB, charges against them will often be brought under the negligence standard resulting from their overall responsibility for processes in the company. Some rules (eg, section 331 of the HGB) apply specifically to directors who are acting as leaders within a company. If one of the elements of a criminal charge can only be established by the corporate entity's conduct (which cannot be found criminally liable), certain criminal rules (ie, section 14 of the StGB and section 9 of the OWiG) function as gap fillers to transfer the element satisfied by the corporate entity to the individual director or officer.

Piercing the corporate veil

18 | When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

In German criminal law, the concept of piercing the corporate veil does not exist. Currently, a corporate entity cannot be found to be criminally liable.

A parent company, however, can be found liable for an administrative offence based on section 30 of the OWiG. With respect to a subsidiary's acts or omissions, a parent company's liability depends on the extent of its representatives' supervisory responsibilities (basic supervisory responsibilities in that context are set out in section 130 of the OWiG). The extent of these responsibilities must be analysed on a case-by-case basis. The decisive question is whether the parent company's representatives can influence or instruct the subsidiary in such a way that the two separate companies appear as an economic unit.

Secondary liability

19 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Pursuant to section 30 of the OWiG, businesses are only liable for actions taken by the expressly identified representatives of the company. Regular employees are not considered to be part of that distinct group.

Whether the company would incur administrative offence liability for actions taken by third parties or other individuals thus depends on the scope of supervisory responsibilities of the company's representatives (as described in section 130 of the OWiG). Generally, a company's representatives will have supervisory responsibility over employees. With respect to security services, the responsibility assessment must be made on a case-by-case basis. With respect to contractors, a company's representatives are commonly found to lack such supervisory responsibility. These general principles also apply with regard to the Supply Chain Act. This act establishes extensive due diligence obligations for companies, including the establishment of a risk management system, periodical risk analysis and the implementation of preventive and measures as well as remedial actions. Generally, those due diligence obligations must be established in a company's own business area and that of a company's direct supplier. Indirect suppliers are only included if the company gains substantiated knowledge that risk or violation by an indirect supplier is possible. Even though non-compliance with the Supply Chain Act in certain cases constitutes an administrative offence subject to administrative fines, only the violation of a company's own due diligence obligations triggers the company's liability. The companies will not be held liable for possible human rights and environment-related violations conducted by their suppliers but rather for violating their own due diligence obligations under the Supply Chain Act. For example, not carrying out the risk analysis in compliance with the requirements set out by the Supply Chain Act incurs an administrative fine.

Where third persons or individuals who do not fall under the company's supervisory responsibilities commit human rights violations, a company may nevertheless bear liability for criminal charges that are premised on negligence. A company's representatives must be found to have breached this standard, thereby enabling the violation to occur. If the company's representatives acted wilfully, they can be found to be criminally liable for aiding or abetting, or as principal actors.

Prosecution

20 | Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

No one may initially commence a criminal prosecution against a business because, at present, businesses can only be liable for civil administrative offences under the OWiG. However, if the underlying offences by individuals under sections 30 and 130 of the OWiG are criminal offences, the process pursuant to the Act on Regulatory Offences is combined with the underlying criminal process.

An important difference between the criminal prosecution system and administrative offence proceedings is that the public prosecutor's office must prosecute criminal offences (mandatory prosecution principle), whereas the enforcement authority has discretion to prosecute administrative offences (discretionary prosecution principle). Anyone may submit an administrative offence report with the relevant enforcement authority, which may result in a fine. However, the enforcement authority has discretion on how to handle the process for each report.

This difference is one of the main reasons for the development of a corporate criminal law, which would result in a mandatory prosecution principle for business liability.

21 | What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

The criminal prosecution procedure applies to criminal law offences. This procedure requires that a public prosecutor's office asserts an initial suspicion as a prerequisite to a criminal investigation. The public prosecutor's office acts ex officio or based on a criminal complaint. In general, anyone may file a criminal complaint. The public prosecutor's office is officially obligated to pursue the prosecution of criminal offences.

With respect to administrative offence proceedings, an indication of a breach of administrative law is a prerequisite to an administrative

prosecution. After obtaining the indication of a breach, the enforcement authority decides whether to proceed with any further prosecution.

No special rules for human rights cases exist.

CIVIL LIABILITY

Primary liability

22 | What civil law causes of action are available against businesses for human rights abuses?

Civil law causes of action against a company can be based on contract law. Such claims are available only to the contracting parties.

For example, if a company commits a human rights violation against its employee, the employee may be entitled to a claim arising out of the employer's duties of care found in the employee's employment contract (section 611a in conjunction with section 241, paragraph 2 of the German Civil Code (BGB)).

If the affected person or party is not a contracting party, he or she might still be able to assert claims against the company under the theory of contracts protecting third parties. For such a claim there must be a contractual relationship between two parties and a third party must be affected by the breach of a duty of care in the same way as the contracting party. In addition, a proximate relationship must exist between the contract beneficiary and the affected third party. Both requirements must have been foreseeable by the obligated party and the third party must require protection, which means that the third party must not have his or her own comparable contractual claims.

Additionally, claims against the company can arise from tort law; such claims may be brought by anyone. The primary rule for bringing such a claim is found in section 823, paragraph 1 of the BGB, which describes the claim's central prerequisites as a violation of an erga omnes right mentioned in the section and the company's breach of duty. In addition to general duties of care, a company has specific organisational duties with regard to the entire company's structure.

Pursuant to section 823, paragraph 2 of the BGB, a company's breach of any sections that establish an explicit duty of protection (for example, wilful false reporting of the corporate situation in the annual financial statements, including the non-financial statement pursuant to section 331, paragraph 1(1) of the German Commercial Code (HGB)) can result in the payment of compensatory damages.

If a human rights violation claim is based on dangers associated with the actual working environment, the company may be liable pursuant to section 837 of the BGB, which governs general corporate obligations with respect to hazards in corporate buildings, even if the company did not act in a negligent or wilful manner.

For all of the aforementioned claims, the remedies are compensatory damages.

Pursuant to section 1004 of the BGB, a party affected by any corporate action or inaction can demand the company cease the offending violation or omission.

The German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act), passed in June 2021 and entering into force on 1 January 2023, explicitly states that a violation of the obligations established by the Supply Chain Act does not give rise to any liability under civil law. However, liability under general German (tort) law remains possible. The Supply Chain Act contains an unusual provision for German procedural law; trade unions and non-governmental organisations based in Germany can enforce the rights of the injured party in their own name under facilitated conditions.

The European Commission (EC) announced its intention to publish its own draft legislation of mandatory human rights and environmental due diligence (mHREDD) in February or March 2022. It remains to be seen whether this proposal will include its own statutory regulations on civil liability for breaches of human rights and environment-related rights. However, the non-binding draft directive published by the European Parliament in March 2021 includes a provision on civil liability, obliging EU member states to ensure that they have a liability regime in place under which companies can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance. It is unclear whether the EC will follow this approach. If it does, an amendment of the Supply Chain Act may become necessary in the future.

Director and officer liability

23 | In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

For companies that are organised as general partnerships, limited partnerships or partnerships under civil law, partners – who are the only shareholders – are generally liable for all of the company's obligations pursuant to section 128 of the HGB. According to the prevailing opinion, this also includes a company's tort law liabilities. However, the recourse to the partner is secondary to the company's obligations even though the partners have no possibility of warding off liability.

With respect to other corporate legal forms, no such liability for directors or managers exists. However, in a stock company, the members of the management board are liable for breaches of their duty to exercise skill and care in favour of the company (not third parties), pursuant to section 93(2) of the Stock Corporation Act. This liability may also apply to the directors of a limited company, pursuant to section 43(2) of the German Limited Liability Companies Act. The duty to exercise skill and care is specified, inter alia, by the company's statutes, employment contracts and generally applicable statutory law. Members of management may violate their duties if they do not prevent breaches of criminal or competition law. However, if they can prove that they acted without intention or negligence, they are not liable towards their company.

The available remedy is compensatory damages.

In its consultation on mHREDD requirements, the EC also considered an expansion of directors' duties. This is part of the European Green Deal, which comprises a 'sustainable corporate governance initiative'. The purpose of this initiative is to ensure that 'environmental and social interests are fully embedded into business strategies'. The EC's work on the initiative has so far centred around two proposals:

- to clarify directors' duty of care in EU member state company law to reduce the short-term pressure on company directors and to promote the integration of sustainability into corporate decision-making; and
- to require companies to carry out mHREDD in respect of their own operations and their supply chains.

With regard to the first point above, the EC holds that, nowadays, the focus of directors and boards is often very narrow and limited to short-term financial interests. With a view to avoiding this narrow focus, the EC specifically discusses whether considerations regarding sustainability – in the meaning of environmental, social and governance issues – should be integrated into the company's strategy, decisions and oversight. In the move from a short-term focus on shareholder value to long-term sustainable value creation, the EC attributes a key role to the interests of companies' stakeholders who, in the EC's view, may also contribute to the long-term success, resilience and viability of the company. If this were to be included in a future law, the directors' duty of care would be expanded accordingly, which could also result in an additional liability of directors and in enforcing stakeholder interests by third parties. According to current information, the expansion of directors' duties

will, however, most likely not be included in the EC's proposal for an EU law governing supply chain due diligence expected to be published in February or March 2022. It is expected that directors' duties will be governed by a separate piece of legislation.

Piercing the corporate veil

24 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

A general piercing of the corporate veil rule in the case of tortious liabilities is not recognised under German law. The only scenarios in which German law disregards the form of the legal entities are when the assets of different companies are irrevocably mixed or when one entity is responsible for the insolvency of another. In the case of human rights violations, these scenarios are generally inapplicable.

Regarding tort claims, it is settled case law that a parent company can be individually liable if the scope of the parent company's duty of care can be extended to the acting subsidiary. Such an expansion is only possible if the parent company violated its own duty, such as the duty to organise the subsidiary in a way to ensure that it complies with the law. Another case could be that the subsidiary is subject to the parent company's directives and the violation of human rights results from complying with such a directive. The parent company may exculpate itself if it can prove that:

- it exercised reasonable care when selecting the person responsible for the subsidiary;
- the damage would have occurred even if this care had been exercised; or
- its directive did not directly lead to a violation of human rights.

The available remedy is compensatory damages.

Secondary liability

25 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

There are different means for attributing the human rights abuses of third parties to a company.

First, section 31 of the BGB permits attribution where the acting person is authorised to represent the company. This might be the case for specific categories of employees, whereas contractors and security forces are not covered by this rule.

Second, section 831 of the BGB provides that a company is liable for the actions of its vicarious agents. Vicarious agents are all those that act with knowledge and will in the interest of the principal company and are bound by the principal's instructions. This section could apply to other groups of employees such as, for example, security forces.

Third, section 278 of the BGB provides for attribution to actions by employees in the context of contract claims. These types of claims may only be asserted by the specific contracting parties.

In all other cases, a party can only establish a company's liability where the company's duty of care and responsibilities encompass the acting person.

With regard to the end-user customer, a company may even face liability under the contract pursuant to the warranty for defects law (section 437 et seq of the BGB), if the company indicated to the end customer that human rights were observed during the company's entire production process.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

Whether a shareholder can be held liable for a business's human rights violation depends on the business's legal form. Partners and shareholders of companies organised as partnerships of any kind are generally liable for the company's obligations.

Shareholders of companies organised in other forms (eg, stock companies) are generally not held liable for the business's violation of human rights. However, if the shareholder acted as an officer or representative of the company, he or she can be held liable under certain conditions.

Furthermore, in all cases, shareholders can be held personally liable if they actively participated in the human rights violation. The available remedy is compensatory damages.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

In general, German civil courts have jurisdiction to entertain claims against businesses if the business's general venue is in Germany. The general venue is defined by the business's registered seat. In case of doubt, the business's registered seat is the place in which it has its administrative office. For claims arising from tort, the court in the jurisdiction where the tortious act was committed can also have jurisdiction. This means that even if a business does not have its registered seat in Germany, it can be sued in German courts if the act or omission constitutes a tort and was committed in Germany. Furthermore, if a business has a place of business serving the operation of a factory, a trade enterprise or any other commercial establishment from which transactions are directly concluded, all actions that relate to the operation of the place of business may be brought against that person at the court where the business is situated.

In cases in which one of the parties to the claim is not based in Germany but in another EU member state, the jurisdiction of German civil courts is governed by Regulation (EU) No. 1215/2012 (Brussels Ia), which is generally comparable to German national law. All persons shall be sued in the EU member state where they are domiciled. Legal persons are domiciled where they have their statutory seat, central administration or principal place of business. In tort proceedings, similar rules as those in German law apply. In matters relating to a contract, natural and legal persons may also be sued in the courts where the place of performance of the obligation is in question. For insurance companies, special rules are applicable (eg, in respect of liability insurance, the insurer may be sued in the courts of the place where the harmful event occurred).

The German criminal courts have jurisdiction when German criminal law is applicable. In principle, this is the case for offences committed domestically. Further, German criminal law can be applicable to offences committed abroad if, inter alia, the offender is a German national and the act in question is a criminal offence at the place of its commission. German criminal law is not applicable to legal persons.

The jurisdiction of German criminal courts can also be established due to Germany being party to international treaties that establish universal jurisdiction for specific crimes (eg, the 1984 Anti-Torture Convention).

28 | What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

German courts shall not reject any claims if the courts have jurisdiction under German law or under EU regulations.

Class and collective actions

29 | Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

In November 2018, model declaratory actions were introduced to German law. Since that time, 'qualified entities can request the determination of the existence or non-existence of factual and legal requirements for the existence or non-existence of claims or legal relationships (declaratory objectives) between consumers and entrepreneurs'. The subject of these actions may be any claim or legal relationship, regardless of the legal ground or subject matter, if it is based on the same factual background. Hence, the subject of such a claim could be a business's human rights violation if it is sanctioned under German law (breach of contractual obligation to perform, tort, etc). Also, it is crucial that the claimants are consumers and that the defendant is an entrepreneur.

This kind of action results in a remedy in the form of a declaratory judgment. The judgment itself is binding for all consumers registered for the proceedings. After the issuance of the declaratory judgment, the individual consumer may, on the basis of the findings in the declaratory judgment, sue the business for damages.

In addition to this type of action, German law also permits a plurality of persons to jointly sue if they form a community of interest with regard to the disputed right or if they are so entitled under the same factual and legal cause. Furthermore, it is necessary that the court hearing the case has jurisdiction for all claims brought forward and that the claims may permissibly be dealt with in the same type of proceeding.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

In general, no. However, under certain circumstances, non-governmental organisations (NGOs) focusing on consumer protection or environmental protection have a right to take legal class action. In this context, the protection of human rights can be of relevance as part of the underlying argumentation.

Further, according to the new German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act) passed in June 2021 and entering into force on 1 January 2023, a person who claims that his or her rights have been violated due to non-compliance with the Supply Chain Act may authorise a domestic trade union or an NGO to bring proceedings to enforce his or her rights in the trade union's or NGO's own capacity.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

Numerous arbitration boards have been established in Germany (eg, concerning consumer protection, insurance, public transport and the banking sector). However, in general, these boards address questions concerning contracts or reimbursement rather than possible human rights violations.

The most important grievance mechanism in Germany is the national contact point (NCP) established in 2000 in accordance with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines). It is affiliated with the Federal Ministry for Economic Affairs and Energy, and, in particular, with the Directorate for External Economic Policy. The NCP uses the directorate's organisational structure. However, the NCP is a separate entity and all the decisions are made by the NCP along with the OECD Guidelines Working Group, which is composed of officials from several ministries (Foreign Affairs, Justice, Finance, Labour, Environment, Development and Agriculture).

In addition, business-related human rights complaints can be submitted to the federal parliament's petitions committee. Further, for certain areas, there are contact persons established by federal and state governments, such as the Federal Government Commissioner for Matters Relating to Persons with Disabilities, as well as the State or Federal Commissioners for Data Protection and Freedom of Information.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

According to the procedural guidelines of the German NCP, as of 2019, complaints may be filed with the NCP directly against a multinational company by natural or legal persons, trade unions and NGOs that demonstrate a legitimate interest in the matter in question.

The company against which the complaint is filed will be given the opportunity to comment. The NCP will then decide whether to accept the complaint for in-depth examination as part of an initial evaluation.

Remedies

33 | What remedies are provided under these mechanisms?

Not applicable.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

According to its procedural guidelines, the NCP's initial evaluation involves a careful examination of the allegations made in the complaint in light of the OECD Guidelines, taking into account legal aspects, evaluating whether the issues raised warrant more detailed examination and examining the possible contribution the NCP could make towards solving the problems raised.

If the NCP accepts the complaint, it will begin mediation proceedings with the parties. In the mediation process, the NCP may – where necessary – obtain information from public or non-public bodies inside or outside of the European Union (eg, embassies, NGOs). The NCP may also rely on information provided by foreign NCPs.

The proceedings either end with the parties concluding an agreement or – when an agreement is not possible – a final NCP statement specifying whether the company breached the OECD Guidelines. When appropriate, the NCP statement will contain recommendations for the implementation of the OECD Guidelines.

If an agreement is reached, it might, under certain circumstances, be enforceable between the parties. The final statement, however, is not enforceable.

Publication

35 | Are these processes public and are decisions published?

The NCP does not publicly announce the acceptance of a complaint and the confidentiality of the NCP's proceedings is very important. However, the NCP does publish the dismissal of a complaint and final agreements, as well as final NCP statements on the home page of its website.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

Companies subject to the German Act on Corporate Due Diligence in Supply Chains (the Supply Chain Act), which was passed in June 2021 and enters into force on 1 January 2023, must establish an appropriate internal grievance mechanism. This mechanism must be set up in a way that enables persons to report human rights and environment-related risks and violations that have arisen as a result of the economic actions of the company in its own business area, or those of a direct or indirect supplier. The affected companies must offer a procedure for amicable settlement or participate in an appropriate external complaint mechanism. In any case, the implemented grievance mechanism must maintain the confidentiality of the reporting person's identity and must ensure effective protection against disadvantages or punishments resulting from a complaint. The persons entrusted by the company with the conduct of the proceedings must offer a guarantee of impartiality; they must, in particular, be independent and not bound by instructions.

Further, companies falling under the scope of application of the EU Conflict Minerals Regulation must also establish an internal grievance mechanism as an early-warning risk-awareness system or provide such a mechanism through collaborative arrangements with other economic operators or organisations, or by facilitating recourse to an external expert or body, such as an ombudsman.

Aside from any obligations to establish a grievance mechanism, numerous companies based in Germany are signatories to the Bangladesh Accord or are participants of the United Nations Global Compact.

However, as far as is publicly known, only two German private security companies are members of the International Code of Conduct Association.

Some German companies are affiliates of the Fair Labour Association (FLA), which provides its Workplace Code of Conduct and promotes fair labour principles. It is possible for any person, group or organisation to file a complaint against these companies with the FLA.

For textile products, the federal government has established the Green Button, which is a label for sustainable textiles. To be allowed to use this label, companies must prove that they meet their human rights, social and ecological responsibilities. A prerequisite is the establishment of a complaints office within the company for, inter alia, human rights violations.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

Climate change litigation

In a ruling published on 29 April 2021, the Federal Constitutional Court (BVerfG) held that the provisions of the German Federal Climate Change Act of 12 December 2019 (the Climate Change Act), which governs national climate change targets and annual emission budgets until 2030, are incompatible with fundamental constitutional rights as they lack sufficient specifications for further emissions reductions from 2031 onwards.

With regard to the specific targets set in the Climate Change Act, the BVerfG held that it could not at present ascertain whether the reduction target of 55 per cent by 2030 and the sector-specific annual emissions budgets in Annex 2 violated the government's constitutional obligation to protect the human rights to health and property, and to take action against climate change.

However, the BVerfG took the view that the reduction target of 55 per cent by 2030, including the annual emissions budgets in Annex 2, violated the principle of proportionality. This principle essentially requires that the targeted reduction in greenhouse gas emissions to the point of climate neutrality is distributed over time in a prospective manner that safeguards constitutional rights. According to the BVerfG, this was not the case, as the then-existing provisions would lead to an unequal distribution of the reduction burden between present and future generations. In other words, the German Constitution provides that one generation may not be allowed to consume large portions of the greenhouse gas budgets while bearing a relatively minor share of the reduction effort if this would leave future generations with a drastic reduction burden and expose their lives to extensive losses of their fundamental rights and freedoms. The BVerfG held that the transition to climate neutrality requires that detailed reduction measures are formulated at an early stage for the post-2030 period to provide clear orientation for the further implementation process.

Based on, inter alia, this ruling, in September 2021 Deutsche Umwelthilfe – a German non-governmental organisation (NGO) – filed civil claims against BMW and Audi arguing that the companies must stop distributing cars and vans with combustion engines globally from 2030. Deutsche Umwelthilfe argues that the car manufacturers must reduce carbon dioxide (CO2) emissions for cars sold until 2030 because otherwise the CO2 emissions budget that can allegedly be attributed to these companies would be exceeded, which would negatively affect the plaintiffs. The proceedings have started before civil courts in the first instance. However, depending on the outcome of these claims, it can be expected that the BVerfG's ruling will serve as a basis for further climate-related legal actions in the future.

EU initiative on supply chain due diligence

The supply chain issue has now also been raised at the European level by the European Parliament and the European Commission (EC). The EC conducted a consultation relating to mandatory human rights and

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environmental due diligence requirements, and announced a legislative initiative in the second quarter of 2021. The publication of EU legislation has, however, been rescheduled several times in 2021 due to severe (political) internal disputes and is now announced for February or March 2022. This initiative is strongly supported by the European Parliament. On 10 March 2021, the European Parliament adopted a resolution that sets out principles for the proposed new legislation to influence the EC, which has the sole right of legislative initiative within the European Union.

Criminal complaints filed against German companies

In September 2021, the European Center for Constitutional and Human Rights (ECCHR) filed criminal complaints against the directors of several German companies, including Hugo Boss, Lidl and Aldi. The ECCHR accuses the companies of directly or indirectly abetting and profiting from the alleged forced labour of the Uyghur minority in the Xinjiang Uyghur Autonomous Region in western China and thus of being involved in crimes against humanity. According to the ECCHR, the companies have or had production in Xinjiang until recently. From the ECCHR's point of view, these companies are thus maintaining a business model that is presumably also based on forced labour, although they should have been aware of those risks. Whether the competent prosecution authority, which is the Federal Attorney General's Office, will adopt the ECCHR's position remains unclear.

Italy

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Legance - Avvocati Associati

LEGAL AND POLICY FRAMEWORK

International law

1 | Which international and regional human rights treaties has your jurisdiction signed or ratified?

Italy has entered into the following conventions:

- the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, which entered into force on 12 January 1989; and its Optional Protocol, which entered into force on 3 April 2013;
- the International Covenant on Civil and Political Rights, which entered into force on 15 September 1978 (including reservations with reference to article 15, paragraph 1, and article 19, paragraph 3); and its Second Optional Protocol aiming at the abolition of the death penalty, which entered into force on 14 February 1995;
- the Convention for the Protection of All Persons from Enforced Disappearance, which entered into force on 8 October 2015;
- the Convention on the Elimination of All Forms of Discrimination against Women, which entered into force on 10 June 1985;
- the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force on 5 January 1976 (including declarations with reference to articles 4 and 6);
- the International Covenant on Economic, Social and Cultural Rights, which entered into force on 15 September 1978;
- the Convention on the Rights of the Child, which entered into force on 5 September 1991; its Optional Protocol on child prostitution and child pornography, which entered into force on 9 May 2002; and its Optional Protocol on the involvement of children in armed conflict, which entered into force on 9 May 2002 and in which Italy declares, in compliance with article 3, that:
    - Italian legislation on voluntary recruitment provides that a minimum age of 17 years is required in respect of requests for early recruitment for compulsory military service or voluntary recruitment (military duty on a short-term and yearly basis); and
    - the legislation in force guarantees the application, at the time of voluntary recruitment, of the provisions of article 3, paragraph 3 of the Optional Protocol, inter alia, in respect of the requirement of the consent of the parent or guardian of the recruit; and
- the Convention on the Rights of Persons with Disabilities, which entered into force on 15 May 2009.

Other regional treaties to which Italy is a party include the European Convention on Human Rights, which entered into force on 26 October 1955; the European Convention on the Legal Status of Migrant Workers, which entered into force on 1 May 1995; and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force on 1 August 2014.

2 | Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Italy has ratified the core conventions of the International Labour Organization, which are:

- the Forced Labour Convention, 1930, which entered into force on 18 June 1934;
- the Freedom of Association and Protection of the Right to Organise Convention, 1948, which entered into force on 13 May 1958;
- the Right to Organise and Collective Bargaining Convention, 1949, which entered into force on 13 May 1958;
- the Equal Remuneration Convention, 1951, which entered into force on 8 June 1956;
- the Abolition of Forced Labour Convention, 1957, which entered into force on 15 March 1968;
- the Discrimination (Employment and Occupation) Convention, 1958, which entered into force on 12 August 1963;
- the Minimum Age Convention, 1973, which entered into force on 28 July 1981; and
- the Worst Forms of Child Labour Convention, 1999, which entered into force on 7 June 2000.

3 | How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Italy is committed to multiple initiatives for the protection and promotion of human rights in line with the obligations undertaken at the international level. However, the following human rights areas seem to necessitate legal intervention.

- In terms of the migrant and refugee phenomenon, interceptions at sea may result in a risk of ill treatment or onward refoulement. Moreover, there is a lack of clarity concerning the migrants' hosting and resettlement regime, and the legal framework applicable to them. Additional hurdles relate to difficulties in obtaining residence registration, income-related requirements for naturalisation and the non-acquisition of Italian nationality by children born to refugees in Italy. Asylum seekers and beneficiaries of international protection need more support in accessing employment, language training, civic education and professional training. Italy is still not a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- Through the introduction of Law No. 85/2006, penalties against incitement to racial discrimination and violence have become more lenient in Italy. Many concerns remain over article 631-bis of the Criminal Code regarding the crime of torture, specifically on the

article's effectiveness, which is subject to potential misinterpretation and impunity of the perpetrators.
- Other issues include overcrowding in prisons, the excessive length of court proceedings, anti-defamation laws that undermine the freedom of the press and the spread of phenomena such as irregular employment practices with inadequate and unsafe working conditions.

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

On the contrary; in 2014, Italy voted against the United Nations Human Rights Council Resolution on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

National law

5 Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

Legislative Decree 231/2001 (on the administrative liability of companies) introduced regulatory provisions that should prevent and sanction certain company behaviour, including preventing managers, officers, employees or third parties acting on behalf of the company from violating human rights standards (ie, safety in the workplace).

The Italian legal system transposed EU Directive 2009/52/EC through Legislative Decree 109/2012 (the Rosarno Law), which enables irregular workers to request the legal recognition of an employment relationship to obtain outstanding salaries and the recovery of social security contributions (to be paid by the employer).

Nevertheless, the scope of this mechanism is partially undermined by Legislative Decree 286/1998, which regulates the crime of illegal entry or stay. If an irregular worker who is also an illegal migrant reported an employer violating the Rosarno Law to the authorities, he or she would risk being expelled for illegal entry or stay.

6 Has your jurisdiction published a national action plan on business and human rights?

On 15 December 2016, the government presented its National Action Plan on Enterprise and Human Rights 2016–2021, which focused on:
- promoting due diligence processes, with particular attention to small and medium-sized enterprises;
- promoting the protection of environmental sustainability;
- the fight against corporal labour and forms of exploitation, forced labour, slavery, and irregular labour, with particular attention to migrants and victims of trafficking;
- promoting fundamental labour rights in the process of company internalisation, with particular reference to global production processes;
- combating discrimination and inequality, and promoting equal opportunities; and
- strengthening Italy's role in the framework of international cooperation for development based on human rights.

As at December 2021, an updated version of the National Action Plan on Enterprise and Human Rights has not yet been released.

On 10 December 2020, the government also presented its National Action Plan on Women, Peace and Security 2020–2024, pursuing four objectives to promote and strengthen:
- the role of women in peace processes and decision-making;
- the gender perspective in peace operations;
- women's empowerment, gender equality and the protection of the human rights of women and children in conflict and post-conflict areas; and
- communication, advocacy and training activities, at all levels, on the Women, Peace and Security Agenda and related issues.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

Legislative Decree 254/2016, implementing Directive 2014/95/EU on the disclosure of non-financial and diversity information, imposes the obligation to draw up, for each financial year, a statement that allows an understanding of the company's activity and performance in respect of environmental, social, human resources management, human rights and anti-corruption issues. Public-interest entities must make a declaration for each financial year in which they had, on average, more than 500 employees and they had exceeded, on the balance sheet date, at least one of the following two size limits:
- balance sheet total: €20 million; or
- total net revenues from sales and services: €40 million.

According to the national legislation, the following Italian purpose-driven companies, among others, are required to publish an annual report on the social and environmental impact of their activities and the achievement of their purposes and mission:
- social enterprises (regulated by Legislative Decree 112/2017);
- social cooperatives (regulated by Legislative Decree 112/2017 and Law 381/1991);
- innovative start-ups with social vocation (regulated by Decree Law 179/2012); and
- benefit corporations (regulated by Law 208/2015).

8 What is the nature and extent of the required reporting or disclosure?

The disclosure of non-financial and diversity information must include the activity implemented by the enterprise regarding:
- social and personnel management, including action taken to ensure gender equality, measures to implement relevant conventions of international and supranational organisations, and details of the way in which dialogue with social partners is conducted; and
- respect for human rights, including measures taken to prevent violations and action taken to prevent discriminatory attitudes and actions.

With regard to purpose-driven companies, the information to be provided within the annual report must comply with specific standards provided by the legislator for each legal status. In particular:
- according to Law 208/2015, benefit corporations must draft a report providing all information related to the achievement of the common benefit goals incorporated in the by-laws and measuring the impact generated by the company in relevant areas, such as governance, employees, stakeholders and the environment;
- in respect of innovative start-ups with social vocation, in 2015, Circular 3677/C of the Ministry of Economic Development introduced the obligation for those start-ups to publish a social impact

assessment annually, drafted in accordance with the guidelines under the circular; and
- according to article 9 of Legislative Decree 112/2017, social enterprises and social cooperatives must also publish a social report in accordance with the guidelines issued by the Decree of the Minister of Labour and Social Policy of 4 July 2019.

9 | Which bodies enforce these requirements, and what is the extent of their powers?

On one hand, it is a prerogative of the board of directors to ensure that the disclosure of non-financial and diversity information is drawn up and published. Pursuant to article 8 of Legislative Decree 254/2016, financial penalties shall be established and applied to directors for non-compliance.

On the other hand, the board of auditors monitors disclosure, mainly considering:
- compliance with the law and by-laws, as well as with the principles of correct administration;
- the adequacy of the organisational, administrative and accounting system, and of the internal control system; and
- the adequacy of processes for the identification and management of business risks, and in the extraction and reporting of data pertinent to the disclosure.

The disclosure is also subject to external control by the entity in charge of the statutory audit of the annual financial statements of the company. Such control is related to implementation and compliance with Legislative Decree 254/2016. The entity must issue certification regarding the compliance of the information provided in the disclosure with the requirements set by the Legislative Decree.

Concerning purpose-driven companies:
- benefit corporations are subject to the control and sanctions of the antitrust authority concerning misleading advertising (Legislative Decree 145/2007) and unfair commercial practices (the Consumer Code);
- innovative start-ups with social vocation are subject to annual checks on compliance with legal requirements by the Chamber of Commerce;
- social enterprises are under the control of the Ministry of Labour and Social Policy, which establishes inspections and may order the loss of status; and
- social cooperatives are under state control and, in the event of irregularities, consequences include cancellation from the official register, dissolution by an act of authority and the obligation to devolve assets.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Most companies – mainly corporations – publicly certify their commitment to comply with intergovernmental principles on human rights, labour rights and environmental protection through the adoption of codes of conduct based on those principles.

Useful tools to increase human rights standards include:
- international principles and frameworks (ie, the United Nations (UN) Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development Guidelines, and the UN Global Compact, Sustainable Development Goals); and
- private certifications evaluation standards (ie, SA 8000, ISO 26000, B Impact Assessment and the Global Reporting Initiative Standards).

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

Specific requirements for businesses are provided by Legislative Decree 231/2001.

Regulation (EU) 2017/821 lays down due diligence, supply chain, management system, disclosure and third-party audit obligations for EU importers of minerals or metals containing or comprising tin, tantalum, tungsten or gold.

12 | What is the nature and extent of the required due diligence?

Under Legislative Decree 231/2001, a management organisation model must be adopted. It must provide:
- compliance with the technical structural standards of the law relating to equipment, plants and workplaces, and chemical, physical and biological agents;
- risk assessment activities and the preparation of consequent prevention and protection measures;
- activities of an organisational nature, such as for emergencies, first aid, contract management, periodic safety meetings and consultation with workers' safety representatives;
- health surveillance activities;
- information and training activities for workers;
- surveillance activities with reference to compliance with procedures and instructions for safe work by workers;
- the acquisition of documents and certifications required by law; and
- periodic checks on the application and effectiveness of the procedures adopted.

A code of conduct must also be adopted to:
- inform people within the company and third parties of the nature and content of the company's commitment to fighting crimes and unlawful conduct, asking them to sign an explicit commitment to respect the law and the rules of the code itself;
- increase awareness and knowledge of ethics and corporate policies among employees to obtain their consent and support in the fight against corruption and fraud, and against negligence in matters of occupational safety and environmental protection; and
- support the reputation of the company to increase public confidence.

Both the management organisation model and the code of conduct must be published.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

A supervisory body must be elected to:
- supervise the effectiveness and suitability of the management organisation model;
- evaluate and propose any necessary updates or adjustments to the model;
- carry out checks on the model; and
- receive reports relating to possible offences or corporate irregularities.

14 What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

To assess their specific human rights risks, organisations can apply:

- international principles and frameworks (ie, the United Nations (UN) Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development Guidelines, and the UN Global Compact, Sustainable Development Goals); and
- private certifications evaluation standards (ie, SA 8000, ISO 26000, B Impact Assessment and the Global Reporting Initiative Standards).

CRIMINAL LIABILITY

Primary liability

15 What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

The introduction of Legislative Decree 231/2001 provides that companies are subject to monetary penalties or interdiction (or restraining measures, depending on the crime committed and its gravity) for any typical offence committed or attempted – in Italy or abroad – in the interest or to the advantage of the company itself:

- by individuals who are representatives, directors or managers of the company or of one of its organisational units that have financial and functional independence, or by individuals who are responsible for managing or controlling the company (top-level managers); and
- by individuals who are managed or supervised by an individual in a top-level managerial position.

Among the typical crimes contained in Legislative Decree 231/2001, the following examples relating to human rights violations can be considered:

- the hiring of employees with irregular residence permits (article 22 of Legislative Decree 286/1998);
- the exploitation of workers (article 603-bis of the Criminal Code);
- the employment of illegal immigrants (article 2 of Law No. 109/2012);
- reducing a person to, or holding a person in, a condition of slavery (article 600 of the Criminal Code);
- manslaughter (article 589 of the Criminal Code);
- human trafficking (article 601 of the Criminal Code);
- female genital mutilation practices (article 583-bis of the Criminal Code); and
- child prostitution (article 600-bis of the Criminal Code) or child pornography (article 600-ter of the Criminal Code).

More recently, within the implementation of Framework Decision 2008/913/JHA concerning the fight against all racial and xenophobic forms and expressions, a new paragraph (25-terdecies) on the fight against racism and xenophobia was added to the rules of Legislative Decree 231/2001.

Finally, in regulating the hypothesis in which the offence is committed 'by persons who hold positions of representation, administration or management of the organisation or of one of its organisational units with financial and functional autonomy', article 6, paragraph 1 of Legislative Decree 231/2001 implements a complete reversal of the burden of proof, providing that the organisation is not liable if it demonstrates that it has taken the necessary measures to prevent the commission of offences of the type committed.

On the other hand, when the crime was committed by someone subject to a person in a top-level managerial position, the burden of proof returns to the prosecutor. The company will be liable only when it is proven that the realisation of the crime was made possible by the failure of top-level subjects to comply with their obligations of management or supervision.

16 What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

There are no circumstances in which directors and officers can be held criminally liable for human rights abuses committed by their business. Companies may avoid or significantly reduce the risk of incurring company liability and being sanctioned by adopting and implementing an effective organisational, management and control model under Legislative Decree 231/2001.

In addition to an effective compliance programme, the creation of an internal control body tasked with monitoring the operation, effective implementation and observance of the model is the primary method by which a company can exclude or mitigate potential punishment.

The most relevant requisites of the model are to:

- identify the risky activities or areas of activity within the company's business;
- identify the modalities for handling financial resources suitable for preventing crimes;
- provide for specific protocols or policies aimed at planning the formation and implementation of the company's resolutions in respect of the prevention of potential crimes;
- appoint a monitoring body with autonomous powers of control, in charge of controlling the proper implementation and updating of the model;
- provide for continuous training to company employees and representatives on the model; and
- provide for specific disciplinary sanctions applicable in the case of non-compliance with the guidelines provided for in Legislative Decree 231/2001.

To draft a comprehensive model, a preliminary analysis should be carried out, identifying the gaps within the organisational set-up of the company, which might otherwise facilitate the commission of the crimes listed by Legislative Decree 231/2001.

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

A company can be criminally liable only for the typical offences contained in Legislative Decree 231/2001 (including human rights abuses) committed in the interest or to the advantage of the business itself by top-level managers, or by individuals that they manage or supervise; therefore, there are no circumstances under which directors and officers can be held criminally liable for human rights abuses committed by their business.

Piercing the corporate veil

18 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

It is not expressly provided by Legislative Decree 231/2001 nor by the Criminal Code that a parent company can be held criminally liable for the acts or omissions committed in the interest or to the advantage of a subsidiary.

However, according to recent jurisprudence of the Italian Supreme Court, a parent company may be held liable for offences committed within the scope of the activities of its subsidiaries on the condition that the person acting on behalf of the parent company concurs with the person committing the offence on behalf of the controlled legal entity and that the parent company can be considered to have received a concrete advantage or to have pursued an effective interest by means of the offence committed within the scope of the activities carried out by the subsidiary (ie, Supreme Court Ruling 52316/2016).

Secondary liability

19 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Notwithstanding the position of the individuals committing any of the typical offences listed in Legislative Decree 231/2001 (including human rights abuses) and the company they are working for (ie, employees of the same company in the interest or advantage of which crimes are committed or contractors' employees), businesses can be held criminally liable or defended in the case of prosecution if they meet the relevant criteria enshrined in legislation such as Legislative Decree 231/2001 and the Criminal Code.

In particular, despite the fact that, especially for contractors, there is no corporate connection (ie, no parent–subsidiary situation), clients are still required to comply with a supervisory obligation making sure no crimes, including human rights abuses, are committed by anyone working for the contractors while they perform the activity that they have been appointed for. In the case of absent or insufficient supervision, businesses may still be held criminally liable for not adopting the necessary supervisory efforts, which could and should have been implemented knowing the potential risks.

The actual business interest or advantage gained by the crimes must also be proven.

Prosecution

20 Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

Criminal prosecutions against a business may be commenced only by the state and, in particular, by the public prosecutor competent and responsible in the geographical area where acts were committed.

Criminal prosecutions cannot be commenced by the public prosecutor unless a complaint by the offended person has been filed. In cases concerning more serious crimes, public prosecutors are entitled to commence a criminal prosecution as soon as they receive notice of them (notwithstanding by whom and in which form).

21 What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

Once the public prosecutor has received notice of the crime or a complaint by the offended person has been filed, the public prosecutor opens an investigation (this phase is maintained in full secrecy) to decide whether investigations should be closed and archived with no further prosecution or if a request of indictment should be filed to a judge.

No specific rules or considerations apply to the prosecution of human rights cases.

CIVIL LIABILITY

Primary liability

22 What civil law causes of action are available against businesses for human rights abuses?

The civil liability of companies and corporations follows the rules of contractual and tortious liability (respectively, articles 1,218 and 2,043 et seq of the Civil Code). Protection is granted both against the natural persons responsible for the abuse and against the legal entities on behalf of which those natural persons acted, and aims to obtain compensation for the damage suffered.

With regard to businesses' tortious liability, article 2,043 et seq represents the civil remedy to obtain compensation for material and non-material damage.

Under article 2,059 of the Civil Code, non-material damage includes damage suffered in cases in which a crime was committed, as well as any hypothesis of violation of constitutional personal interests. In this sense, article 2,059 requires proof of the intentional or negligent behaviour carried out by the company and the resulting suffered damage.

Other special laws specifically grant compensation for non-material damage (ie, article 28 of Legislative Decree 150/2011) against discriminatory acts connected to racial, ethnic, linguistic, national, geographical or religious reasons, as well as relating to age, disability, sexual orientation, personal beliefs and equal opportunities.

Finally, should a criminal proceeding be pending, the civil action for compensation for damage may be introduced directly in those criminal proceedings by filing the relevant defences. There are no specific or ad hoc defences available.

Director and officer liability

23 In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

All directors, as members of the board, are jointly responsible for the general management of the company and the conduct of its business. They are jointly liable for any damage caused to the company or third parties as a consequence of their failure to comply with their duties relating to the general management of the company as board members.

Moreover, directors are not only liable for their failure to carry out the actions required of them, but also for failure to control and supervise the other directors' activities and the company's conduct of the business. Nonetheless, the degree of the directors' liability strictly depends on their professionalism and expertise.

Generally, the potential liability of a non-executive director is lower than that of an executive director (ie, a director vested with specific powers and authority), given the different role and involvement in the management of the company. However, the non-executive director's liability cannot be totally excluded, given that all board members are collectively responsible for the management of the company and its

supervision. With regard to single decisions, there are practical ways to exclude non-executive directors' liability; for instance, if:

- the dissent is the result of a board decision that is recorded in the minutes of a board meeting; and
- the non-executive director had reported concerns regarding the conduct not being in the interest of the company to the board of auditors or to the court, depending on the circumstances.

Directors' liability may be extended to general officers, pursuant to the Civil Code. According to Italian case law and doctrine, shadow directors (individuals that become part of the company's management and interact with third parties, despite not being vested with the powers and authority of a company director) are subject to the same liability as that set forth for directors in Italian law.

Regarding the available defences and remedies, the company's shareholders may take legal action against the liable director or directors.

In addition, the single shareholder or third party that suffered damage as a result of the director's misbehaviour may take legal action against the latter to obtain compensation for the damage.

Piercing the corporate veil

24 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

The possibility of piercing the corporate veil exists only if the parent company exercises an unlawful influence over the subsidiary, affecting the rights of the subsidiary itself or of its creditors. In this case, the parent company is liable for the subsidiary's conduct if, under article 2,497 of the Civil Code:

- the parent company operates in its own business and entrepreneurial interest or in the interest of another company;
- the parent company carries out activities in breach of the principles of the correct corporate management; or
- a detriment was caused to the profitability and value of the corporate holding as well as towards the company's creditors.

Should the parent company be held liable, the subsidiary and the creditors are able to implement measures against the abuses of dominant position (ie, applying the rules governing the liability of directors).

Secondary liability

25 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Article 1,228 of the Civil Code provides for 'liability for acts of auxiliaries' in the case of contractual non-fulfilment or breaches resulting from the acts of a third party appointed by the debtor for the performance of contractual obligations. Unless otherwise intended by the parties, the debtor is liable for the intentional or negligent behaviour of the auxiliaries.

On the other hand, article 2,049 of the Civil Code provides for non-contractual or tortious strict liability of masters and employers for damage caused by an unlawful act carried out by their workers and employees in the performance of their functions. Therefore, in the event of any unlawful acts on the workers' or employees' side, protection is granted against the legal person on behalf of which they were acting and aims to obtain compensation for the suffered damage. Proof of the link between the work performance and the damage is found whenever the damaging event has been produced or facilitated by conduct attributable to the work performance, even if the employee has acted without the knowledge of the employer.

The businesses' civil liability is excluded if the actions carried out by a third party (eg, an employee) are not, under any circumstances, attributable to work performed on behalf of the business.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

This can happen in the event of unlawful behaviour on the shareholders' side, which relates to any exercise of corporate powers by the shareholders that conflicts with the principles and rules of the corporate organisation.

However, on a civil law level, there are no specific rules to concretely determine the liability of the shareholders for the business's commission of, or involvement or complicity in, human rights abuses.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

To determine whether an Italian civil or criminal court has jurisdiction in a dispute against a company, it is necessary to refer to Regulation (EU) No. 1215/2012 (the Brussels I-bis Regulation). Regardless of the place in which the alleged violation of human rights has taken place, the Italian courts have jurisdiction if the business is domiciled in Italy.

According to article 63 of the Brussels I-bis Regulation, 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.'

However, this general principle could be subject to different exemptions under the Brussels I-bis Regulation.

28 What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

According to article 6 of the Brussels I-bis Regulation, if the defendant is not domiciled in an EU member state, the jurisdiction of the courts of each member state shall be determined by the law of that member state.

To this extent, article 3 of Law 218/1995 rules that, in circumstances involving a party not domiciled in an EU member state, Italian courts have jurisdiction in accordance with the criteria established by Chapter 2, sections 2, 3 and 4 of the Brussels I-bis Regulation and further amendments, when the issue at stake falls within the scope of application of the Brussels I-bis Regulation itself.

In the same scenario, the relevant disposition would be article 7 of the Brussels I-bis Regulation concerning tort, delict or quasi-delict, according to which a company domiciled overseas could be sued in Italy if 'the harmful event occurred or may occur' in Italy.

Class and collective actions

29 Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

Yes; for instance, in relation to trade union freedom and non-discrimination, and consumer protection.

The local bodies of the national trade union associations may act to protect trade union freedom and the workers' right to strike in the event of any abuses of these rights on the company's side. In accordance with Legislative Decrees 286/1998 and 216/2003, they might also bring a claim in cases of discriminatory behaviour of a collective nature, even in cases where collective discrimination exists without it being possible to clearly discern the victims.

Furthermore, Legislative Decree 215/2003 provides for the ability of associations and legal entities – listed in a specific registry approved at government level – to lodge a complaint on behalf of the victim of discrimination.

Regarding consumer protection, article 140-bis of the Consumer Code grants consumers the ability to bring class-based claims. The claim may be brought by each member of the class in the interest of every other member as well or by an association vested with the specific power. The decision of the judge will be effective in relation to all the members of the class.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

The Italian legal system does not provide for any mechanisms of public interest litigation. Pursuant to article 100 of the Code of Civil Procedure, any person or entity bringing a claim before a court must be entitled to do so by a personal, actual and concrete interest.

The Italian legal system, particularly Italian administrative law, admits the 'popular action'; for instance, pursuant to Legislative Decree 267/2009, each voter may bring before the court claims relating to the forfeiture of public offices (president of the municipality, mayor, etc); however, these mechanisms are distant from those of public interest litigation.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

Italy remains one of the few remaining countries in Europe without a national human rights institution. A pivotal role is instead played by the Italian National Contact Point (NCP) for responsible business conduct, which aims, under the Ministry of Economic Development, to actively contribute to the enactment of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines). One of its most important responsibilities is to handle specific instances submitted by stakeholders alleging that one or more enterprises have breached the OECD Guidelines and violated human rights. In those cases, through mediation and conciliation between the conflicting parties, the NCP works to find a consensual solution.

Another fundamental non-judicial grievance mechanism provided in the Italian National Action Plan on Business and Human Rights is the Banking and Financial Ombudsman, an independent and impartial alternative dispute resolution system for customer complaints about banks and other financial intermediaries.

Finally, although it is not a non-judicial grievance mechanism, it is worth mentioning the Working Group on Business and Human Rights, established within the Inter-Ministerial Committee on Business and Human Rights, the main goal of which is to ensure the implementation of the Italian National Action Plan.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

Every person or entity that has a legitimate interest in the relevant case (eg, private persons, non-governmental organisations, trade unions and other companies) can file a complaint with the NCP.

After submission of the case in writing, the NCP assesses whether it deserves further examination, based on the criteria set out in the OECD Guidelines. The NCP can contact the parties to remind them of their duty to act in good faith. At the end of the evaluation, the NCP can either accept the complaint or publish a statement explaining the reason for rejecting it.

In the case of the former, the NCP offers its 'good offices' (dialogue and conciliation services) to try to reach a consensual solution among the parties. The parties must accept the good offices by subscribing to the terms of reference of the conciliation procedure. Furthermore, at this stage of the procedure, the NCP – depending on the complexity of the case – can also adopt the assistance of an authoritative and impartial third party. The NCP issues a final statement or a report regarding the case, support and conclusion, with recommendations.

There could also be a follow-up phase aimed at determining whether the parties have followed the NCP's recommendations.

Regarding the Banking and Financial Ombudsman, before triggering proceedings, the customer must send a written complaint to the intermediary. The latter has 30 days in which to reply. If the customer has not received an answer or is not satisfied with the response provided by the intermediary within this time frame, he or she can start proceedings before the Banking and Financial Ombudsman within 12 months.

Remedies

33 | What remedies are provided under these mechanisms?

There are several remedies provided by the NCP. In some cases, where no evidence of serious human rights violations is found, the mechanism could simply lead to an agreement between the parties in which the company undertakes the obligation to develop and improve internal policies on human rights. However, in the most serious circumstances, this may not be sufficient. Other forms of remedy provided by the NCP include:

- acknowledgement of wrongdoing;
- cessation of the violation; and
- reparation of the harm in the form of financial compensation to the victims.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

The NCP has conciliative and mediation powers. Its final aim is to reach a compromise between the parties. Within the proceedings, the NCP can

- listen to and convene the parties, separately or jointly;
- listen to other persons;
- request the opinion of competent authorities, representatives of business environments and trade unions, and experts; and
- consult the NCPs of other countries.

The Banking and Financial Ombudsman, insofar as it is an alternative dispute resolution mechanism, has adjudicative powers. Nonetheless, its decisions are not legally binding for the parties.

Publication

35 | Are these processes public and are decisions published?

In compliance with transparency and accountability principles, a record of all cases handled by the NCP is available online through the OECD database of specific instances. They can also be found on the Ministry of Economic Development's website.

If the intermediary does not comply with the Banking and Financial Ombudsman's recommendations, its non-compliance is made public.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

The following international and regional bodies are relevant in Italy:

- the World Bank Inspection Panel;
- the Office of the Compliance Advisor Ombudsman of the International Finance Corporation and Multilateral Investment Guarantee Agency;
- the United Nations (UN) Working Group on Business and Human Rights;
- the European Investment Bank Complaints Mechanism;
- the European Bank for Reconstruction and Development Project Complaint Mechanism; and
- the European Ombudsman.

Regarding multilateral stakeholder mechanisms, involving a commitment of two or more companies to adhere to external schemes (ie, codes of conduct and sets of principles), the following apply:

- the UN Global Compact;
- the Fair Labor Association; and
- the Bangladesh Accord on Fire and Building Safety, which has been signed by some Italian companies.

The following mechanisms that enforce international framework agreements, usually concluded by multinational companies and organisations representing employees and workers (ie, international trade unions), apply:

- the Global Framework Agreement on International Industrial Relations and Corporate Social Responsibility, in particular the dispute settlement under article 8.6 thereof; and
- the International Framework Agreement to Promote and Protect Workers' Rights.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

In 2018, the Working Group on Business and Human Rights conducted a mid-term review of the National Action Plan on Business and Human Rights 2016–2021 to verify the results established in the plan's first two years and to identify the potential shortcomings.

Law No. 199/2016, which amended article 603-bis of the Criminal Code, simplifies the requirements necessary for punishing the crimes of intermediation and exploitation of illegal workers, by enabling punishment of both the intermediary and the exploiting employer.

Finally, a hot topic is the judgment in *Cordella and Others v Italy* (European Court of Human Rights, 24 January 2019), which ascertained the violation of article 8 (right to respect for private and family life) and article 13 (right to an effective remedy) of the European Convention on Human Rights.

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LEGAL AND POLICY FRAMEWORK

International law

1 Which international and regional human rights treaties has your jurisdiction signed or ratified?

Japan has ratified or acceded to the major United Nations (UN) treaties and optional protocols related to human rights as follows:

- the International Convention on the Elimination of All Forms of Racial Discrimination (1965), acceded to on 15 December 1995, in force on 14 January 1996;
- the International Covenant on Civil and Political Rights (1966), ratified on 21 June 1979, in force on 21 September 1979 (Japan has not ratified or acceded to its Optional Protocol and its Second Optional Protocol);
- the International Covenant on Economic, Social and Cultural Rights (1966), ratified on 21 June 1979, in force on 21 September 1979 (Japan has not ratified its Optional Protocol);
- the Convention on the Elimination of All Forms of Discrimination against Women (1979), ratified on 25 June 1985, in force on 25 July 1985 (Japan has not ratified or acceded to its Optional Protocol);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), acceded to on 29 June 1999, in force on 29 July 1999 (Japan has not ratified or acceded to its Optional Protocol);
- the Convention on the Rights of the Child (1989), ratified on 22 April 1994, in force on 22 May 1994; its Optional Protocol on the Involvement of Children in armed conflict (2000), ratified on 4 August 2004, in force on 2 September 2004; and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2005), ratified on 24 January 2005, in force on 24 February 2005; and
- the Convention on the Rights of Persons with Disabilities (2006), ratified on 20 January 2014, in force on 19 February 2014 (Japan has not ratified or acceded to its Optional Protocol).

Japan is also a party to the following international human rights treaties and protocols:

- the Convention Relating to the Status of Refugees (1951), acceded to on 3 October 1981, in force on 1 January 1982;
- the Convention on the Political Rights of Women (1953), ratified on 13 July 1955, in force on 11 October 1955;
- the Convention on the Reduction of Statelessness (1961), acceded to on 17 July 1978, in force on 15 October 1978;
- the Protocol Relating to the Status of Refugees (1966), ratified and in force on 1 January 1982;
- the UN Convention against Transnational Organized Crime (2000), acceded to on 11 July 2017, in force on 14 July 2017; and its Protocol against the smuggling of migrants by land, sea and air (2000), acceded to on 11 July 2017, in force on 14 July 2017; and
- the International Convention for the Protection of All Persons from Enforced Disappearance (2006), ratified on 23 July 2009, in force on 23 December 2010.

2 Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Japan has signed and ratified six of the eight core conventions of the International Labour Organization:

- the Forced Labour Convention, 1930 (No. 29), ratified on 21 November 1932;
- the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ratified on 14 June 1965, in force on 14 June 1966;
- the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified on 20 October 1953, in force on 20 October 1954;
- the Equal Remuneration Convention, 1951 (No. 100), ratified on 24 August 1967, in force on 24 August 1968;
- the Minimum Age Convention, 1973 (No. 138), ratified on 5 June 2000, in force on 5 June 2001; and
- the Worst Forms of Child Labour Convention, 1999 (No. 182), ratified on 19 November 2000, in force on 18 June 2002.

3 How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Based on the report on Japan by the Working Group of the UN Human Rights Council (UNHRC) in the Universal Periodic Review (14 November 2017), more than 20 states made recommendations for Japan to establish a national human rights institution. These recommendations were accepted by Japan in 2018, but there has been criticism that no visible progress has been made so far. Also in the report, several recommendations were highlighted, including:

- abolition of the death penalty;
- adoption of comprehensive legislation to combat discrimination (including discrimination based on sexual orientation and gender identity);
- ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and
- adoption of specific measures to rectify labour standards violations frequently found in the Technical Intern Training Programme.

4 | Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

The Japanese government has not formally or officially supported this matter. Japan did not vote for the UNHRC's Resolution No. 26/9 of 26 June 2014 that established an open-ended intergovernmental working group to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (a treaty on business and human rights).

There are also no official plans by the Japanese government concerning the development of a treaty on this issue.

National law

5 | Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

The international human rights treaties to which Japan is a party were brought into force in accordance with its international treaty ratification and promulgation process.

Almost all of the principles of international human rights stipulated in the international treaties that Japan has signed have been set out (to some extent) in national legislation, especially in labour-related laws and regulations.

6 | Has your jurisdiction published a national action plan on business and human rights?

On 16 October 2020, the Japanese government published its National Action Plan on Business and Human Rights (2020–2025), after lengthy discussions with stakeholders.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

There is no express obligation to present reports or disclosures related to human rights in Japan.

Tokyo Stock Exchange, Inc amended its corporate governance code, which is applicable to the listed companies on the exchange, on 1 June 2018. It stressed the importance of companies taking appropriate measures to address sustainability issues, including social and environmental matters (principle 2.3). This principle is considered to encourage the company to report or disclose non-financial issues, which include human rights-related topics.

8 | What is the nature and extent of the required reporting or disclosure?

There is no express obligation to present reports or disclosures related to human rights in Japan.

9 | Which bodies enforce these requirements, and what is the extent of their powers?

There are no such requirements to be enforced in Japan.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Some Japanese companies publish an annual sustainability report to describe their best practices in terms of human rights. They also publish financial reports with some non-financial information relating to the specific business area to be consistent with the transparency principle. Such companies generally refer to the Global Reporting Initiative standard or the United Nations Guiding Principles Reporting Framework as a guideline.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

There is no specific or express obligation to realise human rights-related due diligence on human rights matters in Japan.

Nevertheless, considering companies' responsibility to respect human rights, some Japanese companies have begun to use human rights due diligence procedures on specific occasions, such as the monitoring of their global supply chain, and merger and acquisition transactions.

12 | What is the nature and extent of the required due diligence?

There is no specific or express obligation to realise human rights-related due diligence on human rights matters in Japan.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

There are no such requirements to be enforced in Japan.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

While there is no specific or express obligation to realise human rights-related due diligence on human rights matters, the Japanese National Action Plan on Business and Human Rights stipulates that Japanese authorities should encourage (but not legally oblige) companies to use human rights due diligence and some Japanese companies have commenced using human rights due diligence procedures in accordance with the United Nations Guiding Principles on Business and Human Rights.

CRIMINAL LIABILITY

Primary liability

15 | What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

There are no specific offences under the Penal Code of Japan for which businesses can be directly held criminally liable for human rights abuses, or involvement or complicity in abuses in Japan.

Nevertheless, businesses can be found guilty of criminal offences by application of the dual criminal liability provisions that are often

stipulated in specific criminal codes. Under these provisions, a body corporate may be found guilty when a representative of a juridical person – or a proxy, employee or any other staff member of a juridical person – has committed any crimes regarding the business of the juridical person. When a dual criminal liability provision is triggered, the existence of negligence by a business is presumed and the prosecution does not have the burden of proof of the negligence.

16 What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

As a defence against the application of dual criminal liability provisions, a business may prove the non-existence of its negligence by asserting that the employer has taken the necessary precautions to appoint employees, supervise them and prevent them from committing criminal activities.

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

There are no specific offences under the Penal Code of Japan for which directors and officers can be held criminally liable for involvement or complicity in human rights abuses conducted by corporations.

However, directors and officers would likely be charged jointly for the offence along with employees, in cases where directors and officers were involved in or instructed criminal activities involving human rights abuses in the course of business. Otherwise, directors and officers of an organisation cannot be criminally liable for acts of the organisation solely because of their position.

Piercing the corporate veil

18 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

In Japan, the issue is more of a civil law nature. There are no criminal charges that can be asserted against a parent company for the commission of human rights abuses or for involvement or complicity in abuses by its subsidiary.

Secondary liability

19 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Under dual criminal liability provisions, a body corporate may be found guilty when a representative of a juridical person – or a proxy, employee or any other staff member of a juridical person – has committed any crimes with regard to the business of the juridical person.

Prosecution

20 Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

In Japan, prosecutors are authorised to exercise their discretion to prosecute criminals. When determining whether to exercise their discretion, prosecutors will consider the public interest and whether there is a reasonable prospect of a conviction.

Private citizens may also reflect their will regarding prosecutions via the Committees for the Inquest of Prosecution, which consist of 11 randomly selected private citizens and may examine (and overturn) the prosecutor's decision for non-prosecution in specific cases.

21 What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

When commencing a prosecution, the prosecutor must comply with criminal procedure pursuant to the Code of Criminal Procedure.

There are no special rules or considerations related to the prosecution of human rights cases in the criminal context.

CIVIL LIABILITY

Primary liability

22 What civil law causes of action are available against businesses for human rights abuses?

Under Japanese law, generally, the available causes of action for civil liability claims to be asserted against businesses for human rights abuses consist of two branches.

- Contractual liability: the breach of contractual obligations may be a cause of action applicable for civil liability claims against businesses that have committed human rights abuses within the contractual relationship (eg, an employment relationship). In the case of breach of a contractual obligation, the injured party may claim for the termination of the contract or for damages, or for both, provided that the basic elements are established, such as (1) non-performance of the obligation; (2) damage incurred by the injured party; and (3) a causal relationship between (1) and (2) are established.
- Tortious liability: acts or omissions that give rise to injury or harm to another may be a cause of action for civil liability against businesses that have committed human rights abuses against any person or entity that incurs damage by such abuses. As a general rule, to pursue a claim for tortious liability, the injured person shall establish (1) wilful misconduct or negligence by the wrongdoer; (2) damage incurred by the injured party; (3) a causal relationship between (1) and (2); and (4) the illegality of such acts or omissions. For tortious liability, Japanese law allows the injured party to pursue civil liability in the form of monetary compensation or injunctive claims. The use of injunctive claims to pursue tortious liability is allowed only in exceptional cases where there is a high probability that irreparable damage will be incurred to personal material rights.

Director and officer liability

23 In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

In general, under Japanese law, directors and officers are not personally liable for what they do on behalf of a corporation.

However, directors can be held personally liable to third parties if they have knowledge of human rights abuses or are grossly negligent in performing the duties that they owe to the company under the Companies Act, which include the duty of care and the duty of loyalty.

To date, there has not been an instance where a director has been found to have breached these duties in relation to an alleged human rights abuse by a company in Japan.

Piercing the corporate veil

24 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

In Japan, corporate entities within a group are separate legal entities and, owing to the limited liability principle applicable to shareholders, the liability of a parent company for the acts or omissions of its subsidiary is exceptional.

Japanese courts will apply the doctrine of piercing the corporate veil only in extreme cases, such as where the legal personality of a subsidiary is considered as a mere shell or where a parent company completely controls its subsidiary and uses its legal personality with an illegal or unfair purpose.

To date, there have been no instances where a parent company has been found liable under a civil claim for an alleged human rights abuse committed by its subsidiary in Japan.

Secondary liability

25 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Companies may be held liable for human rights abuses committed by third parties by means of vicarious liability under the Civil Code. Under the vicarious liability theory, employers (including juridical persons) shall be liable for damage inflicted on any third party by their employees with respect to the execution of that business, unless the employers exercise reasonable care in appointing the employee or in supervising the business.

In cases where contractors are involved, companies may be held liable for human rights abuses committed by contractors only when a company ordering work is negligent in the order or instructions given to the contractors.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

Under the limited liability principle, shareholders' liability is limited only to the amount of their equity contribution. The exception to this principle is piercing the corporate veil, but this is applicable only in extreme cases.

To date, there have been no instances where shareholders of a company have been found liable under a civil claim for alleged human rights abuses committed by the company's subsidiary in Japan.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

There are no specialist courts to hear human rights claims against businesses in Japan. Human rights claims against businesses can be brought before criminal or civil courts and the courts will decide whether they have jurisdiction on such matters under general requirements.

28 What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

Japanese courts do not accept the principle of *forum non conveniens*.

As a rule, under the Code of Civil Procedure, Japanese courts have jurisdiction over an action that is brought against a business whose principal office or business office is located in Japan. However, even when the Japanese courts have jurisdiction over an action, they may still dismiss such an action if they find that there are special circumstances that would make it inequitable to either party or prevent a fair and speedy trial, taking into consideration the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence and other circumstances.

Class and collective actions

29 Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

In Japan, class-based claims are available only for cases where a large number of consumers sue for recovery of property damage. There are no such mechanisms or procedures available for cases of human rights abuses.

Public interest litigation

30 Are any public interest litigation mechanisms available for human rights cases against businesses?

There are no specific mechanisms for public interest litigation available for human rights cases against businesses in Japan.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

National contact point

The Japanese national contact point (NCP) – which consists of members from the Ministry of Foreign Affairs, the Ministry of Health, Labour and Welfare, and the Ministry of Economy, Trade and Industry – receives complaints about the conduct of multinational companies and helps parties resolve these complaints in accordance with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines).

Other mechanisms

The Japanese government has enacted various laws that establish alternative dispute resolution mechanisms (eg, mediation, arbitration) and facilitates using such mechanisms for the resolution of human rights abuses incurred in relation to business activities.

In addition, specific laws and regulations have established the mechanisms by which a supervisory authority may receive any complaints regarding human rights abuses from victims (eg, foreign intern trainees temporarily working in Japan) and whistle-blowers will receive sufficient protection.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

The NCP has the authority to receive complaints that are directly addressed to multinational companies. If a grievance of a multinational company occurs in a country that does not adhere to the OECD Guidelines, it may be submitted to the NCP in the company's home country. After receipt, it shall evaluate the complaint, decide whether to accept or reject it and prepare a report in this respect. In its report, the NCP shall explain its views, and recommended solutions and the parties' settlement on the matter.

Remedies

33 | What remedies are provided under these mechanisms?

The NCP provides the parties with dialogue facilitation or mediation to explore common ground on how to resolve the issues raised. The sessions can result in agreements in which the accused party commits to remedying damage caused by human rights abuses.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

The NCP is a voluntary, non-judicial grievance mechanism. The NCP may provide recommendatory decisions but it does not have the power to render enforceable decisions.

Publication

35 | Are these processes public and are decisions published?

The NCP's final report, which covers its recommendations on the matter, is made public via its website. However, some sensitive information relating to the parties may be protected.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

Most non-judicial, non-state-based grievance mechanisms that are associated with Japan are part of international multi-stakeholder initiatives (MSIs) of which Japan is a corporate member. MSIs normally provide multilateral stakeholder complaints or grievance mechanisms, but this is not guaranteed as MSIs can serve an array of different functions.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

As encouraged by the United Nations Guiding Principles on Business and Human Rights, in October 2020, the Japanese government published the National Action Plan (NAP) on Business and Human Rights (2020–2025). The NAP includes a basic plan for the government to deal with human rights issues and some recommendations to businesses, such as the introduction of a human rights due diligence and grievance mechanism.

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While Japan's NAP has been criticised for being less progressive than the NAPs of other countries, it should still be recognised as an important step, as the Japanese government has sent a clear message to businesses to place more focus on business and human rights issues.

* *The content of this chapter was correct as at February 2021.*

Switzerland

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LEGAL AND POLICY FRAMEWORK

International law

1 Which international and regional human rights treaties has your jurisdiction signed or ratified?

Switzerland has signed and ratified core international and regional human rights treaties including:

- the International Convention on the Elimination of All Forms of Racial Discrimination entered into force on 29 December 1994;
- the International Covenant on Civil and Political Rights; Second Optional Protocol aiming at the abolition of the death penalty entered into force on 18 September 1992;
- the International Covenant on Economic, Social and Cultural Rights entered into force on 18 September 1992;
- the Convention on the Elimination of All Forms of Discrimination Against Women entered into force on 26 April 1997;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 26 June 1987;
- the Convention on the Rights of the Child entered into force on 26 March 1997;
- the Convention for the Protection of All Persons from Enforced Disappearance entered into force on 1 January 2017;
- the Convention on the Rights of Persons with Disabilities entered into force on 15 May 2014;
- the European Convention on Human Rights entered into force on 28 November 1974;
- the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment entered into force on 1 February 1989; and
- the Council of Europe Convention on Action against Trafficking in Human Beings entered into force on 1 April 2013.

2 Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

Switzerland has ratified the eight core conventions of the International Labour Organization as follows:

- the Forced Labour Convention entered into force on 23 May 1941;
- the Freedom of Association and Protection of the Right to Organise Convention entered into force on 25 March 1976;
- the Right to Organise and Collective Bargaining Convention entered into force on 17 August 2000;
- the Equal Remuneration Convention entered into force on 25 October 1973;
- the Abolition of Forced Labour Convention entered into force on 18 July 1959;
- the Discrimination (Employment and Occupation) Convention entered into force on 13 July 1962;
- the Minimum Age Convention entered into force on 17 August 2000; and
- the Worst Forms of Child Labour Convention entered into force on 28 June 2001.

3 How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

Switzerland's human rights record is good by international standards. In the context of the Universal Periodic Review, some gaps and weaknesses have been highlighted (eg, the lack of a general law against discrimination).

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

According to the Swiss National Action Plan 2020–2023, approved by the government on 15 January 2020, Switzerland will focus its efforts on the implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) and will continue to observe the negotiations to develop a binding treaty on business and human rights, paying particular attention to its coherence with the UNGPs.

National law

5 Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

Switzerland has not yet enacted general legislation establishing human rights obligations for businesses or creating specific causes of action against businesses for human rights abuses.

The Responsible Business Initiative would have introduced specific obligations for and causes of action against businesses in relation to human rights abuses, but it was rejected by popular vote on 29 November 2020.

At the sector-specific level, the Federal Act on Private Security Services Provided Abroad prohibits companies from providing security services for the purpose of directly participating in hostilities or where it may be assumed that the recipients will use the services in connection with the commission of serious human rights violations.

6 | Has your jurisdiction published a national action plan on business and human rights?

The Federal Council published a national action plan (NAP) on business and human rights in December 2016, followed by a second one in January 2020. The NAP focuses mainly on the state's duty to protect human rights and to provide access to remedy, as well as on creating support measures for companies, in particular with regard to the implementation of human rights due diligence mechanisms.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

There are currently no specific human rights-related reporting or disclosure requirements under Swiss law that are generally applicable. However, larger Swiss companies may already be required to report non-financial information under existing legislation; in particular, the Code of Obligations (CO).

The counterproposal to the Responsible Business Initiative (RBI), which is expected to be adopted into law in 2021, provides for non-financial reporting obligations for large public interest companies that exceed certain thresholds, similar to what is provided for in EU regulations. Those companies will be required to report on environmental, social and governance (ESG) issues, human rights and anti-corruption.

Listed companies must disclose any price-sensitive facts in their sphere of activity, which may include human rights-related issues, to the Swiss stock exchange (the SIX Exchange Regulation).

Under the Federal Act on Private Security Services Provided Abroad (PSSA), a company that wishes to provide, from Switzerland, private security services abroad must declare its activities to the Private Security Services Section of the Federal Department of Foreign Affairs (FDFA) and accede to the International Code of Conduct for Private Security Service Providers (the Code of Conduct). The Code of Conduct requires signatory companies to report reasonable suspicions of the commission of grave crimes to the authorities and to prepare reports of any incidents involving the use of weapons in the course of their activities.

8 | What is the nature and extent of the required reporting or disclosure?

Pursuant to articles 964bis et seq. CO, large public interest companies will be required to report on their business model, risks, policies and due diligence procedures, and measures taken in relation to ESG issues, human rights and anti-corruption.

Pursuant to the Due Diligence Ordinance and articles 964quinquies et seq. CO, companies incorporated in Switzerland that (i) import or process minerals or metals containing tin, tantalum, tungsten or gold from conflict or high-risk areas; or (ii) offer products or services where there are reasonable grounds to suspect that they were produced or provided using child labour, are required to follow a five-stage due diligence and reporting procedure, which includes implementing a management system, retaining an independent auditor to audit compliance with the due diligence obligations and issuing an annual report on compliance with the due diligence obligations.

The compulsory declaration for security services providers under the PSSA must cover information such as the nature, provider and place of performance of the intended activities, details on the principal and on the recipient of the services, and an overview of the business sectors in which the company is active (article 10 PSSA).

9 | Which bodies enforce these requirements, and what is the extent of their powers?

Companies that fail to comply with the non-financial reporting obligations pursuant to articles 964bis et seq. CO may be fined up to CHF 100,000.

There are no external or state authorities that enforce the general reporting requirements for companies under the CO. Non-compliance with those requirements must be flagged by the auditors and notified to the board or general meeting of the company, and the company's directors may be held liable. This would also apply to the enforcement of non-financial reporting requirements pursuant to the counterproposal to the RBI, if adopted into law.

The Swiss stock exchange authority may issue sanctions (eg, reprimand, fine of up to 10 million Swiss francs and delisting) if listed companies do not comply with reporting requirements.

The Private Security Services Section of the FDFA examines the declarations of security services providers and may initiate a review procedure if there are indications of a breach, including any violation of the prohibition on providing services in connection with the commission of serious human rights violations. Failure to declare an activity is subject to sanctions ranging from a fine to a custodial sentence not exceeding one year.

In addition, the International Code of Conduct Association monitors the reporting duties of private security providers under the Code of Conduct and may take disciplinary action if there is a breach, including suspending or terminating membership.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

Most businesses that report on human rights-related risks and impacts in Switzerland do so within the framework of the Global Reporting Initiative Standards. The United Nations (UN) Global Compact (UNGC) has a Swiss network whose members submit annual 'communications on progress' to the UNGC. Businesses also rely on the Sustainable Development Goals and the UN Guiding Principles on Business and Human Rights (UNGPs) themselves to guide their reporting and disclosure.

The Swiss government also supports and encourages companies to follow the relevant Organisation for Economic Co-operation and Development (OECD) guidance, including the OECD Guidelines for Multinational Enterprises, which contain recommendations on human rights-related reporting.

At the sectoral level, the Swiss government has issued guidance on implementing the UNGPs in the commodity trading sector, which includes recommendations on reporting and communication of human rights impacts. The guidance draws on the relevant OECD guidelines.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

There are currently no specific human rights-related due diligence requirements under Swiss law that are generally applicable to businesses. However, there is a requirement for large companies to report

on the result of their risk assessment (article 961c(2)(2) of the Code of Obligations (CO)). This implies that they must have conducted such an assessment, which could extend to human rights-related risks. Some authors have also expressed the view that the directors' duty of care (article 717 CO) and overall management of the company (article 716a(1)(1) CO) could be held to encompass a corporate social responsibility component requiring businesses – at least multinationals or companies acting in a high-risk sector – to consider the human rights impacts of their activities.

The Responsible Business Initiative (RBI) would have introduced general mandatory human rights due diligence for Swiss businesses, but this was rejected. The counterproposal to the RBI, if adopted, will introduce a due diligence obligation for Swiss companies whose operations involve conflict minerals or a risk of child labour.

Pursuant to the Federal Act on Private Security Services Provided Abroad, private security providers are required to show proof of accession to the International Code of Conduct for Private Security Service Providers (the Code of Conduct), which, in turn, provides for a duty to exercise due diligence, including in relation to human rights-related risks.

12 | What is the nature and extent of the required due diligence?

There are no specific requirements regarding the nature and scope of the risk assessment that large companies must report on pursuant to article 961c(2)(2) of the CO. These may, therefore, vary depending on the size and type of activity of the company.

If the counterproposal to the RBI is adopted into law, Swiss companies whose operations involve conflict minerals or a risk of child labour will be required to put in place a system to identify risks and to ensure traceability in their supply chain, and a risk management plan allowing the company to identify, evaluate, manage and mitigate adverse effects in its supply chain. Both the system and the plan will be subject to an independent audit, and companies will be required to publish an annual report.

Security service providers must exercise due diligence when selecting, vetting and reviewing their personnel and subcontractors.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

There are no external or state authorities that enforce the general risk assessment requirements for companies under the CO. Non-compliance with those requirements must be flagged by the auditors and notified to the board or general meeting of the company, and the company's directors may be held liable. This would also apply to the enforcement of due diligence requirements pursuant to the counterproposal to the RBI, if adopted into law.

Due diligence duties of private security providers under the Code of Conduct are monitored by the International Code of Conduct Association, which may take disciplinary action in the case of a breach, including suspending a member. In addition, the Private Security Services Section of the Federal Department of Foreign Affairs may prohibit the exercise of an activity by a company in the case of non-compliance with the Code of Conduct.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

Popular voluntary standards or regimes for human rights-related due diligence include the United Nations (UN) Global Compact, the Sustainable Development Goals and the UN Guiding Principles on Business and Human Rights.

The Swiss government's guidance for commodity trading highlights the importance of human rights due diligence and proposes implementation measures.

The government also supports the Voluntary Principles on Security and Human Rights, which are guidelines to help mining, gas and oil companies to identify risks and exercise due diligence.

CRIMINAL LIABILITY

Primary liability

15 | What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

There are no specific provisions in the Criminal Code (CC) regarding the commission of human rights abuses by business enterprises, but there is a general provision on corporate criminal liability. Article 102 of the CC provides for both primary and secondary liability for misdemeanours and crimes committed within the business and in the course of commercial activities. Primary liability applies where a deficiency in the business's organisation caused or failed to prevent the commission of a listed offence (paragraph 2). Secondary liability applies if an organisational deficiency prevented the identification of the individual offender within the company (paragraph 1).

The objective elements required to establish liability are that:

- the accused is a business as defined in article 102, paragraph 4 of the CC;
- a criminal offence was committed by an employee or director of the business;
- the offence was committed in the exercise of business functions; and
- there is an organisational deficit within the business.

There is some debate as to the subjective elements required and how they may be attributed to a business. There is no definitive authority on this issue.

A business may only be held primarily liable if one of the specific offences referred to in article 102(2) of the CC has been committed (ie, criminal organisation, terrorism financing, money laundering or bribery). There has been at least one case in Switzerland of a business being charged with money laundering offences in connection with foreign war crimes.

16 | What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

For both primary and secondary liability pursuant to article 102 of the CC, businesses may seek to assert the defence that there was no organisational deficiency by showing that they took all possible organisational measures to prevent the offence. Measures are assessed, having regard to sector-specific risks and to any applicable national or international regulations or standards.

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

According to the case law of the Swiss Supreme Court, members of senior management and of the board who have a controlling position in the business can be held criminally liable if they were aware of the commission of offences by others in the business but took no action to prevent or stop that conduct (liability by omission). For example, in two leading cases, members of the top management were held criminally liable for not having intervened despite being aware of the business's non-compliance with export restrictions on war material.

Piercing the corporate veil

18 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

There are no statutory provisions that expressly establish a basis for criminal liability of parent companies.

For the purposes of criminal liability, businesses are defined as public or private legal entities, companies, or sole proprietorships (article 102, paragraph 4 CC). There is some debate as to whether the narrow wording of this provision can be interpreted to include a group of companies or parent company.

It has been argued that the parent company could be held liable if it is not only the sole or dominant shareholder, but is also involved at an operational level in the running of the subsidiary. There is, however, no settled practice in this respect.

Secondary liability

19 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Article 102(1) of the CC provides for secondary liability of a business where, due to the inadequate organisation of the business, the offence cannot be attributed to an individual person within the business. This provision applies to offences committed by employees where the latter cannot be identified. Businesses may rely on the defence that they took all necessary organisational measures to allow the identification of the individual offender.

Businesses cannot be held criminally liable for the actions of their contractors, provided that the contractors are organisationally independent and not subordinated to the business. However, if the relationship between the contractor and the business is akin to that of employee and employer, article 102 of the CC could apply.

The penalty under article 102(1) of the CC is a fine of up to 5 million Swiss francs. The court determines the fine, taking into account the gravity of the offence, the degree of the organisational failure, the damage caused and the economic capacity of the company.

Prosecution

20 Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

Criminal prosecution falls to the federal or cantonal public prosecutor, depending on the criminal offence at stake. Private citizens or organisations (eg, victims or non-government organisations) may report an offence to the public prosecution services or to the police. The public prosecutor must investigate if there is reasonable suspicion of the commission of a crime for which he or she has jurisdiction and bring charges in court depending on the investigation's results. There is no formal prosecutorial discretion in Switzerland.

Victims may participate in the proceedings and bring civil claims in that context. Furthermore, they can challenge a prosecutor's decision not to investigate or bring charges in court. Private citizens or organisations that reported an offence but are not victims themselves do not have these rights.

21 What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

If the police or public prosecutor have sufficient suspicion of the commission of an offence, formal investigation proceedings must be started that may ultimately lead to charges being brought by the public prosecutor in court.

No special rules or considerations apply to the prosecution of human rights cases. Some offences that may be relevant in this context fall within the remit of the federal prosecutor rather than local prosecutors.

Some offences deemed minor may only be prosecuted upon formal complaint by the victim (eg, common assault or sexual harassment).

CIVIL LIABILITY

Primary liability

22 What civil law causes of action are available against businesses for human rights abuses?

Employees may bring contractual claims for workplace-related human rights violations, but there are currently no specific extra-contractual causes of actions against businesses for human rights abuses under Swiss law. Therefore, the general provisions on extra-contractual liability – in particular, articles 41 (for primary liability) and 55 (for secondary liability) of the Code of Obligations (CO) – apply.

Article 41, paragraph 1 of the CO provides that any person (including a legal entity) who unlawfully causes loss or damage to another, whether wilfully or negligently, is liable to pay compensation. The elements required to establish liability are, therefore, loss or damage; causation; unlawful conduct; and fault.

Establishing unlawful conduct in particular can be problematic in the context of human rights abuses. Businesses are not directly bound by human rights and their conduct can, therefore, only be deemed unlawful if it impinges on a right that is legally protected under private or criminal law (eg, physical integrity or property).

As to fault, one available defence for businesses is that they took adequate measures to prevent identified risks, even if those measures then failed. International and national standards may be taken into account in this context. Other defences include self-defence, emergency or self-help (ie, securing endangered rights).

The remedy under article 41 of the CO is damages. The claimant must demonstrate an actual loss or damage; punitive damages do not exist under Swiss law and reparation for moral damage is only due in the event of homicide or personal injury.

The Responsible Business Initiative (RBI) would have introduced an express cause of action against businesses for human rights abuses committed by a Swiss business or its Swiss or foreign subsidiaries, in Switzerland or abroad, but it was rejected. The counterproposal to the RBI, which is expected to be adopted into law in 2021, does not

provide for a separate cause of action against businesses for human rights abuses.

Director and officer liability

23 | In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

Directors and officers of businesses may be subject to civil liability for the business's commission of or involvement in human rights abuses on the basis of article 41 of the CO, to the extent that the requirements of that provision are fulfilled with respect to them personally. They may also be held indirectly liable on the basis of article 754 of the CO, which provides that directors and officers are liable to the company, its shareholders and its creditors for any loss or damage caused in breach of their duties. The requirements to establish liability under article 754 are a breach of duty causing loss or damage to the company, a shareholder or a creditor, wilfully or negligently.

Directors are not required, as a matter of Swiss law, to consider the interests of third parties. Their primary duty is to act in the interest of the company. Nevertheless, directors are required to comply with the law and to protect the company from legal or reputational damage. In that context, they may have to consider the impacts – including the human rights impacts – of the company's activities and take measures to prevent liability or reputational risks from materialising. In addition, the business's internal regulations and policies may include human rights-related duties, a breach of which could trigger liability under article 754. Directors can defend themselves by showing they exercised due care and diligence in the performance of their duties.

Only the company, its shareholders and creditors may bring a claim for damages against a director under article 754. Third parties do not have standing to sue. Therefore, as a rule, a victim of human rights abuses committed by a business will not be able to bring a claim against the business's directors under article 754, but may do so under article 41 of the CO if the requirements are fulfilled with respect to the directors personally.

Piercing the corporate veil

24 | When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

In general, businesses cannot be held liable for the acts or omissions of separate legal entities, including those of fully owned subsidiaries. However, a number of exceptions to this rule exist in practice.

The Swiss Federal Supreme Court has recognised that the corporate veil may be pierced where it would be abusive to rely on the separate legal personalities of two entities (eg, where the entities form a single economic unit or where the separate legal personalities of the entities are used to circumvent legal regulations). A further exception exists where the parent company's conduct creates the legitimate expectation that it intends to be liable for obligations of its subsidiary (good faith liability). In addition, a parent company may be held liable as a principal for the acts of its auxiliaries, which may include subsidiaries to the extent that they must follow the parent company's instructions (vicarious liability).

The exceptions listed could, in theory, apply in the context of human rights-related claims. However, they do not provide an independent cause of action and the courts apply them with restraint. Moreover, where the subsidiary is abroad, this will raise conflict of laws issues.

In each case, the remedy available is damages.

The RBI would have introduced an express cause of action against parent companies for human rights abuses committed by their Swiss or foreign subsidiaries, in Switzerland or abroad. The counterproposal to the RBI, which is expected to be adopted into law in 2021, does not provide for such a cause of action.

Secondary liability

25 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

A principal may be held liable for loss or damage caused by its auxiliaries in the course of business (article 55 CO). Employees are deemed auxiliaries for the purpose of this provision. Subsidiaries or third parties, such as suppliers or contractors, could potentially qualify as auxiliaries to the extent that their relationship with the principal is comparable to that of an employee to its employer (ie, if they are in a relationship of subordination with regard to the principal). However, there is no settled authority in this respect.

Article 55 of the CO provides for strict liability. The principal is liable irrespective of actual negligence or intent to harm, but may be exonerated from liability if it can show that it exercised due care in choosing, instructing and supervising its auxiliaries, and – where the principal is a business – due care in organising the business, or if it can show that there is no causation between the loss or damage and its failure to exercise due care. The remedy under article 55 is damages.

In discussions surrounding the RBI and the parliamentary counterproposal, article 55 was seen as the starting point to introduce an explicit liability of companies for environmental and human rights-related abuses committed by entities or subsidiaries over which they have actual control. Some authors consider that such a liability already exists under the current legal regime, to the extent that the subsidiary is fully subordinated to the parent company, but this is a matter for debate.

Shareholder liability

26 | In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

There is no legal basis for holding shareholders liable for human rights abuses committed by a business, unless they were directly involved in the commission (in which case, article 41 of the CO would apply) or acted as de facto directors of the business (in which case, article 754 of the CO would apply).

JUDICIAL REDRESS

Jurisdiction

27 | Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

As regards criminal liability, the main criterion for establishing jurisdiction of the Swiss courts is the place where the crime was committed. Article 8(1) of the Criminal Code (CC) provides that an offence is deemed to have been committed at the place where the perpetrator acted or omitted to act, or the offence has taken effect.

There is some debate as to how this applies in the context of corporate criminal liability. One view is that the location of the company is not the place where the crime was committed, meaning that Swiss courts would not have jurisdiction over a Swiss business if the human rights violation occurred abroad. Another view, which appears to enjoy more support, is that article 8 of the CC must be interpreted in connection with article 102 of the CC and that the place of commission of the

offence is, therefore, the place where the business failed to take appropriate organisational measures, which, as a rule, would be the place where the business has its seat.

As regards civil law claims, if the human rights abuses were committed abroad, the rules of applicable international treaties on jurisdiction or the rules of the Swiss Private International Law Act (PILA) determine whether Swiss courts have jurisdiction to entertain a claim against a Swiss business. For extra-contractual claims, a business may, as a rule, be sued at the place where it has its registered office, or where the harmful event occurred or may occur. A Swiss business can, therefore, be sued before Swiss courts for human rights abuses committed abroad. If the human rights abuses were committed in Switzerland, the Code of Civil Procedure (CPC) governs the issue of jurisdiction and provides that the courts at the place where the victim is domiciled, where the business has its registered office or where the abuses produced their effects have jurisdiction.

28 | What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

As regards criminal liability, the main criterion for establishing jurisdiction of the Swiss courts is the place where the crime was committed. Article 8(1) of the CC provides that an offence is deemed to have been committed at the place where the perpetrator acted or omitted to act, or the offence has taken effect. Therefore, if the offence occurred in Switzerland, Swiss courts would have jurisdiction over perpetrators even if they were located abroad.

In addition, articles 5 (offences against minors abroad), 6 (subsidiary jurisdiction in relation to international crimes committed abroad) and 7 (active and passive personality principles) of the CC may be relevant to establish the criminal jurisdiction of Swiss courts over human rights abuses committed abroad.

As regards civil law claims, if the human rights abuses were committed abroad, the rules of applicable international treaties on jurisdiction or the rules of the PILA determine whether Swiss courts have jurisdiction to entertain a claim against a Swiss business. For extra-contractual claims, a business may, as a rule, be sued at the place where it has its registered office, or where the harmful event occurred or may occur. A Swiss business can, therefore, be sued before Swiss courts for human rights abuses committed abroad and a foreign party can be sued in Switzerland for acts or omissions that took place in Switzerland.

If the human rights abuses were committed in Switzerland, the CPC governs the issue of local jurisdiction and provides that the courts at the place where the victim is domiciled, where the business has its registered office or where the abuses produced their effects have jurisdiction.

To the extent that the relevant rules provide for jurisdiction over acts that took place abroad or over parties located abroad, Swiss courts cannot decline jurisdiction over extra-contractual claims on the basis that another forum would be more appropriate.

If a foreign court has already been seized with the same claim, Swiss courts must stay the proceedings, provided that the foreign court can be expected to render, within a reasonable time frame, a decision capable of recognition in Switzerland (article 9(1) PILA).

Article 3 of the PILA provides for a *forum necessitatis*, allowing Swiss courts to accept jurisdiction in cases where the law does not otherwise provide for jurisdiction if the claim cannot be brought abroad (because it is impossible or cannot reasonably be required of the claimant) and the case has a sufficient connection to Switzerland. This provision could, for example, be relied on to bring a claim against the foreign subsidiary of a Swiss company where there is otherwise no basis for jurisdiction over the subsidiary.

Class and collective actions

29 | Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

There are no class actions under Swiss law.

However, article 89 of the CPC provides for group actions by regional or national associations or organisations. The associations may assert a claim in their own name for an infringement of the personality rights of specific groups of persons whose interests they are entitled to represent by virtue of their by-laws. This is particularly relevant for labour disputes, which may have a human rights component.

Article 71 of the CPC allows parties to act jointly if their claims arise out of similar circumstances or legal grounds and article 125 of the CPC provides that the court may consolidate proceedings in those circumstances.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

There are no specific public interest litigation mechanisms available for human rights cases against business enterprises.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

As a member state of the Organisation for Economic Co-operation and Development (OECD), Switzerland has a National Contact Point that promotes the observance of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) and is affiliated to the State Secretariat of Economic Affairs.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

Individuals and organisations may submit a specific instance to the National Contact Point if they believe that a multinational enterprise has acted contrary to the OECD Guidelines. Since 2008, 26 complaints have been filed.

Remedies

33 | What remedies are provided under these mechanisms?

The National Contact Point offers mediation services to parties, publishes the result of the specific instance procedure (ie, whether the parties were able to reach an agreement) and may make recommendations.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

The National Contact Point's main role is to provide a platform for dialogue to the parties. It may act as a mediator or propose an external mediator. It publishes an initial assessment and a final statement setting out basic information in relation to the specific instance but does not make any determination as to whether the OECD Guidelines were

complied with. It may also issue recommendations, but these are not enforceable.

Publication

35 | Are these processes public and are decisions published?

The special instance procedure is not public, but the National Contact Point's final statement is published on its website. If an agreement is reached, information on the results is only included with the express consent of the parties involved. If no agreement is reached or one party is not willing to take part in proceedings, the final statement includes a summary of the reasons why no agreement was reached. Finally, if the National Contact Point decides the issues raised do not merit further examination, it publishes an explanation.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

The International Code of Conduct Association (ICoCA) oversees the implementation of the Code of Conduct for Private Security Service Providers (the Code of Conduct) and has put in place two complaints-handling procedures, one for victims of breaches of the Code of Conduct and one for complaints raised by whistle-blowers. The ICoCA may issue sanctions including suspension or termination of membership.

Switzerland has provided content and financial support for these complaints-handling mechanisms.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

The key recent development in Switzerland was the rejection of the Responsible Business Initiative (RBI) on 29 November 2020. Among other things, the RBI would have introduced broad mandatory due diligence and reporting requirements in relation to human rights and environmental risks, as well as an express liability provision that would have created a cause of action against Swiss companies for human rights abuses committed both in Switzerland and abroad by entities within their control. The initiative received 50.7 per cent of individual votes nationwide, but only got the majority in about a third of the cantons, which led to its rejection.

As a result, the milder parliamentary counterproposal to the RBI is expected to be adopted into law in 2021. This would introduce non-financial reporting requirements for large public interest companies, as well as due diligence obligations for Swiss companies whose operations involve conflict minerals or a risk of child labour. Unlike the RBI, the counterproposal does not include any specific cause of action against Swiss companies for human rights violations.

The Swiss government has repeatedly indicated that it will closely follow developments at the EU level. It remains to be seen whether the EU debate on the introduction of mandatory human rights due diligence will be picked up in Switzerland in the coming years.

* *The content of this chapter was correct as at January 2021.*

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LEGAL AND POLICY FRAMEWORK

International law

1 Which international and regional human rights treaties has your jurisdiction signed or ratified?

Treaty and Optional Protocol Treaty (where applicable)	Key reservations/ derogations	Year in force in United Kingdom
International Covenant on Economic, Social and Cultural Rights	The United Kingdom has reserved the right to interpret this covenant as not precluding the impositions of restrictions to employment based on nationality where such restrictions would safeguard employment opportunities for UK workers	1976
International Covenant on Civil and Political Rights and Second Optional Protocol	The United Kingdom has reserved the right to apply its own measures to members of the armed forces and prisoners; apply such immigration legislation as it deems necessary; and enact nationality legislation as it deems necessary	1976, 1999
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Optional Protocol		1988, 2006
International Convention on the Elimination of All Forms of Racial Discrimination	The United Kingdom has reserved the right to disregard this convention as imposing any requirements to repeal or modify existing laws; and continue to apply such acts as the Commonwealth Immigration Act	1969
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and Optional Protocol	The United Kingdom has reserved a number of rights, including the right to disregard CEDAW as imposing any requirements to repeal or modify existing laws; ignore CEDAW for the purposes of the royal family, armed forces, peerages, etc; and set its own immigration policy	1986, 2004
Convention on the Rights of the Child and First and Second Optional Protocols	The United Kingdom has reserved the right to apply legislation to citizenship and immigration as it sees fit; and to place young offenders in mixed institutions where it deems it to be mutually beneficial	1991, 2003, 2009
Convention on the Rights of Persons with Disabilities and Optional Protocol		Both 2009
European Convention on Human Rights and Optional Protocols Nos. 1, 2, 3, 5, 6, 8, 11, 13 and 14		1953, 1954, 1970, 1970, 1971, 1999, 1990, 1998, 2004, 2010

The extent to which each of these treaties applies to the United Kingdom's overseas territories and dependencies differs from treaty to treaty.

2 Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

The United Kingdom has signed and ratified all eight of the core conventions of the International Labour Organization.

Treaty	Year in force in United Kingdom
Freedom of Association and Protection of the Right to Organise Convention	1949
Right to Organise and Collective Bargaining Convention	1950
Forced Labour Convention and Optional Protocol	1931, 2016
Abolition of Forced Labour Convention	1957
Equal Remuneration Convention	1971
Discrimination (Employment and Occupation) Convention	1999
Minimum Age Convention	2000
Worst Forms of Child Labour Convention	2000

The extent to which each of these conventions applies to the United Kingdom's overseas territories and dependencies differs from treaty to treaty.

3 How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

The Working Group on the Universal Periodic Review of the United Kingdom noted that the United Kingdom has not ratified a number of international human rights treaties (A/HRC/WG.6/27/GBR/2, paragraphs 2–7).

Though the United Kingdom has left the European Union, the United Kingdom remains a member of the European Convention on Human Rights (ECHR).

Prior to leaving the European Union, the UK government had publicly stated that it intended to derogate from the ECHR before embarking on significant overseas military operations. Two previous derogations from the ECHR related to the Troubles in Northern Ireland in the 1970s and the threat posed by terrorism in 2001.

The United Kingdom ranks:

- 23rd for gender equality (per the World Economic Forum's Global Gender Gap Report 2021);
- 17th in the Cato Institute Human Freedom Index; and
- 132nd out of 167 countries for the prevalence of slavery, with an estimated 136,000 people living in modern slavery (per the Global Slavery Index).

Amnesty International has reported the continued restriction of women's access to abortion in Northern Ireland, and the infringement of counter-terrorism and security measures on citizens' rights to a fair trial, freedom of speech and privacy in particular. Human Rights Watch highlighted the growing reliance on food banks and welfare cuts (pre-covid-19) that have negatively impacted the rights of the poorest in society, while on a global scale the United Kingdom has refused to order a fresh inquiry into its complicity in rendition and torture. The UK Equality and Human Rights Commission has reported that the government failed to seek diplomatic assurances over the use of the death penalty against two British terrorist suspects when extending mutual legal assistance to the United States in July 2018, as required by the prohibition against torture and inhuman or degrading treatment in article 3 of the ECHR.

Civil society organisations have also, in recent years, drawn attention to UK business sales alleged to be implicated in foreign human rights and humanitarian law breaches; in particular, regarding defence industry products in use in the conflict in Yemen. In May 2019, the United Nations (UN) Committee Against Torture was critical of the UK government's ongoing failure to meet obligations in the UN Convention Against Torture in relation to immigration detention, prison conditions, and rendition and complicity in overseas torture. The Secretary of State for the Home Department reported that the number of detected irregular arrivals to the United Kingdom via small boats increased from 1,800 in 2019 to 8,500 in 2020. The Joint Committee on Human Rights highlighted concerns over the ways in which 'do not attempt cardiopulmonary resuscitation' notices have been applied in a blanket manner and without the involvement of the individuals or their families during the covid-19 pandemic.

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

The United Kingdom voted against the resolution on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (A/HRC/RES/26/9) in 2014. There have been no recent statements from the UK government as to whether it supports the adoption of a binding treaty or not.

National law

5 Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

The Human Rights Act 1998 seeks to incorporate the rights set out in the ECHR into domestic law. The obligation to protect human rights only applies to businesses to the extent that they perform public functions.

On 7 December 2020, the government launched an independent panel review to consider, among other things, the relationship between domestic courts and the ECHR, and whether the Human Rights Act should be reformed. In its Independent Review of the Human Rights Act, the Joint Committee on Human Rights found that the Human Rights Act remains an effective tool of enforcement for human rights in the United Kingdom and that certain proposals arising from the independent panel review may undermine the prospect of effective enforcement.

On 4 April 2017, the Joint Committee on Human Rights recommended that the government introduce legislation imposing a duty on businesses to prevent human rights abuse and a corresponding offence of failure to prevent human rights abuse. This has not yet been pursued by the government.

6 Has your jurisdiction published a national action plan on business and human rights?

The United Kingdom first produced a National Action Plan on Business and Human Rights in 2013, which was updated in May 2016. It articulates the United Kingdom's stance and action taken in relation to the United Kingdom's duty to protect, respect and fulfil human rights, the government's expectation of businesses to respect human rights wherever they operate, and the need to provide remedy for victims of human rights abuses, including by third parties such as businesses.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

Modern slavery reporting

Under section 54 of the Modern Slavery Act 2015 (MSA), commercial organisations that carry on a business in the United Kingdom, supply goods or services and have an annual turnover of £36 million or more must prepare a slavery and human trafficking statement for every financial year in which the annual turnover is met.

The Modern Slavery (Amendment) Bill, introduced in June 2021, is undergoing a second reading in the House of Lords as at December 2021. If passed in its current form, the amending legislation would insert offences for falsifying slavery and human trafficking statements, and for continuing to source from suppliers or sub-suppliers that fail to demonstrate minimum standards of transparency. The former would be committed by directors, members or partners of a commercial organisation, while the latter would be committed by the commercial organisation itself. To meet the requirements of disclosure and transparency, the commercial organisation would have to:

- publish and verify information about the country of origin of sourcing inputs in its supply chain;
- arrange for credible external inspections, audits and spot-checks; and
- report on the use of employment agents acting on the behalf of an overseas government.

Human rights reporting under the Companies Act 2006

The Companies Act 2006 (CA) requires companies to publish annual strategic reports that may need to include non-financial information (including on human rights) unless the company falls under the small companies regime in the CA. The content of the strategic report differs according to the size and nature of the reporting entity. Directors of large companies must also report how they have had regard to non-financial issues (including the impact of the company's operations on the community and the environment).

Reporting under the UK Corporate Governance Code 2018

The UK Corporate Governance Code 2018 (the Code) requires that certain listed companies must also describe in their annual report how stakeholders' interests and the non-financial issues set out in the CA (including the impact of the company's operations on the community and the environment) have been considered in board discussions and decision-making. That requirement applies to companies with a 'premium listing' under the Listing Rules. The Code is given force by the Listing Rules, which require that premium listed companies divulge in their annual report how they have complied with the Code.

Gender pay gap reporting

The Equality Act 2010 and the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 apply to all private and voluntary sector employers with 250 or more employees on 5 April each year, and require companies to report on pay and bonuses, categorised by gender.

Minerals sourcing reporting

The EU Conflict Minerals Regulation (Regulation (EU) 2017/821) has been incorporated domestically in relation to Northern Ireland only, in accordance with the agreed terms for the United Kingdom leaving the European Union. Under the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020, certain entities that import tin, tungsten, tantalum or gold (as defined) into Northern Ireland in annual volumes above certain thresholds are required to carry out reporting and due diligence on the sourcing of those minerals. The EU Conflict Minerals Regulation has applied the same requirements directly to EU member states since 1 January 2021. It is not clear whether Great Britain intends to introduce its conflict minerals regulation on the same or similar terms as the EU Conflict Minerals Regulation. However, guidance issued by the UK government that strongly encouraged companies trading in natural resources from the Democratic Republic of the Congo to do so in a way that is socially, economically and environmentally responsible – including adhering to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines) and the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs) – was withdrawn on 21 September 2020.

8 What is the nature and extent of the required reporting or disclosure?

Modern slavery reporting

Section 54 of the MSA requires qualifying companies to report on the steps taken to address modern slavery or to issue a statement that no steps have been taken. The MSA lists information that a human trafficking statement may include, such as:

- policies relating to slavery and human trafficking;
- the due diligence processes in entities' supply chains;
- where there is a risk of slavery and human trafficking, how risks are being managed; and
- the training available to staff.

The statement must be approved by a board of directors, members or the general partner (depending on the structure of the entity). The statement must be published on the company website's home page or provided to anyone who requests it within 30 days of the request being received if there is no website.

Human rights reporting under the CA

The content of the strategic report under section 414 of the CA differs according to the size and nature of the reporting entity.

For all companies, the report must include, where appropriate and to the extent necessary to understand that business, information about environmental and employee matters (section 414C(4)(b), CA). For all quoted companies, the report must also include information about social, community and human rights issues, to the extent necessary to understand the development, performance and position of the business, and must also provide gender pay gap information (section 414C(7) to 414C(8), CA). Any traded company (those whose shares are traded on a regulated market), bank or insurer with over 500 employees must include a non-financial information statement in its annual strategic report (section 414CA(1), CA). This non-financial information is listed in section 414CB of the CA and mirrors section 414C of the CA, but includes an additional express requirement for reporting on anti-corruption and anti-bribery matters.

For financial years beginning on or after 1 January 2019, the directors of all large companies must make a statement regarding how the directors have complied with the duty to have regard to matters in section 172(1) of the CA (which includes describing action taken to engage with stakeholders including employees, suppliers, customers and others with whom the company has a business relationship) (section 414CZA, CA) (the section 172(1) statement). In addition, the UK Corporate Governance Code requires the board of a premium listed company to make a similar statement in its annual report.

Gender pay gap reporting

Under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, relevant employers must publish information on the difference between:

- the mean and median hourly rates of pay of male full-pay relevant employees and that of female full-pay relevant employees;
- the mean and median bonuses paid to male relevant employees and those paid to female relevant employees; and
- the proportions of male and female relevant employees who were paid bonus pay and the proportions of male and female full-pay relevant employees in the lower, lower middle, upper middle and upper quartile pay bands.

Minerals sourcing reporting

Entities that import tin, tungsten, tantalum or gold into Northern Ireland in annual volumes above certain thresholds must conduct and report on due diligence on their supply chain unless they can demonstrate that they purchase from refiners that comply with the requirements of the EU Conflict Minerals Regulation. Entities must identify and assess risks, implement a strategy for risk management, carry out third-party audits, and report annually on policies and practices for responsible sourcing.

9 | Which bodies enforce these requirements, and what is the extent of their powers?

Modern slavery reporting

The Secretary of State for the Home Department (the Home Secretary) may seek an injunction to ensure compliance with the reporting requirement.

Human rights reporting under the CA

Failure to comply with the duty to produce a strategic report is an offence that may result in a fine on conviction on indictment, or a fine not exceeding the statutory maximum on summary conviction (section 414A(6)(a) to section 414A(6)(b), CA). The offence is committed by every person who was a company director immediately before the end of the period for filing accounts and reports for the financial year, and who failed to take all reasonable steps for securing compliance with the requirement to prepare a strategic report (section 414A(5)(a) to section 414A(5)(b), CA). If a duly signed report is not compliant, every director who knew that it did not comply or was reckless as to whether it complied and failed to take reasonable steps to ensure compliance or even prohibit publication is similarly liable (section 414D(2), CA). The section 172(1) statement must be made available on the company's website and failure to do so is a criminal offence (section 426B, CA). The offence is committed by every officer of the company who is in default and may result in a fine not exceeding level 3 on the standard scale on summary conviction (section 426B(7) to section 426B(8), CA).

Gender pay gap reporting

There are no enforcement provisions or sanctions for non-compliance.

Minerals sourcing reporting

The Home Secretary carries out the implementation and enforcement functions under the Conflict Minerals (Compliance) (Northern Ireland) Regulations 2020. The Home Secretary can impose non-compliance penalties of up to £25,000 for a failure to comply with a compliance notice issued for a breach of these regulations.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

The UK Stewardship Code is a set of principles to which institutional investors may voluntarily commit that ask investors to explain how they have exercised stewardship and require annual reporting to demonstrate how it has been implemented. The revised UK Stewardship Code, which came into effect on 1 January 2020, includes a new principle under which signatories are expected to take into consideration material environmental, social and governance issues, which may include human rights issues.

The government has supported voluntary gender equality analysis and reporting for organisations with 150 or more employees.

In the UK National Action Plan on Business and Human Rights, the United Kingdom stated its expectation that companies behave in line with the UNGPs, which articulate the corporate responsibility to respect human rights. The UNGPs also state that, in meeting this responsibility, companies should implement human rights due diligence, which includes communicating and reporting on human rights issues.

The OECD Guidelines set out OECD countries' expectations that multinational enterprises conduct business responsibly. This includes an expectation that companies carry out due diligence in respect of a number of issues such as bribery, corruption and the environment. Specifically, the OECD Guidelines contain a chapter on human rights, which includes the expectation that businesses conduct human rights due diligence (including reporting on human rights issues). The OECD has issued Due Diligence Guidance for Responsible Business Conduct and other sector-specific guidance for businesses.

As a participant of the Voluntary Principles on Security and Human Rights, the United Kingdom should encourage companies to implement these principles, which guide companies in maintaining safety and security in a manner that ensures respect for human rights, and include an expectation on corporate participants to report yearly.

The UN Global Compact (UNGC), supported by the United Kingdom, sets out the Ten Principles, which include respect for rights. Corporate participants must report yearly on their progress in embedding the Ten Principles in their strategies and operations.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

The government has not enacted any mandatory human rights-related due diligence requirements.

12 | What is the nature and extent of the required due diligence?

The government has not enacted any mandatory human rights-related due diligence requirements.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

The government has not enacted any mandatory human rights-related due diligence requirements.

14 What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

The United Nations Global Compact, supported by the United Kingdom, sets out the Ten Principles, which include respect for rights. Corporate participants must report yearly on their progress in embedding the Ten Principles in their strategies and operations.

CRIMINAL LIABILITY

Primary liability

15 What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

As a legal person, a company is capable of prosecution for criminal offences, whether under common law or statute, unless the statute provides otherwise.

Corporate liability is mainly established through the application of the doctrines of vicarious liability or the identification principle.

Companies may be vicariously liable for the acts of their employees or agents. This principally applies to strict liability or no-fault offences, where no intention is required to establish liability. Many statutes explicitly impose strict liability on companies and some impose a criminal standard of liability (eg, for health and safety, environmental damage and the offence of failing to prevent bribery).

If strict liability does not apply, criminal intention (or mens rea) is required and the identification principle is applied (*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153). This allows the state of mind of individuals who can be shown to be the directing mind and will of a company for all purposes or for the purposes of performing the particular function in question to be attributed to the company (*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; *SFO v Barclays* [2018] EWHC 3055 (QB); *Bilta (UK) Limited (In Liquidation) and others v Natwest Markets Plc, Mercuria Energy Europe Trading Limited* [2020] EWHC 546; *Natwest Markets Plc, Mercuria Energy Europe Trading Limited v Bilta (UK) Limited (In Liquidation)* [2021] EWCA Civ 680). Typically, such individuals may include the boards of directors and senior managing directors. An agent of the company having some degree of autonomy subject to board approval is not enough to show that they had the requisite directing mind and will; full autonomy for the particular function in question would be required (*SFO v Barclays*). The criminal act (or actus reus) must also be established.

In recent years, corporate liability has been expressly provided for by statute. Key legislation that expressly imposes liability on companies in connection with human rights-related harms includes the following.

- The Corporate Manslaughter and Corporate Homicide Act 2007 applies to offences committed in the United Kingdom and imposes liability through a form of gross negligence where serious management failures result in death by imposing sanctions, including unlimited fines and the remediation of breaches.
- The Bribery Act 2010 creates liability (including against companies) for bribing another person, being bribed or bribing a foreign public official (sections 1, 2 and 6). Under section 7, a commercial organisation will be guilty of a criminal offence if it fails to prevent a person associated with the organisation from bribing another person for obtaining or retaining business or an advantage in the conduct of business for that organisation. This is a strict liability offence and turns on whether a bribe has, in fact, taken place. The Bribery Act applies to commercial organisations carrying on a business (or part thereof) in the United Kingdom, so applies to UK and non-UK companies, and to conduct and activity outside the United Kingdom.
- Part 3 of the Criminal Finances Act 2017 imposes liability on companies for failing to prevent the facilitation of UK or foreign tax evasion by employees and other associated persons. It is immaterial whether any of the relevant conduct takes place in the United Kingdom or elsewhere and whether the criminal tax evasion relates to UK or non-UK taxes. This is a strict liability offence and turns on whether the facilitation has, in fact, taken place.
- The 2020 Global Human Rights Sanctions Regulations enacted under the Anti-Money Laundering Act 2018 prohibit companies from entering financial arrangements with designated persons who are or have been involved in serious violations of human rights, subject to limited licences and exceptions. These regulations also impose liability on certain relevant firms for failing to report dealings or suspected dealings with designated persons. Sanctions for the various offences include imprisonment for up to seven years and unlimited fines.

16 What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

For criminal offences that require the establishment of mens rea, a business enterprise will not be convicted if a directing mind and will of the company possessing the relevant mens rea cannot be identified. A large company might argue in defence that, due to organisational oversight structures and the requirement for board approval for certain activities, no one individual is personally accountable for actions committed by the company such that a person's state of mind can be attributed to the company.

Statutory offences may include express defences to criminal offences. Under the Bribery Act 2010, it is a defence to demonstrate that a company has adequate procedures in place to prevent bribery and corruption. Similarly, under the Criminal Finances Act 2017, it is a defence to demonstrate that the company had reasonable prevention procedures in place (if it is reasonable to expect such measures to be in place).

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

Directors and officers may be criminally liable if they are involved in a criminal offence on behalf of a corporate enterprise (eg, if they are the directing mind and will of a company).

They can also be liable in an individual capacity. For example, directors can be liable for negligence. This can arise under statute (eg, in relation to human rights-related harm; see the Safeguarding Vulnerable Groups Act 2006) or common law (eg, the offence of gross negligence manslaughter). The elements of the offence are that:

- there was a duty of care, which arises where the requirements of foreseeability, proximity, fairness, justice and reasonableness establish such a duty (*Donoghue v Stevenson* [1932] AC 582);
- there was a breach of a duty of care towards the victim;
- the breach of duty was a substantial cause of death; and
- the breach was so grossly negligent that the director can be deemed to have had such disregard for the life of the deceased that his or her conduct was criminal (*R v Adomako (John Asare)* [1995] 1 AC 171).

Recent UK gross negligence manslaughter cases have concerned health and safety violations in the workplace, food safety and medical negligence.

Directors and officers may also be liable if they have conspired in the commission of an offence, or if they consented or connived with the commission of an offence (eg, section 18, Safeguarding Vulnerable Groups Act 2006).

Certain statutes expressly create grounds of individual liability for directors and officers (for example, under sections 1, 2 and 6 of the Bribery Act 2010 or section 33 of the Global Human Rights Sanctions Regulations, which imposes liability on directors who consented or connived to a breach of these regulations, or where the company's breach is attributable to their neglect).

With the exception of small and medium-sized companies, annual strategic reports must contain a section 172(1) statement describing how company directors discharged their duties under section 172 of the Companies Act 2006 (CA), which includes considering the environmental and community impacts of business decisions (section 414CZA(1), CA). Under section 414D of the CA, company directors commit an offence and are liable to pay a fine if they knew or were reckless as to whether the strategic report did not comply with the CA and failed to take reasonable steps to secure compliance.

Piercing the corporate veil

18 | When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

Following a conviction, in proceedings under the Proceeds of Crime Act 2002 for the confiscation of assets, English courts have been willing to treat benefits obtained by a company as the benefit of the criminally liable shareholder, applying the same veil-piercing principles as in civil cases. In the criminal context, this has been analysed as three overlapping situations: where the corporate veil is used to conceal the crime or the benefits; where the criminal act is done in the name of the company; or where the corporate structure is a device to disguise the true nature of the criminal transaction. There are no specific defences except for contending that the requirements for a confiscation order (ie, a criminal lifestyle and benefit from criminal conduct) are not established.

Secondary liability

19 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Under the principle of accessory liability, directors, officers and (in limited circumstances) companies can be liable for aiding, abetting, counselling or procuring the criminal acts of a company or its subsidiaries. Accessory liability requires proof of a conduct element as well as a mental element. The requisite conduct element is that the accessory (D2) encouraged or assisted the commission of an offence by the principal (D1). There must be a causal relationship between the assistance or encouragement of the crime by D2. However, once the conduct element is established, in most cases it is not necessary – or indeed possible – to establish a causal relationship between D1 and D2 (ie, that D2's encouragement or assistance had a positive effect on D1's conduct or the outcome of the crime). The courts have affirmed that the causal relationship between D1 and D2 is ultimately a question of fact and degree as to whether D2's conduct was so distanced in time, place and circumstances from the conduct of D1 that it would not be realistic to regard the crime as encouraged or assisted by D2.

As regards the mental element, D2 must intend to assist or encourage D1 to commit the crime. D2 need not have had the same intent as the primary offender; it is sufficient to establish that the director or company knew that the outcome that in fact arose was the practical certainty of its actions.

Businesses may also be liable under the doctrine of vicarious liability for the actions of a company's employees or agents.

Conspiracy can be committed by a corporate body if it aids, abets, counsels or procures another legal person to commit an offence. Conspiracy requires an agreement between two separate persons and cannot apply between one director and his or her company. The corporate body must have intended to enter the agreement and follow through on the agreed-upon crime through the application of the identification principle. Further, a person or corporate may be convicted of conspiracy even if the actual crime was not committed.

Statutes that impose corporate criminal liability for third parties' involvement in human rights-related issues include section 7 of the Bribery Act 2010 and Part 3 of the Criminal Finances Act 2017, which both impose corporate liability for the criminal acts of others (potentially including employees and contractors) without requiring corporate intention to be established. Section 7(2) of the Bribery Act 2010 sets out the defence that the company had adequate procedures in place. The Criminal Finances Act 2017 has a similar defence on the basis of reasonable prevention procedures. Companies guilty of offences will be liable to fines or may enter into a Deferred Prosecution Agreement (DPA).

Prosecution

20 | Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

The Crown Prosecution Service (CPS), the Serious Fraud Office (SFO) and the Financial Conduct Authority are the main prosecuting authorities in the United Kingdom. Each have their own prosecution guidelines. Generally, prosecutions are pursued if there is a good arguable case and prosecution is in the public interest. Criminal prosecutions may be pursued privately under section 6(1) of the Prosecution of Offences Act 1985 (POA). However, the Director of Public Prosecutions has authority under the POA to continue or stop private prosecutions at any stage (section 6(2), POA).

21 | What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

An investigation is followed by charges, after which the case will go to trial if there is enough evidence to support it. There are no special rules applicable to the prosecution of criminal cases involving human rights issues. The CPS and the SFO may enter into a DPA with a corporate entity suspected of criminal conduct, which allows the imposition of sanctions without a full trial of the matter or a conviction (Schedule 17 of the Crime and Courts Act 2013). The Deferred Prosecution Agreement Code of Practice sets out the bases on which DPAs can be entered into.

CIVIL LIABILITY

Primary liability

22 | What civil law causes of action are available against businesses for human rights abuses?

Civil law claims against companies for human rights-related impacts are founded primarily on tort and can also arise from contract or statute. New bases of liability are tested regularly by rights holders.

Tort

Common law negligence is the main basis of a civil law claim against a company for human rights-related impacts. Key elements are:

- a duty of care owed to a defined individual or group of claimants;
- a breach of that duty of care (by the business falling below the standard of care of a reasonable person); and
- loss or damage arising from the breach that was sufficiently foreseeable and not too remote.

Establishing a duty of care is highly fact-specific. Recent cases in the United Kingdom have considered whether a parent company owes a direct duty of care to third parties who have suffered human rights-related harms in connection with the activities of its subsidiary company. In these circumstances, the degree of knowledge, supervision and control of, and intervention in, another entity's operations and activities will be relevant to whether a duty can be imposed or whether a company has voluntarily assumed responsibility for the conduct of another entity can be established. The difficulty in establishing that a company owes a duty of care in relation to the actions of a third party is illustrated by the Court of Appeal's recent rejection of tortious claims brought against mine owners and operators by individuals injured by Sierra Leone police at mine protests (*Kalma & ors v African Minerals Ltd & ors* [2020] EWCA Civ 144).

On 12 February 2021, the UK Supreme Court issued a decision in *Okpabi v Shell*, holding that the claimants had an arguable case that Royal Dutch Shell (RDS) owed a duty of care to them and that this claim could proceed in English courts. The UK Supreme Court reiterated its view in *Vedanta* that parent companies' duty of care is not exceptional and should be assessed under ordinary principles of tort law (*Vedanta Resources Plc v Lungowe* [2019] UKSC 20; *HRH Emere Okpabi v Royal Dutch Shell* [2021] UKSC 3). These recent judgments indicate that policies promulgated by one entity in respect of another (for example in a group context) may indicate the assumption of responsibility by a company (typically a parent company) for harms caused by other entities. Whether a parent company owes a duty of care will depend on a factual inquiry into the extent of the parent company's involvement in the subsidiary's activities.

In 2021, the English Court of Appeal permitted proceedings on the basis that the defendant owed the claimant a duty of care for alleged harms connected with their global value chains, highlighting the potential liability risks arising from involvement with third parties' harmful practices (*Hamida Begum v Maran (UK) Limited* [2021] EWCA Civ 326).

Tortious liability may also arise against companies as follows.

- Nuisance: liability for acts or omissions that interfere with the claimant's exercise or enjoyment of a right to property (private nuisance) or various public rights (public nuisance). Under the rule in *Rylands v Fletcher*, businesses may be held strictly liable for environmental damage caused by particularly hazardous activities or substances that 'escape' from the business's land and that fall outside of the ordinary or natural use of the land.
- Trespass to the person: liability for assault, battery, false imprisonment or intimidation, committed negligently or intentionally.
- Privacy-related torts: liability for breach of confidence, misuse of personal information or defamation.
- Statutory torts: for example, under the Employers Liability (Defective Equipment) Act 1969, the 1957 and 1984 Occupiers' Liability Acts, the Environmental Protection Act 1990 and the Fatal Accidents Act 1976.

Defences to the tortious claims include the claimant's wrongdoing, contributory negligence or consent and exclusions of liability (subject to limits under the Unfair Contract Terms Act 1977 and the Occupiers' Liability Act 1984). Remedies include compensatory damages (including, potentially, for loss of earnings, medical expenses, pain, suffering and long-term injury or disability) and injunctions to prevent threatened or anticipated acts, or continuing breaches.

Contract

Contractual claims may involve human rights issues. Key examples include:

- employment claims;
- contractual claims by purchasers of businesses, investors or financiers under risk-related warranties and express or implied representations; and
- claims under contracts with the government in providing healthcare, residential or detention-related services.

Statute

Claims against businesses are possible under the Human Rights Act 1998 if the business exercises a public function, which is a concept that is applied restrictively. The business should effectively be standing in the shoes of a public authority.

Certain employment-related rights bestowed by statute must be pursued in the English employment tribunal system. Remedies include compensation, reinstatement of employment and apology.

Sections 90, 90A and 98 of the Financial Services and Markets Act 2000 may provide a cause of action against companies for shareholders who suffer loss (eg, from reduced share prices) as a result of negligent misstatements in prospectuses and fraudulent misstatements in other published materials. Such misstatements may relate to human rights-related issues such as climate change or modern slavery.

Director and officer liability

23 | In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

Generally, and subject to the below, directors are unlikely to be directly liable to victims for human rights-related harms simply by virtue of being directors.

Tort

Directors may be liable for torts that are carried out at their direction by a company of which they are a director and jointly liable with the company where they are personally involved in, or involved in concealing, the breach (beyond simply performing their directorial duties by voting at meetings). This may include deliberately or recklessly inducing breach of company contracts (including employment contracts) and the director's involvement with the contractual breach must additionally be inconsistent with their duties to the company. The English courts have applied this liability in the context of exploitative labour practices and modern slavery-related issues (*Antuzis & ors v DJ Houghton Catching Services Ltd & ors* [2019] EWHC 843 (QB)).

Directors' duties under the Companies Act 2006

Directors can be liable for breaches of their statutory duties under the Companies Act 2006 (CA), including the duty to promote a company's success and to exercise reasonable care, skill and diligence (sections 172 and 173, CA). Failures to follow these requirements or to consider human rights-related factors that breach the standard of reasonable care, skill and diligence in decision-making and that lead to loss may result in directors' personal liability to the company, enforced by the company itself or by a shareholder through a derivative claim. Remedies include damages and an account of profits that are awarded to the company, not directly to shareholders or to victims. Further, directors have personal liability for making a section 172(1) statement that,

under section 414CZA of the CA, must describe how the directors have complied with the duty to have regard to matters in section 172(1) of the CA. This includes describing action taken to engage with stakeholders including employees, suppliers, customers and others with whom the company has a business relationship.

Directors' liability for misstatement (quoted companies)

Directors and senior management may be liable to shareholders for negligent misstatements (including those relating to human rights risks) in prospectuses under English securities legislation (section 90, Financial Services and Markets Act 2000), subject to a reasonable belief defence.

Piercing the corporate veil

24 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

Under English law, piercing the corporate veil occurs where there is evasion, where a legal right exists against a person in control independently of the company's involvement and where the company is interposed with the aim that its separate personality will defeat the right or frustrate its enforcement. In its true form, it is rarely used because most attempts to establish it will reveal a legal relationship between the company and the shareholder that makes piercing the veil unnecessary (*Prest v Petrodel Resources Ltd* [2013] UKSC 34, per Lord Sumption at paragraphs 16, 28 and 35).

A finding of parent company liability based on the existence of a separate duty of care does not amount to a piercing of the corporate veil. Instead, the parent is held liable on the basis of its own involvement in the circumstances that led up to the relevant damage or injury.

Secondary liability

25 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Companies could be held liable for torts committed by third parties as follows.

- Employer's vicarious liability for employees (or analogous non-employee relationships): an employer may be vicariously liable for the wrongful acts or omissions of an employee carried out in the course of or incidental to the employment (including, for example, an unauthorised method of carrying out a task within the employment).
- Vicarious liability for contractors: in general, employers are not liable for torts committed by independent contractors and duties of care are considered to have been delegated to the contractor. The exceptions are certain non-delegable duties; in effect, duties to ensure that care is taken by the third-party contractor.
- Vicarious liability for authorised or ratified conduct: the business will be liable in tort for acts committed by third parties where the business authorised the acts in question, or approved or adopted (ratified) them after they were carried out.
- Joint liability, where the business instigates or procures the third party's tortious breach or, as an accessory, assists in some way (more than by merely facilitating the breach), provided that there is an express or implicit common plan for the acts to occur.

Secondary liability can only be established where there is primary wrongdoing. A substantive defence for the person liable operates to exclude the employer's liability (*Imperial Chemical Industries v Shatwell* [1965] AC 656), although procedural defences available to the primary defendant will not prevent vicarious liability (*Broom v Morgan* [1953] 1 QB 597). The same remedies as those for primary liability are available.

Shareholder liability

26 In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

In general, shareholders cannot be held liable for the acts and defaults of the company in which they hold equity, owing to the principle of limited liability (subject to situations where the corporate veil is pierced). However, shareholders may be jointly liable in tort with the company where they are personally involved in a tortious breach beyond simply performing their corporate role; for example, by voting at shareholder meetings.

Theoretically, shareholders may also be the subject of a claim by another shareholder under English companies legislation for unfair prejudice, where it is alleged that one shareholder has caused the company (or, potentially, subsidiaries that it controls) (*Re Grandactual Ltd* [2005] EWHC 1415 (Ch) at 29) to become involved in human rights abuses that are, by their nature, unfairly prejudicial to the complainant shareholder's (or all the shareholders') interests (sections 994 and 995, CA). Subject to the courts' discretion, remedies in unfair prejudice actions may include ordering the purchase of shares from the prejudicial shareholder or injunctive relief on the actions of the company (section 996(1), CA). Defences and grounds for striking out a claim include the defendant's refusal of a fair offer to purchase its shares, reliance on provisions in the company's articles or any shareholder agreement, or claimant misconduct, delay or acquiescence.

JUDICIAL REDRESS

Jurisdiction

27 Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

Civil courts

Civil courts have jurisdiction where a business is domiciled (ie, having a statutory seat, central administration or principal place of business) in England and Wales, or where parties submit to the jurisdiction by agreement or conduct.

Where an entity is located outside the European Union or in an EU country, for proceedings instituted on or after 1 January 2021, common law and Civil Procedure Rules (CPR) apply to determine whether jurisdiction may be exercised over the entity.

Jurisdiction may be exercised over such an entity outside of England and Wales where that entity is served with a claim form while in England or Wales (ie, a company director is served while on a business trip in England), or (if required) where the court grants permission to serve the claim form outside the jurisdiction (CPR 6.37). Permission may be granted where:

- the claim has a reasonable prospect of success;
- there exists a jurisdictional gateway under CPR 6B Practice Direction paragraph 3.1, including where:
    - the underlying contract was made or performed in the jurisdiction, or through an agent trading or residing within the jurisdiction;
    - the underlying contract is governed by English law;
    - the tortious damage or breach of contract took place within the jurisdiction; or
    - there is a real issue between a claimant and a UK-domiciled defendant (an anchor defendant) that is reasonable for the

court to try and where the entity outside the jurisdiction is a necessary or proper party to the claim; and
- where England and Wales is the proper place in which to bring the claim or claims.

It is well established that English courts may exercise jurisdiction over disputes involving overseas acts of foreign subsidiaries if the above criteria are met (*Kadie Kalma & ors v African Minerals Ltd & ors* [2020] EWCA Civ 144). In 2021, the UK Supreme Court held that 'damage' refers to actionable harm, direct or indirect, caused by the wrongful act alleged (*FS Cairo (Nile Plaza) LLC v Brownlie (as Dependant and Executrix of Professor Sir Ian Brownlie CBE QC)* [2021] UKSC 45). Thus, 'damage' was given a broader meaning to the effect that the damage should not be limited to that required to complete the cause of action in tort. For jurisdiction over a necessary or property party, permission may be granted if there is a real risk that substantial justice is not available to the claimants in the alternative foreign jurisdiction (*Vedanta v Lungowe and ors* [2019] UKSC 20, at paragraph 20). Where there have been concurrent identical proceedings in different jurisdictions, the courts have previously struck out claims for abuse of process (*Municipio de Mariana v BHP Group plc* [2020] EWHC 2930 (TCC)).

For all proceedings instituted before 31 December 2020 against a business domiciled in an EU or European Free Trade Association state, civil courts will have jurisdiction provided there is a relevant ground under Regulation (EC) No. 1215/2012 (the Brussels Recast Regulation): (Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493).

The United Kingdom has now implemented The Hague Choice of Court Convention in domestic law. This convention gives effect to exclusive choice of court agreements, and allows signatory states to recognise and enforce judgments of other signatory states.

The year 2021 has seen a series of cases against UK companies in respect of their overseas business operations, in which the English courts have refused to strike out these novel claims at the preliminary stages of proceedings (*Josiya & ors v British American Tobacco PLC & ors* [2021] EWHC 1743 (QB); *Hamida Begum v Maran (UK) Limited* [2021] EWCA Civ 326). These judgments show a common trend that, on preliminary challenges, the relevant court should only consider a claimant's pleadings in limited circumstances and should not conduct a mini-trial when assessing the strength of the evidence in support of the claims. This approach means that it is becoming increasingly difficult for these types of novel claims to be disposed of at an early stage without progressing to a full trial. For example, in February 2021, the UK Supreme Court indicated that the claimants should not be required to present more than an arguable claim at the jurisdictional stage of proceedings (*Okpabi v Shell*).

Criminal courts

Criminal courts generally exercise jurisdiction where a substantial part of the conduct comprising the offence takes place in England or Wales unless there is a good reason that the prosecution ought to be heard overseas (*R v Smith (Wallace Duncan)* (No. 4) [2004] 3 WLR 229).

Certain statutory offences that apply expressly to corporates in connection with human rights-related issues apply to conduct that takes place outside the United Kingdom.

28 | What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

Where an entity is located outside the European Union or in an EU country, for proceedings instituted on or after 1 January 2021, common law and the CPR apply to determine whether jurisdiction may be exercised over the entity.

Jurisdiction may be exercised over such an entity outside of England and Wales where that entity is served with a claim form while in England or Wales (ie, a company director is served while on a business trip in England), or (if required) where the court grants permission to serve the claim form outside the jurisdiction (CPR 6.37).

Where jurisdiction over a non-UK domiciled defendant is sought, a claimant will need to establish that England is the necessary and proper place (or *forum conveniens*) for the dispute to be heard. When considering the *forum conveniens*, the court will have regard to factors such as whether substantial justice or witness and victim protection is available in a foreign jurisdiction, the location of evidence, the domicile of the parties, the impact of hearing costs and delays, and sentencing powers.

Where jurisdiction is determined according to the Brussels Recast Regulations (ie, for cases involving EU-domiciled parties that were commenced before 1 January 2021), the court must stay proceedings if there are identical proceedings in an EU state and may only decide to stay proceedings if there are related proceedings in an EU state and England is *forum non conveniens*.

Separately, the CPR expressly state that where jurisdiction over a non-UK domiciled defendant is sought on the basis that it is a necessary and proper party to a claim against an anchor defendant, a claimant will need to establish that England is the necessary and proper place (or *forum conveniens*) for the dispute to be heard. Factors including whether substantial justice is available in a foreign jurisdiction are relevant to the analysis (*Vedanta v Lungowe and ors* [2019] UKSC 20).

Class and collective actions

29 | Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

Two types of specialised collective redress procedure are available under the CPR.
- Representative proceedings (CPR 19.6): if specific, identified parties have the same interest in a claim (whether as claimant or defendant), they may be represented in that claim by one of their number. 'Same interest' is construed liberally and includes parties with 'a common interest and a common grievance' where the relief sought benefits them all (White Book, paragraph 19.6.3; *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284).
- Group litigation orders: in claims that give rise to common or related legal or factual issues that are capable of resolution by a single decision, the court can make a group litigation order for common case management of the related claims (CPR 19.10 to 19.15).

There is a trend of novel class type claims being brought against UK companies in respect of their overseas business operations, including in respect of the operations of third parties in the defendants' broader global value chains (*Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1559). In 2021, the High Court rejected an application to strike out claims brought by more than 7,000 Malawian farmers in tort and unjust enrichment (*Josiya & ors v British American Tobacco Plc & ors* [2021] EWHC 1743 (QB)).

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

Third parties can intervene in ongoing litigation, and file written and oral submissions for the assistance of the court (akin to amicus curiae

procedures in other jurisdictions). Contingency fee agreements, which facilitate access to remedy for impecunious claimants, are permissible in England.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

There are a considerable number of statutory-based ombudsmen, regulators and other complaints offices in the United Kingdom (eg, the Health and Safety Executive, the Consumer Services Ombudsman, the Financial Conduct Authority, the Groceries Code Adjudicator, the Financial Ombudsman Service, the Advertising Standards Authority and the Information Commissioner's Office).

The Equality and Human Rights Commission (the United Kingdom's National Human Rights Institution and equality body) is mandated to reduce inequality, eliminate discrimination and protect and promote human rights. It is tasked with monitoring and promoting human rights compliance.

The United Kingdom's national contact point (NCP) accepts specific instances of multinational enterprises not meeting the expectations set out in the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines).

Independent dispute resolution companies, the Citizens' Advice Bureau, and the Advisory, Conciliation and Arbitration Service also support non-judicial grievance mechanisms by offering services such as adjudication, mediation and negotiation.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

Ombudsman

The complaints process varies. Generally, the complaint will only be progressed if the individual has already given the organisation complained of an opportunity to resolve the complaint.

Equality and Human Rights Commission

The Equality and Human Rights Commission focuses on the regulatory aspects of human rights compliance generally through the conduct of investigations into widespread grievances. There is no individual complaints procedure.

NCP

Relevant interested parties may file complaints with the UK NCP where a multinational enterprise has breached the OECD Guidelines. More than 66 instances have been initiated since 2002.

Remedies

33 | What remedies are provided under these mechanisms?

Ombudsman

Most ombudsmen make recommendations and tend to focus on apologies or a review of policy and procedure.

Equality and Human Rights Commission

Key remedies are usually clarification of the law on a particular issue. In April 2019, the Equality and Human Rights Commission wrote to 47 UK organisations that had failed to report their gender pay gap information and later announced that the formal investigations resulted in 100 per cent of those investigated complying with gender pay gap reporting.

NCP

Where mediation is successful, the UK NCP may provide remedy (depending on its terms). Otherwise, the final statement may include recommendations focusing on remedial action by the company in breach of the OECD Guidelines. For example, in November 2021, the UK NCP found that a British construction equipment company breached the OECD Guidelines because it had not adequately carried out human rights due diligence or assessed the actual and potential human rights impact of the use of its products in the demolition of Palestinian properties and settlement-related construction. The UK NCP recommended that the company write a statement of policy that expressed its commitment to respect human rights, regularly conduct human rights due diligence to assess its human rights impacts and consider how to act on the findings of its due diligence exercise.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

Ombudsman

The powers of UK ombudsmen tend to be investigative. While the majority of ombudsmen will issue non-binding recommendations, there are some schemes, such as the Financial Ombudsman Service, that are enabled by statute to make legally binding decisions that are capable of judicial review.

Equality and Human Rights Commission

The powers of the Equality and Human Rights Commission are generally investigative and not enforceable, but those vested in this commission under the Equality Act 2006 include entering into formal agreements with organisations, serving compliance notices or issuing unlawful act notices, which may require an organisation to prepare a draft action plan setting out how it will remedy the breach and prevent future breaches. Of 166 whistleblowing disclosures made between 1 April 2020 and 31 March 2021, 12 were referred to the enforcement division for further action.

NCP

The NCP facilitates mediation between the parties following acceptance of a specific instance at the initial assessment stage, failing which and following its own investigations the NCP will issue a final statement that may determine whether or not the enterprise has breached the OECD Guidelines. The statement is neither binding nor enforceable. However, since a final statement is usually public, a finding of a breach of the OECD Guidelines may be significant (eg, the government asserts that its Export Credit Agency takes into account NCP reports when considering financing).

Publication

35 | Are these processes public and are decisions published?

Ombudsman

Most ombudsmen publish decisions and data on complaints resolved by final decisions. However, ombudsmen can withhold publication if they believe it is not in the best interest of the complainant (eg, the Local Government and Social Care Ombudsman).

Equality and Human Rights Commission

As a regulator with a remit of clarifying the law, the Equality and Human Rights Commission frequently publishes formal reports following

investigations. Additionally, there is a regularly updated blog on its website discussing its past actions and future plans.

NCP

Initial assessments and final statements are usually published. The parties typically have an opportunity to review and comment before publication.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

The United Kingdom is a member of the International Code of Conduct Association (ICoCA), a multi-stakeholder initiative that has promulgated a code of conduct that promotes the responsible provision of security services as well as respect for human rights and national and international law. The ICoCA receives and processes complaints of alleged violations of the International Code of Conduct by its member companies. Where a complainant seeks support, the ICoCA facilitates fair and accessible grievance procedures that may offer an effective remedy.

While not strictly non-state-based, it is worth mentioning that projects funded by the World Bank (to which the United Kingdom is a party) are subject to the Grievance Redress Service and the World Bank Inspection Panel. They both allow people or communities that believe that funded projects have caused or are likely to cause harm to bring complaints directly to the World Bank. Similarly, the Compliance Advisor Ombudsman is an independent accountability mechanism that works to address the concerns of individuals or communities affected by projects funded by the International Finance Corporation. Moreover, although the United Kingdom's withdrawal from the European Union means that it is no longer part of European Investment Bank (EIB) governance, existing long-term projects funded by the EIB are still subject to the EIB Group Complaints Mechanism.

UPDATE AND TRENDS

Recent developments

37 What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

Civil society groups, led by the Corporate Justice Coalition, are campaigning for a new law that would be modelled on the Bribery Act 2010 to establish a 'failure to prevent' offence for corporate human rights abuses. This law would impose liability on companies that fail to take adequate steps to prevent human rights and environmental abuses in their operations or supply chains. On 22 October 2021, 36 companies highlighted that a more comprehensive approach is needed and thus called for a new law to mandate human rights and environmental due diligence for companies and investors. As at December 2021, the government has not announced an intention to follow the trend in certain EU states (and potentially at EU level) towards the introduction of broad mandatory human rights due diligence legislation.

The government is also looking to revise and strengthen reporting requirements in the Modern Slavery Act 2015 (MSA), which will better align it with legislation in countries such as Australia. The government has committed to:

- amending the MSA to make mandatory the provision of certain information in the modern slavery statement regarding the steps taken to address modern slavery;
- extend reporting requirements to large public bodies; and
- reconsider enforcement and civil penalties applicable to breaches.

Corporate criminal liability principles are also under examination by the Law Commission, which has been asked by the government to consider whether the identification principle remains fit for purpose and to propose options for reform.

The government has stated that it will introduce a suite of green finance measures, which may incorporate human rights frameworks. For example, in the UK Government Green Financing Framework published in June 2021, the government described its plans to finance expenditures through the issuance of green gilts and the retail Green Savings Bonds that will be critical in tackling climate change and other environmental challenges, funding much-needed infrastructure investment and creating green jobs across the United Kingdom. The UK Government Green Financing Framework states that such financing will be given where eligible expenditures adhere to the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights. This echoes a trend in legislative developments in the European Union to refer to human rights risk management frameworks in legislation aimed at promoting sustainable finance.

Finally, on 14 December 2021, the Ministry of Justice published a proposal to replace the Human Rights Act 1998 with a modern Bill of Rights. The Bill of Rights respects the United Kingdom's obligations as a party to the European Convention on Human Rights and the United Kingdom will continue to support reforms to the European Court of Human Rights.

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LEGAL AND POLICY FRAMEWORK

International law

1 Which international and regional human rights treaties has your jurisdiction signed or ratified?

The United States has ratified the following treaties:

- the International Convention on the Elimination of All Forms of Racial Discrimination (acceded in 1994);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (acceded in 1994);
- the International Covenant on Civil and Political Rights (acceded in 1992);
- the Slavery Convention (acceded in 1929);
- the Protocol Amending the Slavery Convention (1956);
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (ratified in 2005);
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (ratified in 2002);
- the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (ratified in 2002); and
- the Abolition of Forced Labour Convention (ratified in 1991).

The United States has signed but not ratified:

- the International Covenant on Economic, Social and Cultural Rights (signatory since 1977);
- the American Convention on Human Rights (signatory since 1977);
- the Convention on the Elimination of All Forms of Discrimination Against Women (signatory since 1980);
- the Convention on the Rights of the Child (signatory since 1995);
- the Convention on the Rights of Persons with Disabilities (signatory since 2009);
- the United Nations (UN) Convention Against Transnational Organized Crime (signatory since 2000); and
- the Protocol Against the Smuggling of Migrants by Land, Sea and Air (signatory since 2000).

In general, when signing or ratifying these human rights treaties, the United States has included declarations stating that these treaties are 'non-self-executing', meaning that they are not enforceable in US courts without implementing legislation and that they do not authorise action incompatible with the US Constitution. The United States also makes certain other reservations and declarations in these treaties, including where a treaty may impose restrictions that would require the government to infringe upon freedom of speech.

2 Has your jurisdiction signed and ratified the eight core conventions of the International Labour Organization?

The United States has ratified two of the eight fundamental conventions. It ratified the Abolition of Forced Labour Convention in 1991 and the Worst Forms of Child Labour Convention in 1999.

3 How would you describe the general level of compliance with international human rights law and principles in your jurisdiction?

The US Constitution and the Bill of Rights provide various individual rights and freedoms, supplemented by significant statutory schemes, which often reflect principles of international human rights law. These include the rights to life and liberty, due process rights, rights to equal treatment under the law, privacy rights, and protections against discrimination and unfair employment practices.

The US Department of State's position is that 'protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago', beginning with the Declaration of Independence and the Constitution. In its 2016 National Action Plan on Responsible Business Conduct (US NAP), the United States stated that it is a leader in promoting responsible business conduct.

The United States ranks:

- 42nd out of 128 countries by the World Justice Project for its adherence to the protection of fundamental human rights; and
- 158th out of 167 countries for the prevalence of slavery.

In 2015, the Working Group on the Universal Periodic Review of the United States noted that the United States has not ratified a number of international human rights treaties (A/HRC/30/12). In June 2018, the United States withdrew from the UN Human Rights Council. The Biden Administration rejoined the UN Human Rights Council on 14 October 2021.

The Inter-American Commission on Human Rights occasionally issues merits reports holding that the United States has violated provisions of the American Declaration of the Rights and Duties of Man. These decisions are not legally binding and the United States treats them as recommendations.

4 Does your jurisdiction support the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises?

The United States has not supported the development of a treaty on the regulation of international human rights law in relation to the activities of transnational corporations and other business enterprises. In particular, the United States is not involved in the work by the

Open-Ended Intergovernmental Working Group to develop a treaty on business and human rights. Although the Biden Administration has not formally commented on the proposed treaty, the US government generally opposes the process, stating that it departs from the foundation laid by the UN Guiding Principles on Business and Human Rights (the UN Guiding Principles) and emphasising the need for a voluntary, multi-stakeholder and consensus-based approach. The United States instead supports the ongoing efforts of 'companies, governments, civil society, and others' using various voluntary means to promote human rights-friendly business practices, describing them as 'innovative, constructive, and continu[ing] to bear practical fruit'. In a 26 October 2020 press release, the US Mission to International Organizations in Geneva stated that the United States is 'open to exploring alternative approaches that align with the [UN Guiding Principles] developed in collaboration with, and that ultimately reflect a broad consensus of, businesses, civil society and other relevant stakeholders'.

National law

5 | Has your jurisdiction enacted any of its international human rights obligations into national law so as to place duties on businesses or create causes of action against businesses?

The United States has not enacted business-specific federal legislation that specifically implements human rights obligations. The US position is that its existing laws with application to business enterprises – including federal anti-discrimination, anti-corruption, fair labour, anti-trafficking, anti-torture and civil rights laws – meet or exceed standards set by its international human rights obligations.

6 | Has your jurisdiction published a national action plan on business and human rights?

On 16 December 2016, the United States published the US NAP. It is the most comprehensive and current catalogue of US efforts to encourage responsible business conduct, and it guides businesses as to where they should focus related due diligence programmes. The key themes and proposed actions include:

- anti-corruption and financial crime;
- forced labour, human trafficking and supply chain responsibility;
- leveraging US government purchasing power in contracting and procurement;
- due diligence requirements;
- responsible business conduct on the internet; and
- improving access to remedies.

The US NAP also makes clear that it reflects a starting point and that the US government intends to increase its commitment to promoting responsible business conduct. On 16 June 2021, the Secretary of State announced that the United States will update the US NAP.

CORPORATE REPORTING AND DISCLOSURE

Statutory and regulatory requirements

7 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related reporting or disclosure requirements?

US securities laws and regulations impose a general requirement on public corporations to disclose information about material risks to their business.

The US conflict minerals rule (adopted by the US Securities and Exchange Commission (SEC) in 2012 pursuant to section 1502 of the federal Dodd-Frank Act) (the Conflict Minerals Rule) requires companies to conduct due diligence and to report on the sourcing of conflict minerals originating in the Democratic Republic of the Congo (DRC) or an adjoining country. The Conflict Minerals Rule applies to companies that use certain minerals and that file reports with the SEC under the Securities Exchange Act of 1934. However, in 2017, the SEC stated that it would not recommend enforcement action for non-compliance with some requirements of the Conflict Minerals Rule, due to federal court rulings that held a requirement of the rule unconstitutional. The Conflict Minerals Rule has not been formally revoked, and certain parts of it remain both in force and potentially subject to SEC enforcement.

The California Transparency in Supply Chains Act (CTSCA) requires companies to disclose the extent of their due diligence with respect to human trafficking and slavery in their supply chains. It applies to any company doing business in California that has annual worldwide gross receipts of over US$100 million and that identifies itself as a retail seller or manufacturer on its California tax return.

Regarding environmental, social and governance (ESG) requirements, on 1 December 2020, the ESG Subcommittee of the SEC's Asset Management Advisory Committee recommended that the SEC require the adoption of standards by which corporate issuers of securities disclose material ESG risks in a manner consistent with the presentation of other financial disclosures. In March 2021, the SEC formed its Climate and ESG Task Force to, among other things, review disclosure and compliance issues relating to public company disclosures as well as the ESG strategies of investment advisers and investment funds.

Also in March 2021, the SEC also issued a request for public input on public company disclosure practices, with some commenters asking the SEC to mandate more disclosure by public companies on human rights issues. In September 2021, the SEC proposed new proxy voting reporting requirements for SEC-registered investment companies. The proposed rule would require investment companies to disclose how they vote proxies on a range of human rights or 'human capital/workforce' issues including supply chain exposure to human rights risks, outsourcing or offshoring and workplace sexual harassment. The SEC is also widely expected to propose mandatory ESG reporting requirements for public companies in early 2022. The proposed disclosures are almost certain to include human rights issues such as supply chain considerations. The SEC may also issue new reporting requirements or guidance for investment advisers and investment companies.

8 | What is the nature and extent of the required reporting or disclosure?

The Conflict Minerals Rule requires companies for which the use of conflict minerals – designated as tin, tantalum, tungsten and gold – is 'necessary to the functionality or production of a product manufactured by' the company to make a reasonable and good-faith effort to determine whether the minerals originated in the DRC or an adjoining country, and to disclose their determinations and describe their country of origin inquiries to the SEC as well as on their public websites. Where this inquiry determines that the conflict minerals did originate in the DRC or an adjoining country, the company must exercise due diligence on the source and chain of custody that conforms to a nationally or internationally recognised due diligence framework. The company must disclose this due diligence on its website in a conflict minerals disclosure. Where the due diligence confirms the company's determination, it must file and post a detailed conflict minerals report on its website. In 2017, the SEC stated that, due to US federal court rulings that called into question the constitutionality of the part of the Conflict Minerals Rule requiring a conflict minerals disclosure and conflict minerals report, it would not recommend enforcement action against companies that do not comply with these requirements if they file the other disclosures required by the Conflict Minerals Rule.

Under the CTSCA, companies subject to it must disclose on their websites the extent of their efforts in relation to verification, audits, certification, internal accountability and training regarding the possible existence of human trafficking or slavery in their supply chains. Companies may not hide the information but, rather, are required to post a 'conspicuous and easily understood link'. Company pages are typically brief, including one paragraph per disclosure category.

The SEC is also widely expected to propose mandatory ESG reporting requirements for public companies in early 2022. The proposed disclosures are almost certain to include human rights issues such as supply chain considerations.

9 | Which bodies enforce these requirements, and what is the extent of their powers?

The SEC administers general disclosure requirements and the Conflict Minerals Rule, and will enforce any forthcoming ESG-related disclosures by public companies, investment advisers and investment companies. Failure to comply with SEC regulations can result in a violation of the Securities Exchange Act of 1934, allowing the SEC to impose civil penalties. Private parties can also sue public companies, investment advisers and investment companies for material misstatements in their disclosure documents.

The California Attorney General may bring an action for injunctive relief against a company that violates the CTSCA, requiring it to comply with the law by posting the required information on its website. This is the exclusive remedy for violation of the CTSCA.

Voluntary standards

10 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human rights-related corporate reporting and disclosure regimes?

The 2016 National Action Plan on Responsible Business Conduct (US NAP) encourages US companies to implement the voluntary best practices contained in the United Nations (UN) Guiding Principles on Business and Human Rights (the UN Guiding Principles). The UN Guiding Principles recommend that businesses have in place due diligence processes to identify, prevent, mitigate and account for how they address their impacts on human rights. The UN Guiding Principles also recommend that businesses whose 'operations or operating contexts pose risks of severe human rights impacts' provide formal reports on how these risks are addressed. The US NAP indicates that the Department of State and other agencies will 'welcome and recognize new methods of reporting in support of RBC [responsible business conduct]'.

The UN Guiding Principles Reporting Framework, while not officially endorsed in the US NAP, provides voluntary guidance for businesses about reporting on how they respect human rights. This framework is supported by guidance for the internal audit, assurance of companies' human rights performance and a database of reports of companies disclosing human rights performance.

The UN Global Compact provides wide-ranging support for companies in the implementation of and adherence to the Ten Principles (including respect for human rights) in their business and operations. This is made available through guidance and online tools, as well as through seminars, training and talks through UN Global Compact local networks.

The US NAP also encourages US companies to implement the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines), which set out OECD countries' expectations that multinational enterprises conduct business responsibly. This includes an expectation that companies carry out due diligence in respect of a number of issues (such as bribery and corruption and the environment). Specifically, the OECD Guidelines contain a chapter on human rights, which includes the expectation of human rights due diligence (including reporting on human rights issues). The United States encourages the implementation of the OECD Guidelines, including their disclosure and transparency recommendations, through the US National Contact Point for Responsible Business Conduct.

The US NAP states:

> *The US government encourages businesses to treat tools like the OECD Guidelines and the UN Guiding Principles as a floor rather than a ceiling for implementing responsible business practices, and to recognize that implementing RBC should be a continuing process.*

In 2015, the California Department of Justice released a CTSCA resource guide containing examples and recommendations for compliance with the CTSCA's mandatory disclosure. It also points to sources such as, inter alia, Verité's 'Compliance is Not Enough: Best Practices in Responding to The California Transparency in Supply Chains Act'.

Numerous investment advisers and investment companies have also become members of the UN Principles for Responsible Investment (UNPRI). The UNPRI requires members to submit reports on various investment-related ESG metrics. Reports submitted by investment managers are also published on the UNPRI's website. The UNPRI reporting scheme is modelled on the Global Reporting Initiative standards and the two organisations have entered into a collaboration agreement to better align their reporting regimes.

CORPORATE DUE DILIGENCE

Statutory and regulatory requirements

11 | Are businesses in your jurisdiction subject to any statutory or regulatory human rights-related due diligence requirements?

Executive Order 13627, 'Strengthening Protections Against Trafficking in Persons in Federal Contracts' (EO 13627), establishes an affirmative duty on companies that contract or subcontract with the federal government in contracts over US$500,000 to institute a compliance programme to prevent trafficking-related activities. Contracts for commercial off-the-shelf supplies or services to be performed outside the United States for a value lower than US$500,000 are not subject to the compliance plan requirements.

The US conflict minerals rule (adopted by the US Securities and Exchange Commission (SEC) in 2012 pursuant to section 1502 of the federal Dodd-Frank Act) (the Conflict Minerals Rule) requires companies to conduct due diligence on the sourcing of conflict minerals. However, some portions of this rule are not currently enforced. Assuming that the SEC adopts new environmental, social and governance (ESG) reporting requirements for public companies, public companies will have to calibrate their due diligence programmes to ensure that they can accurately disclose covered issues.

The US Foreign Corrupt Practices Act (FCPA) prohibits US companies, US citizens and companies publicly traded on a US stock exchange from making, promising, offering or authorising payments to foreign officials to influence their actions or secure improper advantages. The US government has noted the connection between pervasive or endemic corruption and human rights abuses, and requires companies to conduct FCPA due diligence.

The California Transparency in Supply Chains Act requires certain companies to disclose the extent of their due diligence with respect to human trafficking and slavery in their supply chains but does not prescribe mandatory due diligence requirements.

The Bank Secrecy Act requires financial institutions to report to the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) any transaction that the financial institution knows, suspects or has reason to suspect involves funds derived from illegal activity, including human trafficking.

The Department of the Treasury requested, in a letter to the SEC, that broker-dealers report certain suspicious transactions under the Money Laundering Control Act of 1986 (MLCA) to the Internal Revenue Service Criminal Investigation Division or, in cross-border cases, to US Customs and Border Protection. The MLCA prohibits conducting or attempting to conduct a financial transaction involving the proceeds of a 'specified unlawful activity', including human trafficking. Discussion of the letter can be found in a New York Stock Exchange Memorandum dated 20 January 1989.

12 | What is the nature and extent of the required due diligence?

Under EO 13627, relevant contractors and subcontractors must implement and maintain a compliance plan related to preventing, monitoring and reporting employee and subcontractor activities during the period of contract performance. The nature of the particular plan will vary widely based on industry and the contract; for example, in industries with higher trafficking risk such as agriculture and construction, the plan is expected to be more robust.

Under the Conflict Minerals Rule, where an inquiry determines that the conflict minerals did originate in the Democratic Republic of the Congo (DRC) or an adjoining country, the company must exercise due diligence on the source and chain of custody that conforms to a nationally or internationally recognised due diligence framework. The company must disclose this due diligence on its website in a conflict minerals disclosure. Where the due diligence confirms the company's determination, it must file and post a detailed conflict minerals report on its website. In 2017, the SEC stated that, due to US federal court rulings that called into question the constitutionality of the part of the Conflict Minerals Rule requiring a conflict minerals disclosure and conflict minerals report, it would not recommend enforcement action against companies that do not comply with these requirements if they file the other disclosures required by the Conflict Minerals Rule.

Under the FCPA, companies are required to conduct robust due diligence before transacting with third parties or acquiring another business.

In fulfilling their obligations under the Bank Secrecy Act, financial institutions must collect information and conduct due diligence on customers, including collecting and verifying the identity of beneficial owners of legal entity customers, and file suspicious activity reports for any transaction or series of transactions indicative of criminal activity, including human trafficking. FinCEN listed human trafficking and human smuggling as among the Anti-Money Laundering and Countering the Financing of Terrorism National Priorities on 30 June 2021.

With respect to the MLCA, broker-dealers should report suspicious wire transfers or non-cash transactions to the Internal Revenue Service Criminal Investigation Division or, in cross-border cases, to US Customs and Border Protection. They should also retain records of such reports.

13 | Which bodies enforce these requirements, and what is the extent of their powers?

Contract officers within each US agency enforce the requirements and have discretion regarding penalties for violations of contractor requirements with respect to EO 13627. The enabling regulations state that the consequences of a contractor's violation of EO 13627 and its regulations may include:

- requiring the contractor to remove employees from performance of the contract;
- requiring the contractor to terminate a subcontract;
- suspension of contract payments;
- loss of an award fee;
- termination of the contract; or
- 'other remedies available to the Government'.

The contract officer may consider mitigating and aggravating factors when deciding on penalties for non-compliance.

The SEC enforces the Conflict Minerals Rule and can impose civil penalties for non-compliance. However, in 2017, the SEC stated that it would not pursue enforcement actions for failure to file a conflict minerals disclosure or conflict minerals report if the company complies with the other portions of the Conflict Minerals Rule.

The US Department of Justice (DOJ) and the SEC enforce the FCPA. Failure to conduct required due diligence can result in criminal liability or significant monetary penalties, or both.

FinCEN can bring civil enforcement actions for violations of the Bank Secrecy Act, including for violations of the reporting and record-keeping requirements. In addition, the DOJ can impose criminal penalties for wilful violations of the Bank Secrecy Act.

14 | What voluntary standards should businesses refer to for guidance on best practice in relation to any applicable human-rights related corporate due diligence regimes?

The 2016 National Action Plan on Responsible Business Conduct (US NAP) encourages US companies to implement the voluntary best practices contained in the United Nations (UN) Guiding Principles on Business and Human Rights (the UN Guiding Principles). The UN Guiding Principles recommend that businesses have in place due diligence processes to identify, prevent, mitigate and account for how they address their impacts on human rights. The UN Guiding Principles also recommend that businesses whose 'operations or operating contexts pose risks of severe human rights impacts' provide formal reports on how these risks are addressed. The US NAP indicates that the Department of State and other agencies will 'welcome and recognize new methods of reporting in support of RBC [responsible business conduct]'.

The UN Guiding Principles Reporting Framework, while not officially endorsed in the US NAP, provides voluntary guidance for businesses about reporting on how they respect human rights. This framework is supported by guidance for the internal audit, assurance of companies' human rights performance and a database of reports of companies disclosing human rights performance.

The UN Global Compact provides wide-ranging support for companies in the implementation of and adherence to the Ten Principles (including respect for human rights) in their business and operations. This is made available through guidance and online tools, as well as through seminars, training and talks through UN Global Compact local networks.

The US NAP also encourages US companies to implement the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines), which set out OECD countries' expectations that multinational enterprises conduct business responsibly. This includes an expectation that companies carry out due diligence in respect of a number of issues (such as bribery and corruption and the environment). Specifically, the OECD Guidelines contain a chapter on human rights, which includes the expectation of human rights due diligence (including reporting on human rights issues). The United States encourages the implementation of the OECD Guidelines, including their disclosure and

transparency recommendations, through the US National Contact Point for Responsible Business Conduct.

The US NAP states:

> *The US government encourages businesses to treat tools like the OECD Guidelines and the UN Guiding Principles as a floor rather than a ceiling for implementing responsible business practices, and to recognize that implementing RBC should be a continuing process.*

The OECD Due Diligence Guidance for Responsible Business Conduct provides practical recommendations and guidance to support businesses in implementing policies that protect human rights in their business operations and supply chains. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provides detailed recommendations to assist companies that source minerals or metals to uphold human rights in their supply chains.

According to the SEC's website and disclosure form, where due diligence is required under the Conflict Minerals Rule, companies 'must conform to a nationally or internationally recognized due diligence framework, such as the due diligence guidance approved by the [OECD].'

An advisory that was issued by the US Departments of State, Commerce, Homeland Security and Treasury in July 2020 and updated in July 2021 relating to forced labour concerns in the Xinjiang Uyghur Autonomous Region of China recommends that companies look to the best practices for human rights due diligence in the UN Guiding Principles, the OECD Guidelines, and the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

The US Department of State's 'Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities', issued in September 2020, urges and provides guidance on conducting voluntary human rights due diligence (and voluntary reporting) in this area.

The American Bar Association (ABA) has published the 'ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor', which outline best practice principles and draft policies for companies to consider when developing their own labour due diligence policies.

Many businesses voluntarily engage in a range of human rights due diligence practices and incorporate these practices into their corporate policies.

CRIMINAL LIABILITY

Primary liability

15 What criminal charges can be asserted against businesses for the commission of human rights abuses or involvement or complicity in abuses? What elements are required to establish guilt?

In general, corporations can be held criminally liable for violations of US federal or state law under the respondeat superior doctrine when the offence is:

- committed by the corporation's officers, employees or agents;
- within the scope of the relevant individual's or individuals' employment, or the relevant individual or individuals are acting with the actual or apparent authority of the corporation; and
- committed at least in part with the intent to benefit the corporation.

In some circumstances, the knowledge or intent of multiple employees may cumulatively satisfy the necessary elements of an offence on the part of the corporation (even if no individual employee satisfied the necessary elements in his or her own right).

The 13th Amendment of the US Constitution, adopted in 1865, states that 'Neither slavery nor involuntary servitude . . . shall exist within the United States'. Passed pursuant to the US Congress's enforcement power in section 2 of the Thirteenth Amendment, the Trafficking Victims Protection Act (TVPA) imposes federal criminal liability on businesses for benefitting from participation in a venture that engaged in trafficking or forced labour, including use of forced labour in their foreign supply chains. Companies can be liable for up to US$500,000 or twice the economic benefit of the violation. Victims may also be entitled to restitution in criminal cases. The TVPA applies extraterritorially, meaning that companies may be held criminally liable in the United States for human trafficking that occurred abroad. Reauthorisations of the TVPA have required the US Department of Labor (DOL) to maintain lists of goods that it 'has reason to believe are produced by child labor or forced labor in violation of international standards', to signal to government and the private sector where action is needed. The reports, titled 'Findings on the Worst Forms of Child Labor' and 'List of Goods Produced by Child Labor or Forced Labor', identify goods, sectors and countries that the DOL has reason to believe use forced labour.

Section 307 of the Tariff Act of 1930 prohibits the importation of goods produced in whole or in part with forced labour. The Trade Facilitation and Trade Enforcement Act of 2015 amended the Tariff Act to remove an exception that allowed for the importation of certain products made with forced labour if not produced domestically 'in such quantities . . . to meet the consumptive demands of the United States'. Violations can result in seizure, forfeiture and other civil or criminal penalties. The Countering Americas Adversaries Through Sanctions Act presumes that goods made with North Korean labour involve forced labour and restricts their entry into the United States pursuant to section 307. The Ashurst-Sumners Act prohibits the knowing transportation in interstate commerce or importation of goods made in whole or in part with prisoner labour and imposes fines or imprisonment, or both, for violations.

The Fair Labor Standards Act of 1938 (FLSA) prohibits businesses from shipping or delivering for shipment any goods produced in the United States by oppressive child labour. The FLSA provides for fines of up to US$10,000 and imprisonment for wilful violations of this prohibition.

The Money Laundering Control Act of 1986 (MLCA) prohibits conducting or attempting to conduct a financial transaction involving the proceeds of a specified unlawful activity with the intent to promote the carrying on of the specified unlawful activity, or knowing that the transaction is designed to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity. The MLCA also prohibits transporting, transmitting or transferring funds (or attempting to do the same) from, to or through the United States with the intent of promoting the carrying on of specified unlawful activity. Finally, the MLCA prohibits engaging in or attempting to engage in certain monetary transactions in property derived from specified unlawful activity with the knowledge that the proceeds derive from criminal activities. Under the MLCA, 'specified unlawful activity' includes violations of the TVPA.

Under the federal conspiracy statute, each participating individual in a conspiracy may be liable for misconduct. Corporate officers and employees can be held liable where they agree with at least one other person to commit a federal crime and at least one of them takes an overt act in furtherance of the conspiracy. A person who instructs another to commit a crime or aids and abets the offence is also criminally liable.

Some parts of the US sanctions regime specifically target individuals and companies involved in human rights violations, such as the Global Magnitsky Human Rights Accountability Act (GLOMAG). GLOMAG, in conjunction with other sanctions legislation and regulations,

authorises civil and criminal penalties for individuals and companies that do business with foreign persons designated by the United States as being involved in the violation of human rights.

16 What defences are available to and commonly asserted by parties accused of criminal human rights offences committed in the course of business?

Defendants will not be convicted of criminal human rights violations if they did not possess the requisite mens rea associated with the violation. Thus, the following defences may be employed:

- under the TVPA: the defendant did not act with knowledge or reckless disregard of the fact that the business benefited from forced labour;
- under the FLSA: the defendant did not deliberately commit the violation;
- under the Ashurst-Sumners Act: the merchandise was not knowingly transported; and
- under the MLCA: the defendant did not know that the relevant property represented proceeds of unlawful activity or did not act with the requisite intent (eg, 'to promote the carrying on of specified unlawful activity').

Examples of other common defences that have been used against TVPA charges are that the activities took place before the time of the TVPA's (or amendments thereto) enactment; that the defendant did not 'participate' sufficiently in the trafficking venture to warrant liability; that the defendant is not present in the United States for jurisdictional purposes; or that there was no force, fraud or coercion involved.

Director and officer liability

17 In what circumstances and to what extent can directors and officers be held criminally liable for involvement or complicity in human rights abuses? What elements are required to establish liability?

In general, directors and officers are criminally liable for any crimes that they have personally committed, even when the corporation can also be prosecuted. Particular statutes dictate the circumstances under which and the extent to which directors and officers can be prosecuted, and the elements required to prove the offence.

Under the TVPA, directors and officers may be criminally liable where they knowingly benefit from a violation of the TVPA and know, or are in reckless disregard of the fact, that the venture has been engaged in a violation of the TVPA. Such convictions are punishable by up to 20 years in prison.

Piercing the corporate veil

18 When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

A parent company may be held criminally liable for the acts of a subsidiary if the subsidiary is an instrumentality or alter ego of the parent company. US courts look to a range of factors in deciding whether to pierce the corporate veil, including:

- whether the entities maintained separate identities, including separate directors and officers;
- whether the subsidiary was sufficiently capitalised;
- whether corporate formalities were followed; and
- the existence of fraud or wrongdoing.

Secondary liability

19 In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Businesses may be held criminally liable for the acts of officers, employees or agents under the respondeat superior doctrine. The defences and penalties available depend on the specific criminal offences alleged.

The TVPA provides for secondary liability by imposing federal criminal liability on businesses for benefitting from participation in a venture that engaged in trafficking or forced labour. Accordingly, under the TVPA, a business can be secondarily liable for forced labour or other offences by a supplier, even where the supplier is a separate company.

The MLCA does not require the accused business to have committed the specified unlawful activity. Instead, it merely requires that the proceeds derived from the specified unlawful activity and that the business acted with the requisite intent. Thus, businesses could be liable for MLCA violations based on specified unlawful activity committed by third parties.

Prosecution

20 Who may commence a criminal prosecution against a business? To what extent do state criminal authorities exercise discretion to pursue prosecutions?

In the United States, only the federal, state and local criminal authorities may commence a criminal prosecution. Prosecutors, who are part of the executive branch of government, have broad discretion over whether and when to investigate and prosecute.

In the US federal context, the Department of Justice's (DOJ) Principles of Federal Prosecution of Business Organizations provide that a prosecutor should consider the following factors when deciding whether to prosecute a corporation:

- 'the nature and seriousness of the offense';
- 'the pervasiveness of wrongdoing within the corporation';
- 'the corporation's history of similar misconduct';
- 'the corporation's willingness to cooperate';
- 'the adequacy and effectiveness of the corporation's compliance program';
- 'the corporation's timely and voluntary disclosure of wrongdoing';
- 'the corporation's remedial actions';
- 'collateral consequences';
- 'the adequacy of remedies such as civil or regulatory enforcement actions';
- 'the adequacy of the prosecution of individuals responsible for the corporation's malfeasance'; and
- 'the interests of any victims'.

The DOJ's Principles of Federal Prosecution of Business Organizations also note that 'prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases' (including deterrence and the immediate remedial steps other corporations are likely to take).

21 What is the procedure for commencing a prosecution? Do any special rules or considerations apply to the prosecution of human rights cases?

Each prosecuting authority at the federal, state and local levels has its own guidelines and procedures for commencing a prosecution. The prosecuting authority with jurisdiction over the matter has discretion to begin criminal investigations in accordance with its respective

procedural rules. In some circumstances, the prosecuting authority may request a grand jury, which will indict an accused upon a finding of probable cause. At the federal level, the DOJ has a specific division called the Human Rights and Special Prosecutions Section that specifically considers prosecutions of human rights violators and other international criminals using a range of existing US statutes. However, there are no special rules or considerations that apply to the prosecution of human rights cases.

CIVIL LIABILITY

Primary liability

22 | What civil law causes of action are available against businesses for human rights abuses?

There are several federal civil rights and anti-discrimination laws under which plaintiffs can bring civil lawsuits for certain types of human rights violations. These include, for example, the Civil Rights Act, the Americans With Disabilities Act and the Age Discrimination in Employment Act.

Civil tort claims may be brought against businesses that commit certain forms of human rights abuses. For example, the torts of assault, battery, false imprisonment, nuisance, trespass and intentional infliction of emotional distress provide potential grounds for civil liability for human rights violations. The specific tort claims that may be made and their elements vary by US state. For example, in *Doe v Exxon Mobil Corp*, in which plaintiffs alleged violations of Indonesian tort law relating to killings and tortures in Indonesia, the US District Court for the District of Columbia found that it had personal jurisdiction over Exxon Mobil Oil Indonesia Inc (*Doe v Exxon Mobil Corp*, No. 01-1357 (LFO/AK) (DDC 18 July 2008); *Doe v Exxon Mobil Corp*, 393 F. Supp. 2d 20 (DDC 2005)). In 2019, the court declined to reconsider these findings (*Doe I v Exxon Mobil Corp*, No. 01-CV-1357-RCL, 2019 WL 2348100 (DDC 3 June 2019)).

The Trafficking Victims Protection Act (TVPA) allows victims to sue businesses for monetary damages if they establish by a preponderance of the evidence that the company benefitted from participation in a venture that it knew or should have known engaged in forced labour or trafficking. For example, in December 2019, in *Doe v Apple*, No. 1:19-CV-03737 (DDC 15 December 2019), 14 guardians of children who were allegedly killed or maimed working in cobalt mines in the Democratic Republic of the Congo filed suit against major technology companies in the US District Court for the District of Columbia, alleging that the companies aided, abetted and knowingly benefitted from forced labour. This case has been dismissed, in part because the judge found that the TVPA does not apply extraterritorially. The plaintiffs have appealed. Notably, the US Congress in 2018 passed the Fight Online Sex Trafficking Act (FOSTA), which allows trafficking victims to bring TVPA claims against social media companies if they knew or should have known about trafficking and benefitted from it. FOSTA also amended the TVPA to authorise state attorneys general to sue for civil penalties in federal court on behalf of their citizens as parens patriae using the reckless disregard standard applied in criminal cases.

The Fair Labor Standards Act of 1938 provides for civil monetary penalties for violation of the ban on child labour of up to US$11,000 for unharmed child employees and up to US$50,000 if death or serious injury occurred. The penalty may be doubled if the violation was repeated or wilful.

The Torture Victim Protection Act of 1992 provides for a civil remedy of compensation for victims of torture at the hands of individuals acting under the actual or apparent authority, or colour of law, of a foreign nation.

Under the Anti-Terrorism Act (ATA), victims of terrorism may seek compensation from their attackers. Since the Justice Against Sponsors of Terrorism Act passed in 2016 over President Obama's veto, companies and individuals may also be liable for conspiracy to commit, providing material support for, or aiding and abetting, terrorism. If successful, a plaintiff may recover three times the damages sustained, the litigation costs and attorneys' fees. Successful defences typically focus on the remoteness of the defendant's acts to the plaintiff's injury (ie, lack of causation or knowledge). Suits may also be dismissed for lack of personal jurisdiction. However, the Anti-Terrorism Clarification Act of 2018, among other things, broadened the scope of personal jurisdiction for ATA claims in certain circumstances.

Director and officer liability

23 | In what circumstances and to what extent are directors and officers of businesses subject to civil liability for involvement or complicity in human rights abuses?

Corporate directors and officers are fiduciaries of the corporation and its shareholders, and can be subject to civil liability for violation of their fiduciary duties. The fiduciary duties include duties of loyalty, care, good faith and fair dealing. Directors are generally presumed to satisfy their duty of care where they stay informed of all material information about business decisions, act in good faith and act in what they reasonably believe to be the best interests of the corporation. A corporation's certificate of incorporation may also eliminate the liability of directors for breaches of the duty of care (but not the duty of loyalty, which includes the duty to act in good faith).

In exceptional circumstances, a failure to properly oversee a corporation's operations may amount to a breach of the duty of good faith. Courts have held that directors' failure to implement reporting systems or controls, or conscious failure to monitor or oversee the operations of the corporation, may constitute a breach of their fiduciary duties. Such a breach could potentially occur in circumstances where directors fail to oversee the corporation's compliance with human rights obligations; however, such failures would need to be of a high level to give rise to liability.

In most cases, only shareholders of a company may initiate civil actions against directors and officers for breaches of fiduciary duties.

Directors and officers may also be subject to civil liability where this is expressly provided for by statute; for example, under securities laws requiring disclosure of material risks to the corporation.

Additionally, to the extent that a director or officer is personally involved in conduct that gives rise to civil liability (eg, where he or she acts outside the scope of his or her position as director or officer of the company), this may independently give rise to primary liability.

Piercing the corporate veil

24 | When can the courts disregard the separate legal personalities of corporate entities within a group in relation to human rights issues so as to hold a parent company liable for the acts or omissions of a subsidiary?

A parent company may be held liable for the acts of a subsidiary if the subsidiary is an instrumentality or alter ego of the parent company. US courts look to a range of factors in deciding whether to pierce the corporate veil, including:

- whether the entities maintained separate identities, including separate directors and officers;
- whether the subsidiary was sufficiently capitalised;
- whether corporate formalities were followed; and
- the existence of fraud or wrongdoing.

Secondary liability

25 | In what circumstances and to what extent can businesses be held liable for human rights abuses committed by third parties?

Similar to criminal offences, businesses may be held civilly liable in tort for the acts of officers, employees or agents under the respondeat superior doctrine. The defences and penalties available will depend on the specific tort alleged.

By contrast, the actions of an independent contractor will generally not give rise to vicarious liability in tort for the principal. One exception to this rule is where a contractor performs certain non-delegable duties on behalf of a business. Non-delegable duties include (among others) duties that involve inherent danger or danger to the public and actions for which the principal would be strictly liable if performed by it directly. A further exception to this rule is where an independent contractor acts in such a way that a third party would reasonably believe that the contractor is acting as the principal or an employee of the principal. In such circumstances, the employer may be vicariously liable for the contractor's actions as if the contractor were an employee of the principal.

The TVPA provides for secondary liability by allowing victims to sue businesses for monetary damages if they establish by a preponderance of the evidence that the company benefited from participation in a venture that it knew or should have known engaged in forced labour or trafficking.

Shareholder liability

26 | In what circumstances can shareholders be held liable for involvement or complicity inhuman rights abuses?

Shareholders are generally not liable for the corporation's actions. The circumstances under which US courts will pierce the corporate veil are outlined below; however, this is far more likely to occur with respect to shareholders in a closely held, rather than a publicly traded, corporation.

A parent company may be held liable for the acts of a subsidiary if the subsidiary is an instrumentality or alter ego of the parent company. US courts look to a range of factors in deciding whether to pierce the corporate veil, including:

- whether the entities maintained separate identities, including separate directors and officers;
- whether the subsidiary was sufficiently capitalised;
- whether corporate formalities were followed; and
- the existence of fraud or wrongdoing.

JUDICIAL REDRESS

Jurisdiction

27 | Under what criteria do the criminal or civil courts have jurisdiction to entertain human rights claims against a business in your jurisdiction?

US federal and state courts must have personal jurisdiction and subject matter jurisdiction to hear a case. Personal jurisdiction refers to the power that a court has to make decisions regarding the parties to the lawsuit. The Supreme Court established in *International Shoe v Washington*, 326 US 310 (1945), that the Constitution requires that a defendant has at least minimum contacts with the forum for a court to sustain personal jurisdiction. There are two types of personal jurisdiction: general and specific. If a court has general jurisdiction over a defendant, that defendant is considered 'at home' in the jurisdiction and any claim against the defendant can be brought in that jurisdiction. Specific jurisdiction arises when the defendant's connections to the jurisdiction relate to the litigation.

The Anti-Terrorism Clarification Act of 2018 (ATCA) specifically expands personal jurisdiction for certain claims made under the Anti-Terrorism Act (ATA). The ATCA provides that a defendant is deemed to have submitted to personal jurisdiction for a claim under the ATA if he or she receives certain types of US foreign assistance or meets criteria relating to activities of the Palestine Liberation Organization.

Subject matter jurisdiction refers to the court's authority to hear a particular type of case or subject matter. Most state courts have general subject matter jurisdiction, which means that they may hear almost any claim arising under federal or state law. Federal courts have limited jurisdiction, meaning that they have the authority to hear only claims arising under the Constitution or statutes that grant them subject matter jurisdiction. The two main forms of federal subject matter jurisdiction are 'federal question' jurisdiction, meaning that the claim arises under federal law, and 'diversity' jurisdiction, which occurs when the amount of the claim exceeds US$75,000 and the plaintiff and defendant are from different states. Defendants may waive personal jurisdiction but may not waive subject matter jurisdiction and disputes based on lack of subject matter jurisdiction may be raised at any point in the litigation.

The jurisdictional requirements for human rights claims are typically defined by statute. For example, the Alien Tort Statute (ATS) provides federal courts with statutory subject matter jurisdiction over actions for torts 'committed in violation of the law of nations or a treaty of the United States'. The ATS permits claims by non-US nationals for certain violations of international law, including human rights violations. In recent years, the Supreme Court has limited the scope of possible claims by holding that

- the ATS does not grant jurisdiction over claims between foreign parties involving conduct occurring outside the United States (see *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013) (*Kiobel*)); and
- the ATS does not grant jurisdiction over claims against foreign corporations (see *Jesner v Arab Bank, PLC*, 138 S Ct 1386 (2018)).

In *Nestlé USA, Inc v Doe*, Docket No. 19-416 (2021), the Supreme Court held that general corporate activity in the United States is insufficient to rebut the presumption against extraterritoriality, but did not rule out liability for US corporations for international law violations under the ATS.

The ATA and the Torture Victim Protection Act also provide subject matter jurisdiction for claims occurring outside the United States relating to terrorism (in the case of the ATA) and torture (in the case of the Torture Victim Protection Act). In each of these cases, however, a plaintiff must also establish personal jurisdiction in accordance with the requirements outlined above.

Similarly, the Trafficking Victims Protection Act (TVPA) accords US courts extraterritorial jurisdiction in respect of certain offences, including forced labour violations committed overseas if the alleged offender is either a US national or present in the United States. The parameters of the term 'present in' remain unsettled, but one federal district court has held that 'present in' requires physical presence (including through an agent). The court dismissed the argument that 'present in' should be analysed under the looser standards of personal jurisdiction, which does not necessarily require physical presence but instead requires that the defendant have certain minimum contacts with the forum (see *Ratha v Phattana Seafood Co, Ltd*, Case No. CV 16-4271-JFW (ASx), 2017 WL 8292391, 2017 WL 8292922 (CD Cal 21 December 2017); *Ratha v Phattana Seafood Co, Ltd*, Case No. CV 16-4271-JFW (ASx), 2016 WL 11020222 (CD Cal 9 November 2016)). The extraterritoriality of the TVPA's civil remedy section is unclear and currently the subject of litigation.

More generally, courts apply a presumption against the extraterritorial application of US law, having held that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none' (*Morrison v Nat'l Austl Bank Ltd*, 561 US 247 (2010)). In the context of the ATS, the Supreme Court held in *Kiobel* that claims must 'touch and concern the territory of the United States' with 'sufficient force to displace' this presumption against extraterritorial application.

28 | What jurisdictional principles do the courts apply to accept or reject claims against businesses based on acts or omissions that have taken place overseas and parties that are domiciled or located overseas?

In circumstances where a US federal court has jurisdiction over a dispute, the court may nevertheless use its discretion not to exercise that jurisdiction under the doctrine of *forum non conveniens*. Under this doctrine, federal courts have discretion to dismiss a case where there is an 'available and adequate alternative forum' and 'the balance of private and public interests favors dismissal' (see Restatement (Fourth) of Foreign Relations Law of the United States). In determining whether to exercise this discretion, a court will give deference to the plaintiff's choice of forum.

Class and collective actions

29 | Is it possible to bring class-based claims or other collective redress procedures against businesses for human rights abuses?

Yes. US law does not impose additional restrictions on class actions for human rights violations. The basic requirements for a class action are:

- the class is so numerous that joinder of all members would be impracticable;
- there are questions of law or fact common to the class;
- the claims of the representative parties are typical of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

Public interest litigation

30 | Are any public interest litigation mechanisms available for human rights cases against businesses?

Contingency fee arrangements and class actions are generally permitted in the United States, which can facilitate access to remedy.

Third parties can, with the leave of the court or agreement of the parties, file amicus curiae briefs in civil judicial proceedings. An amicus curiae may participate in oral argument with the permission of the court.

Some non-governmental organisations (NGOs) assist victims of human rights abuses seeking redress, including through providing legal representation and facilitating class actions. In certain circumstances, an NGO may also initiate an action directly, provided that it satisfies the requirements of standing applicable to any plaintiff. An organisation may bring an action on behalf of its members in circumstances where its members have standing to sue in their own right; the interests it seeks to protect are 'germane to the organization's purpose'; and the participation of individual members in the lawsuit is not required.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

Available mechanisms

31 | What state-based non-judicial grievance mechanisms are available to hear business-related human rights complaints? Which bodies administer these mechanisms?

The US National Contact Point (USNCP) is a dispute resolution and mediation resource created to further the effectiveness of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the OECD Guidelines), which cover a wide range of responsible business conduct.

The USNCP's specific instance process is triggered when a party makes allegations against a multinational enterprise operating or headquartered in the United States. Between 2000 and 2016, the USNCP handled 45 specific instances, with two resulting in mediation and agreement between the parties.

Filing complaints

32 | What is the procedure for filing complaints under these mechanisms?

An entity can submit a specific instance to the USNCP via email or post providing the entity's specific interest in the case and stating that it is in a position to supply information about the case. It must also state its preferred outcome and which part or parts of the OECD Guidelines the accused company has violated. The USNCP then considers the case's admissibility.

Remedies

33 | What remedies are provided under these mechanisms?

If the USNCP finds that the specific instance is material and substantiated, and that it meets the other OECD criteria, then it will offer its mediation services to the parties. The parties can accept or reject mediation.

For example, in 2017, the USNCP received a Specific Instance from the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco, and Allied Workers Associations (the International Union). The International Union alleged that conduct by The Coca-Cola Company (TCCC) was inconsistent with the OECD Guidelines on the basis that subsidiaries of independent bottler Coca-Cola Amatil 'engaged in and continued to pursue efforts to undermine the rights of workers concerning freedom of association and collective bargaining'. The International Union claimed that TCCC's 'failure to execute due diligence and remediation, as recommended in the Guidelines', constituted a breach of the OECD Guidelines. TCCC argued, inter alia, that due to its minority interest in Coca-Cola Amatil, it was unable to direct or control Coca-Cola Amatil's actions or the actions of its subsidiaries. The USNCP accepted the Specific Instance and offered mediation to the parties. Despite the parties' acceptance of the mediation, they were unable to reach an agreement.

Enforcement

34 | What powers do these mechanisms have? Are the decisions rendered by the relevant bodies enforceable?

The decisions are not enforceable. The USNCP's mediation powers and any arrangement resulting from the mediation are premised on the parties' consent.

Publication

35 | Are these processes public and are decisions published?

The USNCP processes take place in private, but the Department of State publishes a final statement on its website at the end of the process. The end of the process can occur at any stage, ranging from the USNCP deciding not to offer mediation to the parties reaching an agreement in mediation.

NON-JUDICIAL NON-STATE-BASED GRIEVANCE MECHANISMS

Available mechanisms

36 | Are any non-judicial non-state-based grievance mechanisms associated with your jurisdiction?

The 2016 National Action Plan on Responsible Business Conduct (US NAP) states that the United States will provide and support access to the following grievance processes:

- through its active US National Contact Point (USNCP), the United States facilitates access to the Organisation for Economic Co-operation and Development's specific instance process; and
- the World Bank's Stolen Asset Recovery Initiative, which provides a platform for pursuing recovery of stolen funds.

The US NAP also states that the United States will provide stakeholder outreach and consultation to explore how the United States can address concerns about the 'perceived lack of accessible and effective remedy available to those who feel they have been negatively impacted by US business conduct abroad'. As part of this process, the United States stated it would seek advice regarding how it could best support access to remedies, 'including the potential development of tools or guidance related to non-government based mechanisms'.

The US Department of Labor (DOL) also facilitates the implementation of a number of other multilateral stakeholder mechanisms for improving human rights internationally. For example, the DOL serves as the secretariat of the Child Labour Cocoa Coordinating Group – a public–private partnership involving the United States, the Ivory Coast, Ghana and private sector stakeholders – that is aimed at eliminating abusive labour practices in the international cocoa supply chain.

UPDATE AND TRENDS

Recent developments

37 | What are the key recent developments, hot topics and future trends relating to business and human rights in your jurisdiction?

Corporate purpose

On 19 August 2019, the Business Roundtable, consisting of an influential group of chief executive officers, published its 'Statement on the Purpose of a Corporation', revising its prior opinion that corporations must serve shareholder interests above all. In its new statement, the Business Roundtable endorsed the view that corporations must serve the interests of five coequal stakeholders: customers, employees, suppliers, communities and shareholders.

Use of economic sanctions

Since 2017, the United States has increasingly used economic sanctions to discourage and punish human rights abuses, imposing both civil and criminal penalties on violators. Notable examples include sanctions on:

- Russian entities and individuals pursuant to the Global Magnitsky Human Rights Accountability Act (GLOMAG) for abuses such as extrajudicial killing and torture of LGBTQI people;
- Iranians implicated in human rights violations in Iraq;
- certain foreign persons in Hong Kong;
- Venezuelan officials for their role in human rights violations; and
- a Bangladeshi law enforcement unit allegedly responsible for disappearances and extrajudicial killings.

Actions related to the Xinjiang Uyghur Autonomous Region of China

In 2019 and 2020, the US government increased its focus on alleged forced labour and other human rights violations against the Uyghur Muslim population in the Xinjiang Uyghur Autonomous Region of China (Xinjiang), as follows.

Executive actions

- The US Department of Commerce's Bureau of Industry and Security has added Chinese entities, including technology and textile companies, to its Entity List, on the basis of alleged involvement in human rights violations. To do business with parties listed on the Entity List, companies must comply with additional licensing restrictions for exports, re-exports or in-country transfers of goods, software or technology that are subject to the Export Administration Regulations.
- Beginning in September 2019, pursuant to section 307 of the Tariff Act of 1930, the US Customs and Border Protection has issued Withhold Release Orders and Findings to detain imported goods believed to have been manufactured using forced labour in Xinjiang, including all cotton and tomato products.
- Pursuant to GLOMAG, the US Department of the Treasury has announced the addition of Chinese entities and individuals to the Specially Designated Nationals list, making them 'Blocked Persons' under US sanctions law, based on involvement in alleged human rights violations in Xinjiang.
- On 19 January 2021, the US Department of State declared its view that the alleged abuses against Uyghur Muslims in Xinjiang constitute genocide.

Legislative actions

On 17 June 2020, the US Congress passed the Uyghur Human Rights Policy Act of 2020, which requires the President to:

- report on 'each foreign person, including any official of the Government of the People's Republic of China, that the President determines is responsible for' enumerated violations in Xinjiang; and
- impose asset- and visa-blocking sanctions on the foreign persons identified in the report.

This act also requires the Director of National Intelligence, in coordination with the Secretary of State, to report on, inter alia, 'Chinese companies that are involved in – (A) constructing or operating the internment camps in Xinjiang . . . ; or (B) providing or operating mass surveillance technology in Xinjiang'.

US Congress has passed the Uyghur Forced Labor Prevention Act, which imposes a presumption that all goods made in part or in full in Xinjiang were made using forced labour. These imports will be barred from entering the United States unless 'clear and convincing evidence' can be shown that they were not made using forced labour.

Guidance

In July 2021, the US Departments of State, Commerce, Homeland Security and the Treasury updated an advisory originally published in July 2020, 'Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang' (the Advisory), to assist companies to comply with

the increasing business and trade restrictions the US government has imposed and continues to impose on public and private entities and individuals with respect to Xinjiang. The Advisory emphasises the need for businesses with supply chain links to Xinjiang or labourers from Xinjiang to engage in human rights due diligence (HRDD), and recommends that such companies look to the best practices described in the United Nations (UN) Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development Guidelines on Multinational Enterprises and the International Labour Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy to develop or improve their HRDD programmes.

On 30 September 2020, the US Department of State issued its 'Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities', urging US companies that work with or design and manufacture products or services that have surveillance capabilities to 'integrate human rights due diligence into compliance programmes, including export compliance programs'.

Corporate liability for human rights violations generally

There is an increasing focus on human rights issues in companies' supply chains more broadly and new uses of the Trafficking Victims Protection Act (TVPA) to pursue supply chain-related civil claims. For example, in December 2019, in *Doe v Apple*, No. 1:19-CV-03737 (DDC 15 December 2019), 14 guardians of children who were allegedly killed or maimed working in cobalt mines in the Democratic Republic of the Congo filed suit against major technology companies in the US District Court for the District of Columbia, alleging that the companies aided and abetted and knowingly benefitted from forced labour. This case was dismissed but has been appealed. The Advisory suggested that the US government would increase criminal enforcement of the TVPA.

International trade and investment agreements

International trade and investment agreements increasingly include provisions relating to corporate social responsibility. For example, article 24.13.2 of the United States–Mexico–Canada Agreement requires the governments of the United States, Mexico and Canada to encourage businesses operating in their countries to 'adopt and implement voluntary best practices of corporate social responsibility that are related to the environment'.

Climate change

On 20 January 2021, the United States rejoined the Paris Agreement, an international treaty that aims to limit global warming, via President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad. This executive order describes the steps that the United States will take to 'exercise its leadership to promote a significant increase in global climate ambition to meet the climate challenge', including, for example:

- hosting an early Leaders' Climate Summit;
- reconvening the Major Economies Forum on Energy and Climate;
- creating the presidentially appointed position of Special Presidential Envoy for Climate;
- prioritising the 'press for enhanced climate ambition and integration of climate considerations across a wide range of international fora, including the Group of Seven (G7), the Group of Twenty (G20), and fora that address clean energy, aviation, shipping, the Arctic, the ocean, sustainable development, migration, and other relevant topics';
- developing 'a climate finance plan, making strategic use of multilateral and bilateral channels and institutions, to assist developing countries in implementing ambitious emissions reduction measures, protecting critical ecosystems, building resilience against the impacts of climate change, and promoting the flow of capital toward climate-aligned investments and away from high-carbon investments'; and
- directing the Secretary of State to prepare 'a transmittal package seeking the Senate's advice and consent to ratification of the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer'.

Although disclosures related to environmental, social and governance (ESG) issues continue to be governed by the general materiality rule and guidance issued by the US Securities and Exchange Commission (SEC) in 2010, the SEC is widely expected to propose mandatory environmental and other ESG-related reporting requirements for public companies in early 2022. The SEC has also proposed ESG-related disclosure requirements for proxy votes by investment companies, and may propose additional disclosure requirements for investment companies and investment advisers in the future.

Plaintiffs are increasingly filing claims against corporations alleging climate change harms. In December 2019, Exxon prevailed at trial against the New York State Attorney General in a case alleging violations of securities laws resulting from misleading disclosures relating to the impact of climate change on Exxon's business. Municipalities in several US states have pursued tort claims against major oil and gas companies for climate change-related harms, such as rising sea levels. New York passed a constitutional amendment providing for the right to clear air and water, and a healthy environment.

Executive orders in the early days of the Biden Administration

In the early days of his administration, President Biden released a number of human rights-related executive orders, presidential actions and memoranda, including, inter alia:

- the Memorandum on Protecting Women's Health at Home and Abroad;
- the Memorandum Preserving and Fortifying Deferred Action for Childhood Arrivals;

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- the Proclamation on Ending Discriminatory Bans on Entry to the United States;
- the Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government;
- the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation; and
- the Executive Order Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.

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JUST TRANSACTIONS
JUST TRANSITION AND THE BANKING SECTOR

Clifford Chance, the Institute for Human Rights and Business and the CDC Group jointly authored a white paper on Just Transition and the Banking Sector.

The report team led consultations and interviews with banks to understand how they are incorporating Just Transition considerations into their strategies, governance, and operations.

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