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Top Ten Developments in Business and Human Rights in 2021

The “hardening” of legal norms on business and human rights continued their long-term accretion in 2021, through judicial, legislative and administrative enforcement. Dutch courts ordered Shell to take far-reaching environmental actions company-wide, and positive action in an individual case. Three European nations passed laws requiring all companies above a certain size to carry out human rights due diligence, as the EU considered similar legislation.

In the UK, jurisprudence on the liability of parent companies in tort for alleged human rights and environmental harms was consolidated and extended to encompass harms occurring in a company’s value chain.

In Latin America, the Inter-American Court of Human Rights made the United Nations Guiding Principles on Business and Human Rights legally binding. In the United States, even conservatives on the Supreme Court disclaimed corporate immunity for torts in violation of international law. U.S. government agencies imposed sanctions, and new U.S. legislation authorized additional sanctions on Chinese companies whose products are allegedly made with forced labor in Xinjiang. Finally, authoritative proposals to strengthen business reporting on human rights impacts were made in Europe and globally.

Except as otherwise indicated, the following all took place in 2021:

Court Orders Shell to Reduce Carbon Emissions: The Hague District Court ordered Royal Dutch Shell to reduce its carbon emissions by 45% by 2030, as compared to its 2019 emissions. The court relied on the “unwritten standard of care” article of the Dutch Civil Code. In interpreting that standard, the court cited, among other elements, the rights to life and to respect for private and family life in European and United Nations treaties on human rights. It also relied extensively on the business responsibility to respect human rights as elaborated in the UN Guiding Principles on Business and Human Rights. Shell’s appeal is pending.

Mandatory Human Rights Due Diligence: National Laws: Germany, Norway and Switzerland adopted laws mandating large companies based

in those countries (and, under the German and Norwegian laws, foreign companies doing business in those countries) to engage in human rights due diligence. Unlike financial due diligence focusing on risks to a company, human rights due diligence focuses on risks to third parties whose human rights may be affected by a company's activities. While the three new national laws differ on details, they generally apply to companies above a certain size with respect to their own activities and their supply chains. The Swiss law requires due diligence only with respect to conflict minerals and child labor. All three laws will be enforceable by fines and, in the German case, also by exclusion from public procurement. However, unlike the 2017 French Loi de Vigilance, the new laws are apparently not enforceable by civil suits.

Mandatory Human Rights Due Diligence: EU Legislation: In 2020 European Union Justice Minister Didier Reynders announced that the European Commission planned to adopt EU-wide legislation mandating human rights due diligence. Early in 2021, the European Parliament proposed such a law. However, the date of promulgation has been repeatedly postponed and is now expected during the French presidency of the European Commission in the first semester of 2022. In response to the EU delay, the Dutch government has announced that it will develop a due diligence law broader than those of its neighbors.

Parent Company Liability in UK: The British Supreme Court in *Okpabi v. Shell* unanimously reaffirmed and clarified its 2019 ruling in *Lungowe v. Vedanta* that British parent companies can be held liable in tort for harm resulting from inadequate oversight or shared management of the relevant activities of a foreign subsidiary. Parental "control" of the activity is not required. Shared management or failure to implement group-wide policies may suffice. There is no presumption against parent liability. The case against Shell was remitted to the High Court for further proceedings.

Parent Company Liability in The Netherlands: The Hague Court of Appeal found Shell's Nigeria subsidiary liable for oil spills in the Niger Delta, and ordered parent company Royal Dutch Shell to install a leak detection system on a major oil pipeline. Shell is appealing the installation order.

Company Liability for Third-Party Violations: A British Court of Appeal held in *Begum v. Maran* that a British company that sold a ship for demolition in Bangladesh could owe a duty of care to shipbreakers, even where multiple third parties were involved in the transaction. The suit by the widow of a worker who fell to his death alleged that the demolition site was known for poor working conditions, child labor, and high rates of death and injuries of workers. The appellate judges observed that the British company could and should have chosen a safer contractor.

Binding Norms in Latin America: The Inter-American Court of Human Rights approved the settlement of a case brought on behalf of Miskito divers alleging that Honduras failed adequately to regulate industrial fishing companies in the Caribbean. The court's opinion made clear that compliance with the UN Guiding Principles on Business and Human Rights is a legal duty of States under the American Convention on Human Rights, to which 24 Latin American and Caribbean nations are parties. Those states are now obligated to require their companies to carry out the business "responsibility to respect" human rights, as detailed in the Guiding Principles.

Corporate Liability Under International Law: The U.S. Supreme Court in *Nestle v. Doe* held that U.S. courts had no jurisdiction over a suit under the Alien Tort Statute, where nearly all the allegedly tortious activity occurred outside the United States. However, in various opinions, five of the nine justices, including conservative Justices Samuel Alito and Neil Gorsuch, opined that corporations can be held civilly liable for violations of international law. No justice expressed disagreement.



U.S. Sanctions Against Forced Labor in Xinjiang: Three U.S. government agencies acted against imports of solar products allegedly made with forced labor in Xinjiang, China. The Customs and Border Control issued a Withhold Release Order against products incorporating materials made by a Chinese company and its subsidiaries, resulting in seizure of solar modules manufactured by a number of multinationals; the Commerce Department added that company and four others to its Entity List, which prohibits exports without a license of U.S.-origin items to listed entities; and the Labor Department added polysilicon from China to its “List of Goods Produced by Child Labor or Forced Labor.” In December, the United States enacted legislation establishing a presumption that all goods made wholly or in part in Xinjiang are made with forced labor and can be seized on entry to the United States.

Sustainability Reporting: Proposals to improve corporate reporting on sustainability, including human rights impacts, were made at European and global levels. The European Commission proposed a Corporate Sustainability Reporting Directive to strengthen and broaden reporting on a company’s impacts on “people and the environment,” including its “respect for human rights.” The International Financial Reporting Standards Foundation established a new International Sustainability Standards Board to improve corporate reporting on climate and other environmental, social and governance (ESG) matters. Impacts on human rights would be indirect. The European Commission hopes that its proposal, if enacted into EU law, will make companies more aware of fundamental rights, improve their identification and management of adverse impacts, increase capital flows to companies that respect rights, and make companies more accountable for their adverse impacts on rights.

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