

Business and Human Rights Due Diligence Roadmap



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Strategies for Mitigating Risks of Human Rights Violations

Given the proliferation of lawsuits against corporations for violations of international criminal and humanitarian law in recent years, many multinational corporations have adopted policies and taken actions to prevent violations and mitigate risk. These actions include:

- undertaking human rights due diligences of suppliers, joint venture partners, agents and other business partners;
- adopting human rights charters and environmental stewardship policies and ensuring that all business partners adopt policies at least as rigorous as their own;
- incorporating human rights protection language into contracts with suppliers and other third parties.

Some companies, wishing to go a step further, voluntarily self-report on their human rights compliance through mechanisms such as the UN Guiding Principles Reporting Framework or the Business & Human Rights Resource Center.

Baseline Standards of Human Rights Policies and Due Diligences

At a minimum, human rights policies should include, and human rights due diligences should review, the following:

- Respect for the human rights of company employees, including the right to just and favorable working conditions, workplace safety, privacy and family life and freedom from workplace harassment;
- Freedom from discrimination on the basis of nationality, race, gender or any other protected class;
- Respect for the right of employees to express their opinions or their faith in the workplace;



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- A commitment to environmental stewardship and to comply with applicable local, national and international environmental protection laws;
- A commitment to act in accordance with national and international standards of business transparency and integrity and to combat bribery and corruption;
- Support for the rule of law and for the institutions, processes and frameworks that ensure the resolution of legal disputes;
- A covenant to combat human trafficking and eradicate modern slavery;
- A requirement for local agents, vendors, service providers and other partners to comply with (or to adopt policies at least as rigorous as) the companies' own business and human rights policies.

Incorporating Human Rights Protection Language into Contracts

The following baseline boilerplate language can be incorporated into contracts with suppliers and other third parties:

Counterparty [Supplier, Licensee, Lessor, Lessee, Seller, Partner, Investor, etc.] warrants that it does not, and agrees that it will not, conduct business with any vendors, subcontractors or any other third parties that (a) employ children, (b) use forced labor, prison labor, indentured labor or bonded labor, or (c) use corporal punishment or other forms of mental and physical coercion as a form of discipline. Company and Counterparty agree to define "child" as less than sixteen (16) years of age. However, if local minimum age law sets the definition of "child" below sixteen (16) years of age and is in accordance with the standards set forth in International Labor Organization Convention No. 138, then the lower age shall apply.

Counterparty warrants that its directors, officers and employees and any other persons controlled by Counterparty to perform any services under this Agreement are not engaged in sexual exploitation, trafficking of persons or other abuses of international human rights law.

Counterparty undertakes to both respect the labor and human rights standards enumerated in this Clause and to ensure that third parties under its control respect the labor and human rights standards enumerated herein.

Companies that are serious about ensuring respect for human rights may go a step further by reserving a right to audit their counterparties' premises with minimal notice to ensure that they understand, respect and ensure the respect of universal human rights standards in their local operations. Sample language might include the following provision:

Company has the right to audit Counterparty's premises to ensure compliance with the provisions of this Clause.

While boilerplate language exists that can be incorporated into contracts across various sectors, companies should consider tailoring contracts to their specific industry. For example, a supply contract in the defense industry would likely incorporate language relating to the manufacture and sale of weapons in accordance with international humanitarian law and prohibitions on child soldiers.

Baseline Standards of Human Rights Due Diligences

The following core components should be incorporated into a company's due diligence of its operations and those of its partners:

- identifying and assessing actual or potential adverse human rights impacts that the company may cause or contribute to directly or which may be linked to its business relationships;

- integrating findings from impact assessments across company operations and taking action according to its involvement in any relevant impact;
- evaluating the effectiveness of measures and processes to mitigate adverse human rights impacts; and
- communicating on how impacts are being addressed and showing investors and impacted stakeholders that there are adequate policies and processes in place.

The following baseline standards should be applied when undertaking human rights due diligences of potential acquisition targets, JV partners and other potential partners:

- details of claims brought against the target, including actual or threatened litigation, with a focus on labor, human trafficking, money laundering, terrorism or other abuses of international human rights law;
- review of compliance with international human rights standards, including a review of human rights policies and environmental protection charters, if applicable;
- determining if the company is a sanctions target found on the UN sanctions list, the EU Sanctions Map, OFAC lists or Her Majesty's Treasury list;
- undertaking AML and terrorist links searches through financial crime and sanctions screening tools;
- review of insurance policies and claims in any areas relevant to human rights and environmental protection.

Prominent Cases Alleging Corporate Liability for International Crimes

- Alleged complicity for crimes against humanity and forced labor in Eritrea:

Arraya et al. v. Nevsun Resources, Ltd., Canada (2014)

- Alleged complicity for genocide in Rwanda:

Sherpa, CPCR, Ibuka France v. BNP Paribas, France (2017)

- Alleged complicity for crimes against humanity in Syria:

Prosecutor v. LafargeHolcim SA ("Lafarge"), France (2016)

- Alleged complicity in genocide, crimes against humanity and torture in Sudan:

Prosecutor, Fédération internationale pour les droits humains (FIDH), Ligue des droits de l'Homme (LDH), Global Diligence Alliance [representing Sudanese victims] v. BNP Paribas, France (2020)

- Alleged complicity for war crimes in Sudan:

Prosecutor v. Ian Lundin and Alex Schneider [executives of Lundin Energy], Sweden (2021)

- Alleged complicity for genocide in Myanmar:

Jane Doe [Rohingya refugees] v. Meta Platforms Inc. [Facebook] et al., California (2021)

- Alleged complicity for war crimes in Yemen:

ECCHR, Sherpa and Amnesty International France v. Dassault, MBDA France, Thales, France (2022)

Legal Instruments and Guiding Principles

Legal instruments and guiding principles governing business and human rights include the following:

- The UN Guiding Principles on Business and Human Rights
- The OECD Guidelines for Multinational Enterprises
- The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
- The OAS American Convention on Human Rights
- European Union Directive 2014/95/EU
- The ASEAN Human Rights Declaration

Modern Slavery Statements

Companies should consider whether they are required to publish a modern slavery statement under section 54 (Transparency in Supply Chains) of the UK Modern Slavery Act 2015. A commercial organization is required to publish an annual statement if all the criteria below apply:

- it is a 'body corporate' or a partnership, wherever incorporated or formed;
- it carries on a business, or part of a business, in the UK;
- it supplies goods or services; and
- it has an annual turnover of £36 million or more.

Organizations that have a demonstrable business presence in the UK and meet the other criteria should publish an annual statement. Factors that should be considered by companies when determining whether the UK Modern Slavery Act applies to them include, but are not limited to, whether they have UK offices; they provide services in the UK; they receive income in the UK; and they have another visible UK business presence, such as a website.



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