


12-30-2022

Contracting Against Slavery: Corporate Accountability for Human Rights Supply Chain Violations

Alexandra Hyken

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

 Part of the [Comparative and Foreign Law Commons](#), [Contracts Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Jurisdiction Commons](#), [Legislation Commons](#), [Litigation Commons](#), [Other Law Commons](#), [Supreme Court of the United States Commons](#), and the [Torts Commons](#)

Recommended Citation

Alexandra Hyken, *Contracting Against Slavery: Corporate Accountability for Human Rights Supply Chain Violations*, 48 Brook. J. Int'l L. 301 (2022).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol48/iss1/6>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

CONTRACTING AGAINST SLAVERY: CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS SUPPLY CHAIN VIOLATIONS

INTRODUCTION

At least 24.9 million people are enslaved worldwide.¹ Of that population, it is estimated that sixteen million are engaged in forced labor that is related to the private sector.² The European Union Commission approved a legislative directive that will increase corporate accountability for human rights supply chain violations, including forced labor, and create various forms of redress.³ Likewise, following calls for legislation that mandated supply chain monitoring for human rights violations, Canada introduced a bill in March 2022 that “requires business[es] to establish processes to prevent, address and remedy adverse impacts on human rights that occur in relation to their business activities conducted abroad.”⁴ Yet, at the same time, the United States (US) continues to narrow corporate accountability for violations of this sort.⁵

1. See INT’L LABOUR ORG. AND WALK FREE FOUND., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 5 (2017). This figure does not include forced marriage. *Id.* When including forced marriage, the number rises to nearly 40 million enslaved people worldwide. *Id.*

2. *Id.* at 10. Private sector refers to business-related activity, typically within the global supply chain, which excludes the commercial sex industry. *Id.* at 9.

3. See *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive*, COM (2022), 71 final (Feb. 23, 2022) [hereinafter *EU Commission Directive*]; see also Press Release, Council of the EU, Council gives final green light to corporate sustainability reporting directive (Nov. 28, 2022) (on file with author).

4. See *e.g.*, Letter from Canadian Network on Corporate Accountability to the 44th Parliament, Global Sign-On Letter Proposed mHREDD law in Canada (May 31, 2021); Bill C-262, *An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad*, First Reading, Marc. 29, 2022, First Session, 44th Parliament, 70-71 Elizabeth II, 2022 [hereinafter Bill C-262].

5. See generally Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021). See also *Part Two – Mandatory Corporate Human Rights Due Diligence: What Now and What Next? An International Perspective*, GIBSON, DUNN & CRUTCHER LLP (Mar. 11, 2021), <https://www.gibsondunn.com/part-two-mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international->

While not eliminating the risk of a lawsuit, in *Nestlé USA, Inc. v. Doe*, the US Supreme Court (USSC) alleviated pressure for corporations in the US to monitor supply chains for human rights violations.⁶ In that case, when forced laborers sued Nestlé⁷ and Cargill⁸ under the Alien Tort Statute (ATS)⁹ for aiding and abetting in human trafficking and forced labor that occurred in Côte d'Ivoire (also known as Ivory Coast), the USSC found that the plaintiffs had not established

perspective/ (stating that in comparison to global efforts, the United States is “less advanced on human rights reporting and/or substantive corporate human rights due diligence”).

6. See William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (Jun. 18, 2021), <https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/> (stating that while the *Nestlé* holding does not end human rights litigation in the United States, it seems likely to only continue under specific statutes, like the Torture Victim Protection Act or the Trafficking Victims Protection Reauthorization Act). See also Fien Schreurs, *Nestlé & Cargill v. Doe Series: Remediating the Corporate Accountability Gap at the ICC*, JUST SEC. (Jan. 11, 2021), <https://www.justsecurity.org/74035/nestle-cargill-v-doe-series-remediating-the-corporate-accountability-gap-at-the-icc/> (stating that there is a gap in corporate liability for global human rights violations that must be remedied). See also Suzanne Speats et al., *Nestlé USA v. Doe: U.S. Supreme Court confirms Nestlé and Cargill cannot be sued in the US for alleged aiding and abetting of forced labour overseas*, ALLEN & OVERY (Aug. 9, 2021), <https://www.jdsupra.com/legalnews/nestle-v-doe-u-s-supreme-court-further-3095950/> (stating that “[m]oving forward, it may be difficult to bring claims against U.S. companies for violations beyond” the three original torts named in 1789, when the ATS was created). See generally *Nestlé USA, Inc.*, 141 S. Ct. 1931.

7. Defendant Nestlé, USA employs over 30,000 people in the United States across 31 states. *Nestlé in the United States*, NESTLÉ, <https://www.nestleusa.com/about-us> (last visited Nov. 21, 2022). In 2020, the company ranked highest at 38.44% for U.S. market share of chip, baking chocolate, and cocoa makers. *Top Chip/Baking Chocolate/Cocoa Makers, 2020*, MKT. SHARE REP. (Virgil L. Burton, III & Robert S. Lazich eds., 32nd ed. 2020) Gale, 2022. Business Insights: Essentials.

8. Defendants Cargill Incorporated Company and subsidiary Cargill Cocoa (Cargill) are a business-to-business food supplier that employs over 150,000 people globally. *Business at a Glance*, CARGILL, <https://www.cargill.com/food-beverage/cocoa-chocolate/business-at-a-glance> (last visited Oct. 22, 2021). Cargill produces and distributes cocoa and chocolate products worldwide. *Id.*

9. The Alien Tort Statute (ATS) was enacted by Congress in 1789 as part of Judiciary Act that established federal court systems to create a cause of action by an alien for a tort only in violation of the “law of nations,” or international law. See 28 U.S.C. § 1350; see also Dodge, *supra* note 6.

extraterritoriality.¹⁰ The plaintiffs, however, demonstrated in their complaint that operational decisions made in the US led to their trafficking and forced labor.¹¹ This holding disregarded the question asked on certiorari as to whether corporations could be liable under the ATS.¹² Although *Nestlé* left the door cracked for potential future ATS litigation, it is time to turn toward other sources of law, namely contract, for corporate supply chain accountability.¹³

Adopting contract clauses up and down the supply chain would effectively monitor corporate accountability for extraterritorial human rights violations and provide remedies when violations occur.¹⁴ To contract for human rights, buyers and suppliers could agree to standards set by third-party organizations¹⁵ or join a coalition that monitors supply chains.¹⁶ Alternatively, corporations could implement Model Contract Clauses (MCCs), like those that a working group under the American Bar Association¹⁷ created, which are aimed at increasing human rights due diligence in supply chains.¹⁸

The issue is that corporations lack incentive to incorporate and enforce these contract clauses because, especially in the US, courts are generally not holding corporations accountable, like

10. *Nestlé USA, Inc.*, 141 S. Ct. at 1936–37. Extraterritoriality is “the application of laws to people, entities, lands, environment, or activities beyond the borders of the state that promulgates the laws.” Stephen M. Sheppard, *Bouvier Law Dictionary Extraterritoriality*, WOLTERS KLUWER BOUVIER L. DICTIONARY DESK ED. (2012).

11. *See Doe I v. Nestlé USA Inc.*, 766 F.3d 1013, 1017–18 (9th Cir. 2014). *Doe v. Nestlé, S.A.*, 929 F.3d 623, 638 (9th Cir. 2019). First Amended Class Action Complaint for Injunctive Relief and Damages at 6–9, *Doe I v. Nestlé, S.A.*, 748 F. Supp. 2d 1057 (2009) (No. 205-CV-05133).

12. *Nestlé USA, Inc.*, 141 S. Ct. at 1940, 1950.

13. *See Dodge*, *supra* note 6.

14. *See* Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 5 WISC. L. REV. 10009, 1111-16 (2019).

15. *See infra* notes 157–60.

16. *See infra* note 161.

17. The American Bar Association (ABA) is a legal professional organization that sets standards and advances the rule of law within the United States. A.B.A., https://www.americanbar.org/about_the_aba/ (last visited Oct. 22, 2021).

18. *Contractual Clauses Project*, A.B.A. https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ (last visited Oct. 6, 2021).

in *Nestlé*.¹⁹ But various pressures to integrate supply chain contracts exist, including consumer awareness and corporate social responsibility (CSR);²⁰ environmental, social and government (ESG) compliance;²¹ and statutory regulations.²² Currently, proposed statutory measures with the greatest potential for impact in the global sphere are in the European Union (EU) and Canada because these regulations would affect multinational corporations operating in these regions, regardless of their headquarter location.²³ This Note proposes that the US should look toward contract law for corporate accountability for human rights supply chain violations. Furthermore, although CSR, ESG criteria, and statutory regulation work in tandem, foreign legislation will be the impetus for companies to implement contracts for human rights, and corporations should look toward incorporating contracts in the supply chain as an effective and efficient way to meet these statutory demands.

Part I of this note will demonstrate the context of forced labor in international law, the global development of corporate liability for human rights in the supply chain, and the growing interest in various forms of compliance. Part II will outline the EU resolution and the Canadian proposal on mandatory due

19. See generally *Nestlé USA, Inc.*, 141 S. Ct. 1931. See also *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (holding that when a corporation was sued under the ATS for activity happening outside of the U.S., the ATS does not have the presumption of territoriality). See also Samuel Estreicher & Julian G. Ku, *SCOTUS Again Restricts International Human Rights Law Suits*; *U.S. FOREIGN RELATIONS*, 266 N.Y.L.J. 3, 3 (2021).

20. CSR covers a range of actions aimed at consumer's social expectations of environmental and/or human rights initiatives. Florian Wettstein, *The History of 'Business and Human Rights' and its Relationship with 'Corporate Social Responsibility'*, in RSCH. HANDBOOK ON HUM. RTS. AND BUS. 23, 32 (Surya Deva & David Birchall eds., Edward Elgar Pub. 2020). CSR is often considered a public relations strategy rather than a systemic corporate pursuit. *Id.*

21. ESG is "a set of standards for a company's behavior used by socially conscious investors to screen potential investments." *Environmental, Social, and Governance (ESG) Criteria*, INVESTOPEDIA (Sept. 27, 2022), <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp>. The social branch of ESG considers working conditions. *Id.*

22. See *infra* notes 54–61; see generally *EU Commission Directive*; see also Bill C-262.

23. Ben Rutledge, *What US businesses need to know about the proposed EU law on corporate due diligence*, BUS. & HUM. RTS. RES. CTR. (Jul. 22, 2020), <https://www.business-humanrights.org/en/blog/what-us-businesses-need-to-know-about-the-proposed-eu-law-on-corporate-due-diligence/>. See also Bill C-262, art. 5, cl. b.

diligence. It will then illustrate that despite the rise in global corporate accountability for forced labor violations, the US deviates from this norm by continuously disregarding corporate accountability under ATS litigation.²⁴ Part III will suggest an alternative approach to the ATS for corporate accountability for forced labor in their supply chains by proposing that the pressure from foreign legislation would promote the implementation and enforceability of contract clauses.²⁵

I. FORCED LABOR AND CORPORATE ACCOUNTABILITY

Not only is forced labor a recognized violation of international law, but also corporations globally are being held accountable when these violations occur in their supply chain.²⁶ Additionally, policymakers recognize that operational-level grievance mechanisms and/or extraterritorial forums of adjudication are necessary for holding corporations accountable when violations occur.²⁷

24. See generally *Nestlé USA, Inc.*, 141 S. Ct. 1931. See also *Kiobel*, 569 U.S. at 108, 115. See also *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

25. Sarah Dadush, *Contracting for Human Rights and Corporate Due Diligence: Using the ABA Working Group's Model Contracts Clauses 2.0*, NOVA BUS. HUM. RTS. AND THE ENV'T (Apr. 14, 2021), <https://novabhre.novalaw.unl.pt/contracting-for-human-rights-and-corporate-due-diligence-using-the-aba-working-groups-model-contract-clauses-2-0/>.

26. Antonio Cassese, *A Plea for a Global Community Grounded in a Core of Human Rights*, in INTERNATIONAL HUMAN RIGHTS, THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 163 (Philip Alston & Ryan Goodman eds., 2012). See also Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating UNOCAL: The Expanding Web of Liability for Business Entities Incorporated in International Crimes*, 40 THE GEO. WASH. INT'L L. REV. 841, 845 (2009). International law is found in three sources: custom, treaties, and general principles. See Statute of the International Court of Justice, art. 38(1), 1945, 59 Stat. 1055 (stating that international sources of law come from conventions, international custom, "general principles of law recognized by civilized nations," and judicial decisions). See also *The Paquete Habana* 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law" and is determined by "customs and usages of civilized nations" when no treaty is present).

27. See U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶¶ 25–31, U.N. Doc. A/HRC/17/31 (June 16, 2011) [hereinafter *U.N. Guiding Principles*].

A. Forced Labor in International Law

Core values fundamental to all of humanity constitute international *jus cogens*, or “a set of peremptory norms that may not be derogated from.”²⁸ These norms are universal in that all nations must abide by them.²⁹ Engaging in forced labor is considered a violation of international *jus cogens*.³⁰ The United Nations (UN) further entrenched this ban on forced labor in international law.³¹

In 1948, the UN General Assembly specified customary standards by unanimously adopting the Universal Declaration of Human Rights (UDHR), a non-binding agreement that includes a ban on slavery and declares that everyone has the right to employment with fair conditions.³² In 1976, specific rights listed in the UDHR became binding when countries signed the International Covenant on Civil and Political Rights.³³ The enforceable treaty outlaws slavery and servitude, going so far as to say that in times of public emergency, sections of the treaty can be set aside, but the ban on slavery can never be derogated.³⁴ As of 2018, 172 countries have signed the treaty.³⁵

Although not a binding source of law, the American Law Institute’s³⁶ Restatement (Third) of the Foreign Relations Law of the United States is influential in the sphere of international law.³⁷

28. Cassese, *supra* note 26.

29. *Id.* at 164.

30. *Id.* at 163.

31. *See id.* *See also* U.N. Charter, preamble, arts. 1(1), 55. *See also* G.A. Res. 217A, at 4 (Dec. 10, 1948).

32. G.A. Res. 217A, at 4, 8, 23 (Dec. 10, 1948).

33. G.A. Res. 2200A (XXI), at 8 (Mar. 23, 1976). The International Covenant on Civil and Political Rights (ICCPR) obligates signatories to protect basic human rights, such as equality before the law, the right to life, and freedom of thought and religion. *Id.* at 2, 6, 18.

34. *Id.* at 4.

35. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (Apr. 2019), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>.

36. The American Law Institute (ALI) is an independent organization that produces “scholarly work to clarify, modernize, and otherwise improve the law.” *About ALI*, THE AM. L. INST., <https://www.ali.org/about-ali/> (last visited Oct. 26, 2021).

37. *See* Samuel K. Murumba, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Themes and Variations*, 25 BROOK. J. INT'L L. 5, 10 (1999) (stating that the Restatement (Third) of the Foreign Relations Law “contains one of the most authoritative articulations of the customary international law of human rights.”).

The Restatement says that a State violates international law if “it practices, encourages, or condone . . . slavery or slave trade.”³⁸ Furthermore, even if States are not bound by treaties that outlaw slave trade, they are still “bound by . . . the same obligations as a matter of customary law.”³⁹

B. Corporate Liability and the Global Rise of Accountability for Forced Labor

While corporate executives can be criminally liable for aiding in international human rights violations, such as war crimes, corporations themselves have generally not been a party in international court.⁴⁰ In 1970, the International Court of Justice⁴¹ found that whether a corporation could be considered a party to a civil case depended on the country interpreting the law, not necessarily on international common law.⁴² One example of such interpretation from the United Kingdom (UK) is *Lubbe v. Cape Plc*, where the House of Lords held that a parent company could be responsible for its overseas subsidiaries if it was involved in operations, if its directors and employees knew or should have known what was happening, if action was or was not taken, and if a duty of care between the parent company and the subsidiaries was broken.⁴³

In a growing international norm, both statutes and courts are expanding the “web of liability” for corporations that commit human rights violations.⁴⁴ A big contribution to this shift was the

38. Restatement (Third) of Foreign Relations Law § 702 (Am. L. Inst. 1987). “Condoning” can include not providing access to a remedy, not taking steps to prevent the abuse, or not punishing perpetrators. *Id.* cmt. b.

39. *Id.* cmt. e.

40. See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 N.W. J. INT’L HUM. RTS. 304, 306 (2008) (stating that this principle was established at the Nuremberg trial, where corporate leaders were indicted alongside top Nazi government officials).

41. The International Court of Justice (ICJ), based in The Hague, is “the principal judicial organ of the United Nations.” I.C.J., <https://www.icj-cij.org/en> (last visited Oct. 24, 2021).

42. See *Barcelona Traction, Light & Power Co. Ltd. (Blg. V. Spain)*, 1970 I.C.J. 3, 51 (Feb. 5).

43. *Lubbe v. Cape Plc*, [2000] 1 W.L.R. (H.L.) 6, 24, 33 (appeal taken from Eng.).

44. See Thompson, *supra* note 26, at 845 (discussing the “emerging transnational ‘web of liability’ for business entities) (citing ANITA RAMASASTRY & ROBERT C. THOMPSON, *FAFO, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE*

UN Human Rights Council's unanimous approval of the Guiding Principles of Businesses and Human Rights (UNGPs), which outline the symbiotic relationship between government and business regarding international human rights.⁴⁵ The UNGPs set the standard that government has a duty to protect against human rights violations of international law, businesses have an ethical obligation to respect individual rights implied by this duty, and both must provide adequate remedial solutions for violations.⁴⁶

Specifically, the government's responsibility is to ensure sufficient oversight of international human rights obligations and engage with businesses to mitigate risk.⁴⁷ A business's responsibility is to avoid contributing to negative human rights impacts and to seek to prevent or mitigate these impacts.⁴⁸ This mitigation can be achieved by practicing human rights due diligence (HRDD), an ongoing and evolving process of assessing human rights impacts within a business, integrating these findings into the corporation, monitoring responses, and communicating this assessment.⁴⁹ The extent of due diligence implementation varies according to size and complexity of the business.⁵⁰ Additionally, remedial and grievance systems should be incorporated into a business's due diligence plan, and governments should create sufficient and accessible judicial mechanisms.⁵¹ Although non-binding, the UNGPs are arguably on the path toward becoming a custom of international law because they set forth a framework that has led to legislation and norms around the world.⁵²

1. Adopted Legislation Post-UNGPs

Since the UNGPs, the world has witnessed an increase in the amount of legislation regulating businesses for violations of

BREACHES OF INTERNATIONAL LAW (2006), <http://www.fao.no/pub/rapp/536/536.pdf>. See also *infra* notes 53–69.

45. See *U.N. Guiding Principles*, General Principles.

46. See Wettstein, *supra* note 20, at 29; see also *U.N. Guiding Principles*, General Principles.

47. See *U.N. Guiding Principles*, ¶¶ 1–10.

48. *Id.* ¶ 13.

49. *Id.* ¶ 17.

50. *Id.* ¶ 17.

51. *Id.* ¶¶ 25–31.

52. See Mark B. Taylor, *The human rights due diligence in theory and practice*, in RSCH. HANDBOOK ON HUM. RTS. AND BUS. 100–01 (Surya Deva & David Birchall eds., 2020).

forced labor in the supply chain.⁵³ For example, the United Kingdom enacted the Modern Slavery Act in 2015, incorporating due diligence and mandating that corporations prepare slavery and human trafficking statements each fiscal year.⁵⁴ Similarly, in 2017, France adopted the Law of Vigilance, requiring companies of a certain size to establish and publish their due diligence plans.⁵⁵ If a company fails to implement this plan, then it can be held civilly liable.⁵⁶ In 2019, the Netherlands implemented the Child Labor Due Diligence Act, establishing a “duty of care” to prevent the use of child labor in a company’s supply chain, requiring due diligence to assess this duty, and establishing criminal and civil liability if this duty is breached.⁵⁷ The Bangladesh Accord, entered into in 2013 and renewed in 2018, is a prominent initiative that provides labor unions in the garment sector with enforceable rights.⁵⁸ Germany passed the Act on Corporate Due Diligence in Supply Chains in 2021, establishing mandatory obligations enforcing due diligence procedures regarding human rights within supply chains.⁵⁹ China and Singapore have attempted legislation on HRDD, but are both still trying to garner enough support to enact these laws.⁶⁰ In 2017, lobbyists in Hong Kong renewed a push for legislation to end forced labor.⁶¹

53. *Id.*

54. *See* Modern Slavery Act (2015), ¶ 54. Similarly, Australia adopted legislation that mandates reporting regarding modern slavery in the supply chain. *See also Modern Slavery Act 2018* (Austl.).

55. Code de commerce [C. Com.] [Commercial Code] art. L. 225-102-4-5 # (Fr.).

56. *Id.*

57. Wet zorgplicht kinderarbeid Stb./S. 2019 (Neth.); Jones Day, *The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor*, LEXOLOGY (Feb. 4, 2020), <https://www.lexology.com/library/detail.aspx?g=c65161b5-1450-405b-9848-1d5612a4954f>

58. *See* Accord on Fire and Building Safety in Bangladesh, May 15, 2018.

59. Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten [Act on Corporate Due Diligence in Supply Chains], July 16, 2021, GESETZAT at 16 (Ger.).

60. *See* GIBSON, DUNN & CRUTCHER LLP, *supra* note 5.

61. *See* Beh Lih Yi, *Hong Kong lawmaker vows fresh push for UK-style anti-slavery Law*, REUTERS (Jan. 9, 2019, 3:30 AM) <https://www.reuters.com/article/us-hongkong-trafficking-lawmaking/hong-kong-lawmaker-vows-fresh-push-for-uk-style-anti-slavery-law-idUSKCN1P30PR>.

2. Global Court Decisions Trend Toward Corporate Accountability

In addition to legislation, courts around the world have also seen this shift toward holding corporations liable for supply chain violations occurring outside the country where the corporation is headquartered.⁶² Notably, in *Lugowe v. Vendanta*, the Supreme Court of the United Kingdom found that when Zambian citizens sued the UK-owned parent company of a Zambian mine for negligence and breach of statutory duty, the parent company could be liable in British Court.⁶³ The court held that when a parent company “holds itself out as exercising . . . supervision and control of its subsidiaries,” it may be liable to third parties.⁶⁴ When Pakistani nationals brought an action against a German retailer for injuries and wrongful death claims arising from an incident that occurred in Pakistan, which was the first time that a transnational corporation was sued in Germany for a human rights violation that occurred in another country, the court stated that corporations could be liable if there were sufficient connections to the claim.⁶⁵ In the Netherlands, when Shell⁶⁶ was sued as the parent company of Shell Nigeria because

62. See e.g., INTERNATIONAL COMMISSION OF JURISTS, REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 4 (Vol. 3, 2008) (stating that “in every jurisdiction, victims of gross human rights abuses or their families can initiate civil claims themselves.”). See also Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 Am. Bus. L.J. 579, 581 (2021) (stating that “civil lawsuits brought against multinational corporations (MNCs) are on the rise globally.”).

63. See *Lungowe v. Vendanta*, [2019] UKSC 20, [2017] EWCA (Civ.) 53 (Eng.).

64. *Id.*

65. *Jabir et al. v. KiK Textilien und Non-Food GmbH*, 7 O 95/15, 59-60 (Landgericht Dortmund) (Ger.) (note, this case was dismissed due to a time bar on the claim); see also Jonas Poell et al, *Jabir and others v. KiK Textilien und Non-Food GmbH-Dortmund court dismisses lawsuit*, LEXOLOGY (Jan. 11, 2019) <https://www.lexology.com/library/detail.aspx?g=c7f74ae0-9c8e-41de-ad1c-9cab3c4b83b8>.

66. Shell is a global energy company operating in over 70 countries with more than 80,000 employees. *About Us*, SHELL GLOB., <https://www.shell.com/about-us.html> (last visited Oct. 22, 2021).

of damage from an oil spill, the court found the parent corporation liable.⁶⁷

Furthermore, corporate liability for human rights violations is not limited to European courts.⁶⁸ Canadian courts have consistently found Canadian corporations liable when breaches of customary international law occur outside of Canada.⁶⁹ For example, when Guatemalans sued a parent corporation in British Columbia for negligence and battery, the court held that the corporation could be liable when they were aware of and did not stop the excessive force occurring in Guatemala.⁷⁰ Therefore, the rise in civil liability alongside statutory regulations indicates the crystallizing global custom of corporate accountability for human rights violations.

C. Social Pressures Mount for Corporate Accountability for Human Rights Violations

Consumer, shareholder, and business support for monitoring the supply chain for human rights violations continues to expand.⁷¹ CSR is a range of business initiatives driven by the combination of social expectations and economic interests.⁷² Today, CSR has grown to be ubiquitous within the corporate sphere, to the point where businesses must engage with it to stay

67. See HoF 3 oktober 2021, RvdW 2021, 200.126.804 m.nt (Oguru/Royal Dutch Shell, plc.) (Neth.).

68. See *e.g.*, Hiribo Mohammed Fukisha v. Redland Roses Limited (2006) eK.L.R. (Kenya) <http://kenyalaw.org/caselaw/cases/view/31767/> (holding that when a corporation was sued for causing serious bodily harm due to exposure to hazardous chemicals, the corporation was liable); see also *Union Carbide Corporation v. Union of India* (1991) 4 S.C.C. 584 (India) (finding that when residents sued for injuries due to a chemical plant's toxic gases, a court held the corporation liable).

69. See *e.g.*, *Neysun Res. Ltd. v. Araya*, [2020] S.C.C. 5 (Can.) (finding that when three Eritrean workers sued a Canadian company for a breach of international law that caused injury in Eritrea, the corporation could be liable); *e.g.*, *Bil'in (Vill. Council) v. Green Park Int'l Ltd.*, [2009] Q.C.C.S. 4151, 188, 199 (Can. Que.) (stating that if a corporation did commit a war crime, it would be held liable under civil law); *e.g.*, *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, 54-75 (Can. Ont. Sup. Ct.) (QL) (finding that when villagers were sexually assaulted by security personnel of the Canadian company's subsidiary, the Canadian company owed a duty of care to the villagers).

70. *Garcia v. Tahoe Resources Inc.*, [2017] B.C.C.A. 39 (Can.).

71. See *infra* notes 72–88.

72. See Wettstein, *supra* note 20, at 32.

competitive.⁷³ The Governance & Accountability Institute⁷⁴ found that 92 percent of the S&P 500 Index published sustainability reports in 2020.⁷⁵

Similarly, investors incline toward ESG compliance not only for ethical beliefs, but also to mitigate risk factors that could cost them future dollars.⁷⁶ In a statement signed by 105 investors calling for mandatory HRDD legislation, the Investor Alliance for Human Rights⁷⁷ writes, “This type of regulation increases the robustness of corporate risk management processes, helps investors achieve higher risk-adjusted returns, and contributes to economic growth.”⁷⁸ Likewise, US Trust finds that millennial interest in ESG investing continues to grow and that nearly half of those engaging in impact investing believe that corporations should be held accountable for their actions.⁷⁹ An important aspect of the EU’s mandatory due diligence resolution is that it obligates integration of due diligence into a business’s policies,

73. See Mo Ghoneim, *Why Corporate Social Responsibility Matters*, FORBES, (June 14, 2019, 7:30 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2019/06/14/why-corporate-social-responsibility-matters/?sh=4ee7965132e1>.

74. The Governance & Accountability Institute is a consulting firm that focuses on ESG and sustainability. *Guiding the Next Leaders in Sustainability*, G&A INST., INC., <https://www.ga-institute.com/about.html> (last visited Nov. 26, 2021).

75. Press Release, Governance & Accountability Institute, Business Wire, 92 % of S&P 500[R] Companies and 70% of Russell 1000[R] Companies Published Sustainability Reports in 2020, G&A Institute Research Shows, (Nov. 16, 2021) (on file with author).

76. See INVESTOPEDIA, *supra* note 21.

77. The Investor Alliance for Human Rights is a membership-based initiative made up of over 200 institutional investors representing over twelve trillion U.S. dollars in assets in nineteen countries that focuses on investor responsibility and corporate engagements with respect to human rights. *About the Investor Alliance for Human Rights*, INVESTOR ALL. FOR HUM. RTS., <https://investorsforhumanrights.org/about> (last visited Nov. 21, 2021).

78. Press Release, Investor Alliance for Human Rights, The Investor Case for Mandatory Human Rights Due Diligence (Apr. 21, 2020) (on file with author). Additionally, the Alliance submitted a letter to the EU in support of the proposal on mandated HRDD. See Memorandum from Investor Alliance for Human Rights, Investor Statement in Support of Mandated Human Rights and Environmental Due Diligence in the European Union (Oct. 7, 2021) (on file with author).

79. See U.S. TRUST, *2017 U.S. Trust Insights on Wealth and Worth*, BANK OF AM. CORP., at 65 (Sept. 2017).

forcing open conversation about HRDD with shareholders and consumers.⁸⁰

Lastly, there is global growth in corporate support for mandatory due diligence measures because compliance becomes easier when more corporations practice it.⁸¹ Various dilemmas arise out of HRDD, all of which are manageable if collective action is taken, rather than piecemeal corporate plans or country-by-country legislation.⁸² For example, national laws could conflict with international laws, or the goal of monitoring human rights could conflict with a corporation's ultimate objective of maximizing profits.⁸³ These challenges, however, are mitigated when more countries and corporations engage in due diligence because the strength in numbers gives companies the necessary leverage to enact changes that limit adverse impacts.⁸⁴ When the EU legislation mandating due diligence was initially proposed, twenty-five global corporations signed a letter in support.⁸⁵ Since then, more call-to-actions and joint letters in support from businesses have been made.⁸⁶ Moreover, standard-setting organizations like the Business for Inclusive Growth,⁸⁷ which works closely with policymakers, are in favor of widespread legislation.⁸⁸

80. See *EU Commission Directive*, art. 5.

81. See *infra* notes 82–88.

82. See Taylor, *supra* note 52, at 93–95; see also *EU Commission Directive*, at 11.

83. *Id.*

84. *Id.*

85. See Letter in Support for EU framework on mandatory human rights and environmental due diligence (Sept. 2, 2020) (on file with author). Signees include Unilver, H&M Group, Aldi, and more. *Id.*

86. See generally *List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation*, BUS. & HUM. RTS. RES. CTR. (June 6, 2019), <https://www.business-human-rights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/>.

87. “Business for Inclusive Growth is a partnership between the OECD and major corporations,” committed to developing corporate best practices for HRDD. *Who We Are*, B4IG, <https://www.b4ig.org/who-we-are/> (last visited Nov. 21, 2021). Corporate members include Microsoft, Goldman Sachs, Michelin, Salesforce, Panera Bread, and more. *Id.*

88. See *id.*

II. THE EUROPEAN UNION AND CANADA PROPOSE LEGISLATIVE CHANGE WHILE THE UNITED STATES LAGS BEHIND

A. *European Union Directive*

While the UNGPs set a standard of HRDD, their voluntary nature has not sufficiently fought issues like forced labor because few countries and companies have opted into them.⁸⁹ The European Union's adopted legislative directive aims to "improve corporate governance practices" by integrating mitigation processes, "increase corporate accountability for adverse impacts," and provide access to remedies to "those affected by adverse human rights and environment impacts of corporate behaviour."⁹⁰ The resolution seeks to create uniformity across the EU as it relates to HRDD, rather than the piecemeal legislation that is currently in place.⁹¹ Furthermore, it is "extra-territorial by design" because it requires that companies doing business within the EU take responsibility for their global operations.⁹²

The directive affects large companies and small and medium-sized companies that are publicly listed or are high risk.⁹³ All those effected must publish insights into their own compliance.⁹⁴ Moreover, the directive incorporates the UNGP's Guiding Principles on HRDD, reflecting the need for an ongoing mitigation and remedial process, and the level of compliance should be proportionate to the size of the business.⁹⁵ In addition to internal remedial mechanisms, the legislation requires that States have appropriate sanctions and processes to hold corporations civilly liable.⁹⁶ Finally, the directive requires that companies, where

89. See *EU Commission Directive*, at 1–2 (explaining that part of the need for the Directive is that companies face a lack of legal clarity regarding HRDD because the "existing voluntary standards on responsible business conduct" and that "[v]oluntary action does not appear to have resulted in large scale improvement across sectors"); see also Pierre Brochet, *European Union: New EU Mandatory Due Diligence Regime On Human Rights, The Environment and Good Governance*, MONDAQ BUS. BRIEFING (Aug. 13, 2021), <https://www.mondaq.com/corporate-and-company-law/1101852/new-eu-mandatory-due-diligence-regime-on-human-rights-the-environment-and-good-governance>.

90. *EU Commission Directive*, Explanatory Memorandum, at 3.

91. See Brochet, *supra* note 89; see also *EU Commission Directive*, at 1–2.

92. Brochet, *supra* note 89.

93. *EU Commission Directive*, at 14.

94. *EU Commission Directive*, art. 4, cl. 2, art. 11.

95. *Id.* at 14; *Id.* preamble, cl. 12, 31.

96. *Id.* arts. 18–20.

applicable, work in tandem with on-the-ground stakeholders, regardless of their country of operation, to ensure that human rights obligations are being upheld.⁹⁷

B. Canadian Bill

Although Canada currently has an enhanced CSR Strategy,⁹⁸ it is ineffective because there is no mandatory imposition on businesses and because CSR must be updated to reflect a modern understanding of corporate responsibility.⁹⁹ Even though Canadian courts are willing to hold corporations liable for human rights violations that occur outside of the country, no corresponding legislation is in place.¹⁰⁰ On March 29, 2022, Canada's House of Commons introduced Bill C-262, which would require businesses to engage in due diligence.¹⁰¹ Before the legislation was officially proposed, the Canadian Network on Corporate Accountability (CNCA)¹⁰² drafted mandatory due diligence legislation that was introduced to the Canadian Parliament in November 2021 via a joint letter with the support from over 150 organizations and unions.¹⁰³ Further, as a sign of the bill's hopeful

97. *Id.* preamble, cl. 49, art. 7, cl. 2, art. 14, cl. 3.

98. Announced in 2014, Canada's enhanced Corporate Social Responsibility Strategy created government initiatives that support companies to "promote Canadian values and operate abroad with the highest ethical standards." *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad*, GOV'T OF CAN. (May 13, 2021) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.

99. *See generally* Diplomacy Trade and Corporate Evaluation Division, Global Affairs Canada, *Horizontal Evaluation of Canada's Enhanced Corporate Social Responsibility (CSR) Strategy* (2020). The report found that five years into Canada's Enhanced CSR Strategy, improvement was necessary because companies were confused by the mixed voluntary and mandatory approach to CSR and as to potential legal repercussions and because the lack of clarity regarding Canada's definition of CSR and to whom it applied. *Id.* at 21, 24.

100. *See id.*; *see also supra* notes 69–70.

101. *See* Bill C-262, Preamble.

102. The CNCA advocates for policy reform to "ensure that Canadian companies respect human rights and the environment when working abroad." *What we do*, CNCA, <https://cnca-rcrce.ca/about-us/what-we-do/> (last visited Nov. 17, 2021).

103. *See* Letter from Canadian Network on Corporate Accountability to the 44th Parliament, Global Sign-On Letter Proposed mHREDD law in Canada (May 31, 2021) (on file with author); *see also Human Rights and Environmental Due Diligence Legislation in Canada*, CNCA, <https://cnca->

passing, in January 2022, a conservative Member of Parliament publicly supported CNCA's call to action, which the CNCA says signals a future with more political and public approval.¹⁰⁴ Even more, Prime Minister Justin Trudeau issued mandate letters to cabinet members in December 2021, and priorities for the Minister of Labour included working to "eradicate forced labour from Canadian supply chains," introducing legislation to that effect, and ensuring that businesses operating abroad are not contributing to human rights abuses.¹⁰⁵

The March 2022 *Corporate Responsibility to Protect Human Rights Act* would apply to entities incorporated or formed within Canada in addition to those with a place of business, carries on business, or has assets in Canada.¹⁰⁶ The Act obligates corporations to avoid causing adverse human rights impacts both inside and outside of Canada.¹⁰⁷ To engage in the ongoing due diligence process, businesses must post and update annual reports on their risks and mitigation steps.¹⁰⁸ Furthermore, the Act creates a private right action, wherein "any person who raises a serious issue" and is directly affected or has a genuine interest in the matter, presents a reasonable means of proceeding, and has no conflict of interest has standing, and relief can include damages, injunction, specific performance, and any other appropriate relief.¹⁰⁹ Canadian courts have jurisdiction to hear these suits if the action is brought against an entity that is domiciled or ordinarily a resident of that jurisdiction, the entity agrees to the court's jurisdiction, or there is a "real and substantial connection" between the jurisdiction and facts of the case.¹¹⁰ Lastly,

rcrce.ca/campaigns/mhredd/ (last visited Oct. 18, 2022). Supporters include Canadian Labour Congress, Oxfam Canada, and more. *Id.*

104. See Michael Swan, *MP endorses corporate responsibility law*, THE CATH. REG. (Jan. 6, 2022), <https://www.catholicregister.org/item/33899-mp-endorses-corporate-responsibility-law>.

105. Cristin Schmitz, *Prime minister hands out mandate letters to cabinet ministers detailing specific objectives*, THE LAW. DAILY (Dec. 17, 2021, 12:30 PM), <https://www.thelawyersdaily.ca/articles/32271/prime-minister-hands-out-mandate-letters-to-federal-cabinet-ministers-detailing-specific-objectives>.

106. Bill C-262, art. 5.

107. *Id.* art. 6.

108. *Id.* art. 9.

109. *Id.* art. 10, cl. 3-4.

110. *Id.* art. 14.

nothing in the Act precludes criminal prosecution should an offense be committed.¹¹¹

C. *The Current Condition of the United States*

Although the US regulates specific industries regarding human rights, it does not have any sort of legislation on par with human rights due diligence.¹¹² When corporations with headquarters or operational bases in the US have violated human rights extraterritorially in the supply chain, parties have attempted to hold them accountable via the judicial system under the ATS.¹¹³ But, as litigation has progressed, courts have whittled away at the ability to sue for human rights violations and continued to disregard the question of whether corporations can be held liable.¹¹⁴ Of 308 lines of cases that have been brought under the ATS against individual and corporate defendants, only fifty-two have led to judgments for the plaintiffs.¹¹⁵

The ATS was enacted by Congress in 1789 to create a cause of action in the federal district courts by a noncitizen for a tort only in violation of international law.¹¹⁶ The ATS was not used against a corporation until 1996, when villagers from Myanmar (formerly known as Burma) sued Unocal Oil Corporation (Unocal)¹¹⁷ alleging that in collaboration with the military regime,

111. *Id.* art. 11.

112. See GIBSON, DUNN & CRUTCHER, *supra* note 5. See e.g., Exec. Order No. 13,312, 68 Fed. Reg. 45,151 (Jul. 29, 2003). An example of industry-specific regulation is The Clean Diamond Trade Act, which created criminal and civil penalties for a person or corporation that imports rough diamonds, also known as blood diamonds, or diamonds from conflict areas. Tina Muscarella Gooch, *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certificate Scheme?*, 48 NAT. RESOURCES J. 189, 195–97 (2008). The Executive Order has been carried out by a series of regulations that give departments of State, Treasury, Homeland Security, and Commerce the ability to implement the act. *Id.* at 197.

113. See Wettstein, *supra* note 20, at 25–27, 31.

114. See Dodge, *supra* note 6; see also Beth Stephens, *The Rise and Fall of the Alien Tort Statute*, in RSCH, HANDBOOK ON HUM. RTS. AND BUS. 55 (Surya Deva & David Birchall eds., 2020).

115. Oona A. Hathaway, Christopher Ewell & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 33 (forthcoming 2022).

116. 28 U.S.C. § 1350.

117. Unocal Oil Corporation was an American corporation that led the way worldwide in crude oil and natural gas. See *Unocal Corporation*, ENCYC.

the corporation was responsible for murder, torture, rape, and forced labor.¹¹⁸ In a promising decision, the Ninth Circuit found that Unocal could be held liable under the ATS for aiding and abetting in forced labor, murder, and rape.¹¹⁹ But, before trial, the parties settled for what was reported as tens of millions of dollars, and part of the settlement included an agreement to vacate prior decisions.¹²⁰

Since *Unocal*, the USSC has refused to answer the question of corporate liability under the ATS and has reduced its applicability.¹²¹ In *Sosa v. Alvarez-Machain* in 2004, the USSC found that the ATS was purely jurisdictional, giving plaintiffs the right to bring suit in federal district courts, and that any claims brought should conform with violations of international law that were accepted as customary law when the statute was enacted in 1789.¹²² The Court was concerned with exceeding its authority by interfering with foreign affairs managed by the Legislative and Executive Branches and by overstepping congressional authority by creating a new cause action.¹²³

In 2013, when Royal Dutch Petroleum Co. was sued under the ATS for aiding and abetting the Nigerian Government in crimes against humanity, torture and cruel treatment, and more, the USSC held that the ATS does not have the presumption of extraterritoriality because nothing in the statute's language rebuts this presumption.¹²⁴ To rebut this presumption against extraterritoriality, the claim must "touch and concern" the US "with sufficient force."¹²⁵ In subsequent ATS litigation, a lack of touch and concern to the US has been the leading reason for dismissals.¹²⁶ Moreover, a few years later, in *Jesner v. Arab Bank*,

BRITANNICA (Dec 10, 2014), <https://www.britannica.com/topic/Unocal-Corporation>. The company was acquired by Chevron Corp. in 2005. *Id.*

118. *See* *Doe I v. Unocal Corp.*, 395 F.3d 932, 938–41 (9th Cir. 2002).

119. *Id.* at 947.

120. *John Doe I v. Unocal Corp.*, 403 F.3d 708, 708 (9th Cir. 2005); *see also* Stephens, *supra* note 114, at 46, 59.

121. *See* Stephens, *supra* note 114, at 47.

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

123. *Id.* at 725–28.

124. *Kiobel*, 569 U.S. at 113, 115–16 (stating that "when a statute gives no clear indication of an extraterritorial application, it has none" (quoting *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869, 2878 (2010))).

125. *Id.* at 124–25.

126. *See* Hathaway, *supra* note 115, at 34.

the Court found that foreign corporations could not be sued in the US under the ATS.¹²⁷

In 2021, the USSC nearly closed the door on all ATS litigation for human rights violations.¹²⁸ In *Nestlé v. Doe*, when Nestlé and Cargill were sued under the ATS for aiding and abetting in human trafficking and forced labor that occurred in Côte d'Ivoire, the question asked on certiorari to the USSC was whether a corporation could be held liable under the ATS.¹²⁹ The Court, however, ignored the question of corporate liability in its holding, although five justices in their concurring and dissenting opinions stated that there should not be a difference between individual and corporate defendants.¹³⁰ Instead, the Court found that extraterritoriality had not been established.¹³¹ Despite allegations in the plaintiffs' complaint of the defendants' financial control of the area, training and funding of farms, and exclusive trade agreements, the USSC held that "operational decisions" are "generic allegations" that do not sufficiently touch and concern the US.¹³² The decision brought attention to the need for the legislature to step in to regulate the issue because the USSC feared that a ruling on the merits would reach beyond the scope of the judicial power.¹³³

On May 5, 2022, two senators took initial steps in response to the *Nestlé* decision by introducing legislation that would clarify the ATS by expressly stating that the statute applies

127. *Jesner*, 138 S. Ct. at 1403. There, plaintiffs sued Arab Bank, PLC, a Jordanian institution with a branch in New York City, for facilitating or causing in part terrorist acts in the Middle East. *Id.* at 1393. The Court reasoned that allowing ATS litigation of foreign corporations would discourage investments abroad and overstep legislative authority. *Id.* at 1405–06.

128. *See* Dodge, *supra* note 6.

129. *See Nestlé USA, Inc.*, 141 S. Ct. at 1940.

130. *Id.* at 1940–42, 1948 n.4, 1950.

131. *Id.* at 1937.

132. *Id.*; *see also* First Amended Class Action Complaint for Injunctive Relief and Damages ¶¶ 31–56, *Doe I v. Nestlé, S.A.*, 748 F. Supp. 2d 1057 (2009) (No. 205-CV-05133). In the original complaint, defendants included Nestlé, SA, Nestlé, USA, and Nestlé Cote d'Ivoire, SA. After *Jesner*, 138 S. Ct. at 1386, 1406, the plaintiffs were given leave to amend the complaint to include only Nestlé, USA. *See also* *Doe v. Nestlé, S.A.*, 929 F.3d 623, 642–43 (9th Cir. 2019) (holding that plaintiffs could have leave to amend complaint in line with *Jesner* holding).

133. *Nestlé USA, Inc.*, 141 S. Ct. at 1938–40.

extraterritorially, but this legislation is still at a very early stage.¹³⁴ Likewise, Senator Kristen Gillibrand introduced a bill to amend the Fair Labor Standards Act of 1938, which would require employers to restructure their pay rates so that American garment workers get at least minimum wage.¹³⁵ The introduced bill, however, does not obligate change for practices occurring outside the US.¹³⁶ Individual states have also started to react to the need for human rights due diligence, but the piecemeal legislation leads to the same issues as the patchwork currently within the EU: because only two states have proposed or adopted legislation, internal regulation is fragmented and generally ineffective.¹³⁷

III. AN ALTERNATIVE APPROACH TO CORPORATE ACCOUNTABILITY

Considering the holding in *Nestlé* and limitations on tort liability and notwithstanding the piecemeal momentum in this arena, corporations in the US have minimal pressure to engage in supply chain oversight.¹³⁸ Currently, corporations can independently engage in CSR, comply with ESG criteria, or voluntarily opt in to HRDD.¹³⁹ These initiatives, however, do not effectively impose enforceability or remedies on corporations for human rights supply chain violations.¹⁴⁰ The slow roll out of European countries legislating HRDD statutes indicates that without making it mandatory, States are slow to engage in this oversight.¹⁴¹ Likewise, concerns over feasibility of supply chain management are more easily mitigated when a majority engages in

134. Press Release, Durbin, Brown Introduce Legislation to Clarify Critical Tool for Holding Human Rights Violators Accountable (May 5, 2022).

135. Fashioning Accountability and Building Real Institutional Change Act, S. 4213, 117th Cong. (2022).

136. *See id.*

137. *See* S.B. S7428, 2021 Leg., Reg. Sess. (N.Y. 2021) (requiring fashion retail sellers and manufacturers to disclose due diligence policies; as of July 2022, the bill is in Senate Committee); *see also* The Transparency in Supply Chains Act, Cal. Civ. Code § 1714.43 (West 2022) (California's Act mandates that certain businesses publicize their supply chain information).

138. *See supra* note 6; *see also Nestlé USA, Inc.*, 141 S. Ct. at 1937.

139. *See U.N. Guiding Principles*, General Principles.

140. *See infra* notes 180–89.

141. *See* Brochet, *supra* note 89; *see also, e.g.*, S.B. S7428, 2021 Leg., Res. Sess. (N.Y. 2021); *see also, e.g.*, Cal. Civ. Code § 1714.43.

oversight.¹⁴² In light of this, parties looking to hold corporations accountable within the US must look to other sources of law, like contracts, to create a duty to regulate the supply chain.¹⁴³

A. How to Contract for Human Rights

A contract for corporate social responsibility “seeks normative social change.”¹⁴⁴ Contracting for human rights encourages institutional re-framing within a corporation by integrating internal resources for communication, grievances, and remediation.¹⁴⁵ Similar to HRDD, evaluating these contracts is a constant and flowing process.¹⁴⁶ While contracts typically are bilateral or involve known parties, a contract for human rights can involve third-party beneficiaries that might be unknown at the time.¹⁴⁷ These third parties could include shareholders, trade unions, communities, or organizations.¹⁴⁸ Alternatively, the contract could give explicit rights to named third-party beneficiaries, like workers.¹⁴⁹

Currently, contracts between buyers and suppliers often include a supplier code of conduct or sustainability clause, which in theory requires that suppliers respect workers’ rights.¹⁵⁰ To

142. See *supra* notes 82–84.

143. See *id.* See also Desirée LeClercq, *Nestlé United States, Inc. v. Doe* 141 S. Ct. 1931 at https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf. *United States Supreme Court, June 17, 2021*, 115 AM. J. INT’L L. 694, 698 (2021) (stating that “[v]oluntary corporate codes of conduct have failed...to ensure respect for human and labor rights in supply-side countries). See also Bettina Braun et al., *Worker-Enforceable Supplier Codes of Conduct as a Tool for Access to Justice in Global Supply Chains*, 1 GLOB. LABOUR RTS. REP. 7 (2021) (discussing how contracts can “provide workers with access to remedy for certain abuses through supplier contracts.”).

144. See Lipson, *supra* note 14, at 1111. Rather than enforceable in the traditional sense, a contract for social responsibility can deliver normative change by filling in traditional governance gaps and providing flexible ways to enforce social promises. *Id.* at 1111–15.

145. Dadush, *supra* note 25.

146. *Id.*

147. Braun, *supra* note 143, at 8–9.

148. See Lipson, *supra* note 14 at 1117. See, e.g., Bill C-262, art. 10, cl. 3 (stating that a person may bring action when they raise “a serious issue and is either directly affected by the matter” or has a genuine interest in, presents a reasonable means of advancing the proceedings, and has no conflict with the matter).

149. See, e.g., Accord on Fire and Building Safety in Bangladesh, ¶¶ 8–10, May 15, 2018 (expressly giving remedial rights to workers).

150. See Braun, *supra* note 143, at 8.

be effective, however, these clauses must be enforced by buyers.¹⁵¹ Predictably, the clauses are rarely enforced, so they are merely in place as a box-ticking exercise.¹⁵²

One avenue for contracting for social responsibility is to incorporate the American Bar Association's MCCs.¹⁵³ The MCCs are set up to "operationalize" human rights policies so that workers are brought into the "binding and enforceable" sphere of business contracts.¹⁵⁴ Furthermore, they incorporate HRDD, set forth a buyer and supplier code, and create remedial plans if a human rights violation occurs.¹⁵⁵ The MCCs are not simply a box-ticking exercise because the clauses outline obligations that are part of an ongoing process and set out unique remedies to tackle non-traditional contract issues.¹⁵⁶

Other routes for contracting for human rights could be either to import standards from an organization or to require a party to join a group that monitors, certifies, and/or sets guidelines for supply chain management.¹⁵⁷ For example, the International Organization for Standardization creates standards agreed to by international experts about various components of HRDD, and a corporation abiding by these standards can get certified.¹⁵⁸ Similarly, a party could choose to follow the standards set by the Global Reporting Initiative, which helps organizations evaluate their impact by encouraging transparency and reporting.¹⁵⁹ Alternatively, a corporation could follow standards set by Social Accountability International, an organization that also provides

151. *Id.*

152. *Id.* See also Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains*, A.B.A. SECTION OF BUS. L. at 11 (2021) [hereinafter Working Group to Draft Model].

153. See A.B.A., *supra* note 18.

154. Dadush, *supra* note 25.

155. See Working Group to Draft Model, *supra* note 152 at 2–3.

156. See *infra* notes 168–76.

157. See Lipson, *supra* note 14, at 1118.

158. See *About Us*, INTL. ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html> (last visited Oct. 26, 2021) (the International Organization for Standardization (ISO) develops and produces material on standardization that leads to better global business practices, such as supply chain sustainability).

159. See *Our mission and history*, THE GLOB. REPORTING INITIATIVE, <https://www.globalreporting.org/about-gri/mission-history/> (last visited Oct. 26, 2021) (setting global standards for impact reporting and transparency).

tools, auditing systems, and accreditation for compliance.¹⁶⁰ Another option is that a party join an organization like the Responsible Business Alliance, which holds members accountable to a Code of Conduct and gives them access to standards and management tools to support HRDD.¹⁶¹

B. Remedies for Human Rights Contract Violations

One critique of contracting for human rights is how to properly address remedies.¹⁶² This is because a successful breach of contract claim often results in expectation damages, or financial compensation that puts the injured party in as good of a position as they had been before the breach.¹⁶³ When forced labor occurs in the supply chain, however, traditional expectation damages do not necessarily work.¹⁶⁴ Typical contracts ignore whether a product was made with slave labor because labor conditions likely are not causing financial damage to the buyers or suppliers.¹⁶⁵ Instead, standard contracts focus on whether the product is acceptable.¹⁶⁶ Similarly, consequential damages addressing the reputation harm caused by a human rights violation could be an option, but courts would likely consider that harm to be unreasonable and unforeseeable.¹⁶⁷

Alternatively, a party could seek specific performance or an injunction. The contract, however, would likely need to specify the performance for a court to enforce it or to grant an injunction because courts tend to be uncomfortable mandating behavior.¹⁶⁸ Finally, another proposed solution within the realm of typical contract remedies is to liquidate damages.¹⁶⁹ While liquidated

160. See *About SAI*, SOC. ACCOUNTABILITY INT'L, <https://sa-intl.org/about/> (last visited Oct. 26, 2021) (a non-governmental organization that seeks to secure human rights within business practices).

161. See *About the RBA*, THE RESPONSIBLE BUS. ALL., <http://www.responsible-business.org/about/rba/> (last visited Oct. 26, 2021) (“the world’s largest industry coalition dedicated to responsible business conduct in global supply chains”).

162. See Dadush, *supra* note 25 (stating “typical contract remedies may not be appropriate or adequate for addressing the harms suffered.”)

163. See Restatement (Second) of Contracts § 344(a) (Am. L. Inst. 1962).

164. See Lipson, *supra* note 14, at 1124.

165. *Id.*

166. See Working Group to Draft Model, *supra* note 152, at 6.

167. See Lipson, *supra* note 14, at 1125.

168. Restatement (Second) of Contracts §§ 357–66 (Am. L. Inst. 1962).

169. See Lipson, *supra* note 14, at 1127.

damages would likely be an appropriate option, they are only enforceable to the extent that they are reasonable, foreseeable, and not viewed as a penalty.¹⁷⁰ Thus, the issue becomes what is the proper remedy and upon whom can that be enforced.

Contracting for human rights is different than standard contracts, so the remedy must also stray from a traditional contract.¹⁷¹ The MCCs favor human rights harm remediation over traditional contractual remedies.¹⁷² Rather than taking a strict liability approach, where a buyer or supplier breached because a human rights violation occurred, the contracts impose a flexibility that requires the parties to guarantee use of reasonable means to be consistently diligent toward achieving human rights goals.¹⁷³ This approach mirrors the HRDD concept that supply chains are so large and complex that it is unrealistic to expect perfection.¹⁷⁴ Instead, the fluidity of consistent monitoring and best efforts allows companies of varying capabilities to comply and to prioritize the most severe harms.¹⁷⁵

If a breach occurs, the MCCs give both buyers and suppliers termination rights, which increases each party's leverage to require human rights remediation.¹⁷⁶ Ideally, neither party wants to terminate the contract. For buyers, it disrupts the supply chain, causing delays and the potential to incur cost, and conversely, suppliers do not want to lose business.¹⁷⁷ Thus, the concept that both can terminate if the other does not remedy the human rights violation should impose sufficient pressure to make the parties comply.¹⁷⁸ The MCCs also name forums for addressing forced labor violations, first outlining internal operational-level grievance mechanisms, and then giving space for the parties to choose a judicial or arbitration forum, like HRDD

170. See Restatement (Second) of Contracts § 356 (Am. L. Inst. 1962).

171. See Lipson, *supra* note 14, at 1123.

172. See Working Group to Draft Model, *supra* note 152, at 2.

173. *Id.* at 11. The idea of reasonable means is not new to contracts. *Id.* See also U.C.C. § 1-304 ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.")

174. See *U.N. Guiding Principles*, ¶ 17.

175. See Working Group to Draft Model, *supra* note 152, at 11; see also *U.N. Guiding Principles*, ¶ 17.

176. See Working Group to Draft Model, *supra* note 152, at 13.

177. *Id.*

178. *Id.*

monitoring.¹⁷⁹ Therefore, a new approach to contracts for human rights provides corporations with a solution to effectively monitor and remedy human rights violations within the supply chain.

C. Pressure to Incorporate Contract Clauses

Although consumers are more engaged with CSR, shareholders are increasingly more interested in ESG compliance, and businesses themselves are more interested in HRDD, these factors alone are likely an insufficient impetus to incorporate contracts throughout the supply chain.¹⁸⁰ Further, consumer or shareholder led litigation is typically founded in CSR or ESG claims focused on environmental issues, rather than forced labor supply chain violations.¹⁸¹ The COVID-19 pandemic, however, unmasked global corporate human rights violations to the public, and litigation will likely rise accordingly.¹⁸²

In the US, although consumers concerned with CSR initiatives have been successful at bringing misrepresentation claims when a product label has false or misleading statements that a reasonable consumer would rely on when making a purchase, plaintiffs have been unsuccessful at bringing claims alleging that the packaging omits supply chain disclosures.¹⁸³ Likewise, when a corporation in the US has been sued for false ESG statements, if the statements were not concrete, verifiable commitments, then courts have generally not been willing to find a corporation liable.¹⁸⁴ Similar reasoning has been found in securities fraud

179. Working Group to Draft Model Contract Clauses to Protect Workers in International Supply Chains, *Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0, MCCs 2.0 DRAFTING DOCUMENT*, § 1.4; see also U.N. *Guiding Principles*, ¶¶ 25–31.

180. See *infra* notes 183–89.

181. See *ESG Dispute resolution and litigation*, HOWARD KENNEDY, <https://www.howardkennedy.com/en/Hot-topic/ESG---Dispute-resolution-and-litigation> (last visited Nov. 28, 2021). The London School of Economics reported that globally since 2015, climate-related CSR or ESG litigation has more than doubled. Sue Millar et al., *Are we reaching a 'tipping point' in ESG litigation?*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=96603355-8e8d-431f-9e05-608359a5401d> (last visited Nov. 8, 2021).

182. HOWARD KENNEDY, *supra* note 181.

183. See David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 ENV'T. L. REP. (ELI) 10849, 10851–52 (Oct. 2020).

184. *Id.* at 10852–53. Within the last year, some Delaware courts are allowing claims to move forward past the motion to dismiss stage. See Lydia Beyoud & Alex Wolf, *ESG Pressure Raises Ante on Board Duty Breach Claims in*

claims.¹⁸⁵ Thus, rather than improving their actions and global impact, corporations motivated to engage in ESG criteria can limit their liability by making broad, forward-looking statements as opposed to concrete promises.¹⁸⁶ European courts, on the other hand, have been more willing to find corporations liable for environmental harms brought under CSR and ESG.¹⁸⁷

Because these social pressures, whether stemming from the consumer or shareholder, often do not result in liability, they do not properly incentivize corporations to monitor their supply chains and incorporate contracts for human rights. But mandatory due diligence measures, including those already in place in various countries, the EU directive, or the pending Canadian legislation, force corporations to disclose matters that are in line with CSR and ESG criteria.¹⁸⁸ This, in effect, gives legal weight to ESG and CSR commitments that overlap with HRDD.¹⁸⁹

Although the USSC seems unwilling to hold corporations accountable for human rights supply chain violations, fear of foreign sanctions and litigation should compel US headquartered companies to monitor their supply chains.¹⁹⁰ When the EU

Delaware, BLOOMBERG L. (Jan. 18, 2022, 6:00 AM), <https://news.bloomberglaw.com/esg/esg-pressure-raises-ante-on-board-duty-breach-claims-in-delaware>. However, the potential impacts of these cases are unclear as litigation is still in progress. *Id.*

185. See Hackett, *supra* note 183, at 10854.

186. *Id.* at 10850.

187. See *e.g.*, *Vereniging Milieudefensie et al. v. Royal Dutch Shell PLC*, Hague District Court, Judgment of May 26, 2021 (Neth.) (when six NGOs and 17,000 individual plaintiffs sued Shell for failing to take proper steps to reduce emissions, the court held that defendants must reduce worldwide CO2 emissions by 45% by 2030 or else face fines, penalties, or civil damages.).

188. See, *e.g.*, Code de commerce [C. Com.] [Commercial Code] art. L. 225-102-4-6 # (Fr.); Wet zorgplicht kinderarbeid Stb./S. 2019 (Neth.); see Jones, *supra* note 57. Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten [Act on Corporate Due Diligence in Supply Chains], July 16, 2021, GESETZAT at 16, § 6(2) (Ger.). See also *EU Commission Directive*, art. 2, cl. 2. See also Bill C-252, art. 9.

189. See, *e.g.*, *EU Commission Directive*, art. 1, cl. 1 (stating that the “Directive lays down rules (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts”); see also Bill C-252, Summary (declaring that the law “requires businesses to establish processes to prevent, address adverse impacts on human rights that occur in relation to their business activities”).

190. See, *e.g.*, *Nestlé USA, Inc.*, 141 S. Ct. at 1937–40; see also Estreicher *supra* note 19, at 3; see also *EU Commission Directive*, art. 2, cl. 2; see also Bill C-262, art. 5.

directive on mandatory due diligence goes into effect, multinational corporations operating in Europe will risk some form of liability because the legislation requires all States to enact sanctions and create processes that hold corporations accountable.¹⁹¹ Similarly, if the Canadian bill moves forward, then any business operating across North America will need to comply with HRDD or risk repercussions.¹⁹² Therefore, unless they want to risk liability, it will become essential that multinational corporations, even those with headquarters in the US, monitor and correct their supply chains.¹⁹³ Consequently, corporations should look toward contracts as an effective and efficient manner to start engaging in HRDD.¹⁹⁴

HRDD is on the rise globally, which should incentivize corporations to monitor their supply chains.¹⁹⁵ A multinational corporation that currently operates in the UK, France, the Netherlands, or Germany must comply with their supply chain laws, or else risk liability.¹⁹⁶ Courts in those countries and in Canada are also willing and able to hold corporations liable for extraterritorial human rights violations.¹⁹⁷ While the current possibility of liability might be less, pressure is mounting to increase corporate accountability, indicated not only by the rise in successful international litigation and legislation, but also by the rise in CSR, ESG interest, and business support for HRDD.¹⁹⁸

Although the USSC in effect ended corporate ATS litigation for supply chain violations, the Court still discussed the possibility of corporate liability generally.¹⁹⁹ What is more, other US courts have been more open to finding corporations liable for

191. *EU Commission Directive*, art. 2, cl. 2.

192. Bill C-262, art. 5.

193. *Id.*; see also *EU Commission Directive*, art. 2, cl. 2.

194. See Lipson, *supra* note 14, at 1113–15; see also Dadush, *supra* note 25, at 1.

195. See Taylor, *supra* note 52, at 100–03.

196. See *supra* notes 53–61.

197. See *supra* notes 62–70.

198. See *id.*; see also Hackett, *supra* note 183, at 10849–50 (“checked out-comes to date in challenging company operations as to significant ESG matters, such actions are likely to not only increase but also expand into other ESG substantive areas.”).

199. *Nestlé USA, Inc.*, 141 S. Ct. at 1940–42, 1948 n.4, 1950. Specifically, concurring Justice Neil Gorsuch writes, “Nothing in the ATS supplies corporations with special protections against suit...Generally, too, the law places corporations and individuals on equal footing when it comes to assigning rights and duties.” *Id.* at 1941.

their extraterritorial human rights violations.²⁰⁰ For example, in the Seventh Circuit case *Flomo v. Firestone Nat. Rubber Co., LLC*, Judge Richard Posner²⁰¹ said that there seems to be no “compelling reason” for why “corporations have rarely been prosecuted criminally or civilly for violating customary international law.”²⁰² Thus, although the current financial or litigative incentive to incorporate contracts for human rights is relatively low, interest in corporate accountability continues to become more pervasive, seemingly on its way to rising to a standard of customary international law.²⁰³ Consequently, corporations will eventually need to monitor their supply chains, or else face financial repercussions.²⁰⁴ Contracts supply not only an efficient mechanism for this corporate interest, but also satisfy the standard being set globally.²⁰⁵

In addition to contracts providing a solution for corporations to monitor and fix their supply chains, they are also an effective solution to judicial fears regarding corporate accountability.²⁰⁶ A primary concern with the ATS line of corporate litigation was that by holding a corporation accountable for extraterritorial activity, the judiciary was overstepping legislative or executive branch boundaries.²⁰⁷ Contracting for human rights provides a solution to this concern. Courts already know how to apply contract law. Although contracting for human rights is different than a standard contract, the contract clauses themselves will be written to incorporate these differences, so courts can rely on

200. See e.g., *Doe v. Nestlé, S.A.*, 929 F.3d 623 (9th Cir. 2019).

201. Judge Richard Posner was a federal appellate judge for 36 years who, having written over 50 books and 500 articles, is considered one of the most dominant American jurists. John Fabian Witt, *The Provocative Life of Judge Richard Posner*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/09/books/review/richard-posner-biography-william-domnarski.html>. Posner is known for bringing economic ideas into legal theory. *Id.*

202. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1018 (7th Cir. 2011).

203. See Taylor *supra*, note 52 at 100. See also *supra* notes 71–88, 183–87; see also Statute of the International Court of Justice, art. 38(1), 1945, 59 Stat. 1055 (international custom is a source of international law).

204. EU Commission Directive, art. 20; Bill C-262, arts. 10, 11, 15.

205. See Lipson, *supra* note 14, at 1113–15. See also Dadush, *supra* note 25, at 1.

206. See *supra* notes 162–70. See also *Nestlé USA, Inc.*, 141 S. Ct. at 1938–40.

207. See e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 725–28 (2004); see e.g., *Nestlé USA, Inc.*, 141 S. Ct. at 1938–40.

this language to help with enforceability.²⁰⁸ Furthermore, businesses express fear that human rights contracts will scare away new business.²⁰⁹ But some companies have already incorporated human rights contract clauses, and those contracts have continued to be renewed.²¹⁰ Therefore, corporations should be incentivized to incorporate contracts for human rights throughout their supply chains to prevent liability under foreign legislation and litigation. Contracts are not only an adequate solution for corporate accountability for human rights supply chain violations, but they also arm corporations with effective and efficient mechanisms for monitoring and correcting the supply chain.

CONCLUSION

Growing legislation and litigation illustrates that the world is shifting toward corporate accountability for human rights supply chain violations.²¹¹ Nevertheless, the US as a whole is falling behind the global trend by remaining fairly stagnant on the issue.²¹² Multinational corporations, however, regardless of their operational bases, will need to find effective solutions to monitor their supply chains.²¹³ With the adoption of the EU Directive and the passing of the Canadian legislation on the horizon, this need is even more urgent because of the risk for sanctions and litigation.²¹⁴ Contracts for human rights can fill this void as an effective accountability measure for those trying to hold corporations accountable and as an efficient mechanism for corporations to monitor their supply chains. Therefore, foreign legislation that compels engagement in human rights due diligence will extend its reach to US corporations, which should thereby be incentivized to incorporate contracts for human rights.

*Alexandra Hyken**

208. *See supra* notes 162–70.

209. *See Braun, supra* note 143, at 9–10.

210. *Id.*

211. *See supra* notes 53–70, 88–110.

212. *See supra* notes 111–36.

213. *EU Commission Directive*, art. 2, cl. 2.; Bill C-262, art. 5.

214. *Id.*

* B.S., Boston University (2015); J.D., Brooklyn Law School (Expected 2023); Executive Notes Editor, Brooklyn Journal of International Law (2022-

2023). Thank you to the Journal staff, especially Lucie Couillard Sosa and Samantha Past, who helped push my note to be the best it could be. Thank you to my parents, Cindy and Shep Hyken, for their unwavering support throughout my law school journey and who inspired me to reach for my dreams. Thank you to my best friend and roommate Heather Hamacek, who watched me agonize over the note-writing process and provided the perfect amount of distractions. Finally, thank you to the stranger in the bar who gave me the inspiration for this topic – a reminder that you never know where a conversation might lead. All errors or omissions are my own.