

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE TEXAS BUSINESS LAWYER

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INTRODUCTION

The Universal Declaration of Human Rights (UDHR), signed on December 10, 1948, is the heart of international human rights law and is a significant legal document for a variety of reasons. It marks when international law became a body of law focused on individuals rather than states, as the declaration grants individuals rights under thirty articles and applies to all people

regardless of their home nation.¹ It is also significant because it is estimated that the UDHR “has inspired or served as a model for the rights provisions of some ninety constitutions.”² In a reflection of consensus around this document, the United Nations (U.N.) Commission signed the UDHR with forty-eight states in favor of the declaration and eight abstaining (Saudi Arabia, South Africa, the Soviet Union, and four Eastern European states as well as one Soviet satellite state).³ At the time, the U.N. only had fifty-six member states.⁴ As of 2024, 193 countries are members of the U.N., and 171 heads of state at the Vienna Conference on Human Rights in 1993 affirmed “commitment to the purposes and principles contained in the Charter of the United Nations *and the Universal Declaration of Human Rights*.”⁵ The writers of the UDHR intended to show that human rights are universal as humanity is shared by every man, woman, and child regardless of ethnic, racial, linguistic, or religious differences.⁶ While this declaration was not free from critique, it was remarkably progressive for when it was written. One unique aspect of the UDHR is it gives individuals affirmative rights rather than indicating what the state cannot take away.⁷ Because the UDHR applies to all eight billion people on Earth, lawyers have an obligation to follow the principles in this document.

Lawyers are required by state law to be stewards of the legal profession, advocate zealously but ethically and honestly, responsibly manage their clients and practice, and maintain the rule of law in their communities. Lawyers are gatekeepers of the world. A human rights framework is imperative for lawyers to uphold because lawyers are a voice for the voiceless, advocates for

1. See PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 149, 151 (2nd ed. 2012) (discussing the divergence from traditional international law to a modern individualistic view).

2. *Id.* at 148.

3. *Id.* at 141.

4. *Id.*

5. *Id.* at 148.

6. *Id.* at 149.

7. See ALSTON & GOODMAN, *supra* note 1, at 154 (noting that one of the governing principles of the 1948 Declaration emphasized individual rights over state responsibilities).

justice, hold the powerful responsible for their wrongs, and defend those who commit both petty crimes and the worst crimes. Lawyers defend our innocence under the Fifth and Sixth Amendments and ensure our rights to due process under the Fourteenth Amendment. Lawyers often provide legal counsel to both wealthy and powerful individuals and corporations in society. Lawyers also interpret the law in the highest courts as judges, and many serve in the highest echelons of the executive branch, commanding the awesome powers of the federal and state governments to charge people with crimes as state and federal prosecutors. Former Supreme Court Justice and Chief United States Prosecutor at the Nuremberg trials Robert Jackson once said that the “prosecutor has more control over life, liberty, and reputation than any other person in America.”⁸

This paper will focus on Texas business lawyers and human rights. Historically, business has not been quite as receptive to the human rights regime as other professions—in fact, it has been quite to the contrary—and Texas, after California, is tied with New York to host more Fortune 500 companies than any other state, at a total of fifty-two.⁹ That presence is likely to grow because of how business-friendly Texas is and also because of businessman Elon Musk’s turn to Texas after his falling-out with the historic corporate state of Delaware.¹⁰ Musk reincorporating SpaceX in Texas could encourage even more businesses to flock to Texas.¹¹ Other major businesspeople in Texas include Michael Dell of Dell Computers, Jeffrey Hildebrand of Hilcorp Energy, Jerry Jones of the Dallas Cowboys, Walmart heiress Alice Walton, and Andrew Beal of Beal Financial Corporation. Texas’ large and

8. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY, 3, 3 (1940).

9. Alexis Simmerman, *Texas Ties for Second as the State with the Most Fortune 500 Companies: See List*, AUSTIN-AM. STATESMAN (Jun. 5, 2024), <https://www.statesman.com/story/news/state/2024/06/04/fortune-500-texas-companies-list-california-new-york-tesla-mckesson-exxon-mobil/73968165007/>.

10. See Ian Thomas, *How Elon Musk’s War on Delaware Could Change the Way Corporations Make Some of Their Biggest Decisions*, CNBC (Feb. 24, 2024), <https://www.cnbc.com/2024/02/14/elon-musk-war-on-delaware-may-change-how-companies-make-big-decisions.html> (discussing Elon Musk’s announcements of SpaceX’s reincorporation in Texas and Tesla’s shareholder vote to follow suit).

11. *Id.*

growing corporate presence with domestic and international entities warrants adhering to business and legal principles focused on protecting human rights domestically and internationally. Because federal and state law does not codify many human rights principles and the Foreign Corrupt Practices Act and international treaties do not directly mention every human rights issue, the UDHR, Texas Disciplinary Rules of Professional Conduct, the United Nations General Principles for Business and Human Rights, and the human rights due diligence/corporate responsibility space can help fill the void for Texas business lawyers when it comes to human rights issues. In 2011, the United Nations Human Rights Council endorsed the “U.N. Guiding Principles on Business and Human Rights,” written by political scientist John Ruggie to address business and human rights in the international community as non-binding suggestions for businesses to follow.¹² This pivotal document is the heart of mandatory human rights due diligence laws as this declaration was intended to help states bolster their laws, as well as businesses adjust their business practices, to protect human rights. The general framework of this declaration is that states are supposed to protect human rights, businesses are supposed to respect human rights, and those harmed are supposed to have access to remedies. This paper will also discuss human rights due diligence and corporate responsibility largely from a comparative law perspective, with some discussion of domestic laws.

Obeying human rights laws should be a piece of due diligence in all international business transactions because some laws are codified, and human rights awareness is required of attorneys under the professional responsibility code from an ethics standpoint. Because of how integrated world trade and the global economy have become, the world has become more cognizant of just how many human rights issues there are in our country and the world. Because global business is supposed to protect human rights rather than harm them, and human rights transcend wealth, class, ethnicity, race, and borders, Texas business

12. *The UN Guiding Principles on Business and Human Rights: And Introduction*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. 1, 2–4 (2011), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf [hereinafter “UN Guiding Principles”].

lawyers have a duty to understand human rights and incorporate them into their work. A comprehensive understanding of the UDHR starts with understanding World War II: it is the historical antecedent of the declaration. The UDHR was inspired by World War II because not only was it a war of racism on all sides, but it saw many human rights violations, including war crimes as well as the killing and maiming of civilians, on the basis of ethnicity and religion.

II. WORLD WAR II OVERVIEW

The roots of the UDHR start with the seismic disaster that was World War II, the deadliest war in all of human history, with an estimated 70 million people killed. By nation, World War II is estimated to have killed between 20 and 27 million Soviets, between 10 and 20 million Chinese, 6 million Germans, around 6 million Poles, between 2.5 million and 3 million Japanese, and around 1.5 million Yugoslavs.¹³ The United States, Great Britain, France, Hungary, Romania, Austria, and Italy are estimated to have lost between 250,000 and 900,000 people.¹⁴ The Holocaust is estimated to have killed 11 million people, including 6 million Jews.¹⁵ The major powers who waged World War II in their quest for world domination were Nazi Germany, Imperial Japan, and Fascist Italy. Nazi Germany under Adolf Hitler intended to establish a 1,000-year Reich with Aryan Germans inhabiting

13. See *The Untold History of the United States: Chapter 1*, (Showtime television broadcast Nov. 12, 2012) [hereinafter *Untold History: Chapter 1*]; Aaron O'Neill, *Estimated number of military and civilian fatalities due to the Second World War per country or region between 1939 and 1945*, STATISTA (last visited Dec. 16, 2024), <https://www.statista.com/statistics/1293510/second-world-war-fatalities-per-country/>; *Justice for Uncompensated Survivors Today (JUST) Act Report: Poland*, U.S. DEP'T OF STATE (last visited Dec. 16, 2024), <https://www.state.gov/reports/just-act-report-to-congress/poland/>; *War in the Balkans, 1941-45*, NAT'L ARMY MUSEUM, <https://www.nam.ac.uk/explore/war-Balkans>, (last visited Dec. 16, 2024).

14. O'Neill, *supra* note 13.

15. *How Many People did the Nazis Murder?*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution> (last visited Dec. 16, 2024).

Central Europe and Russia that rightfully belonged to Germany, and Germany would destroy Jewish Bolshevism in the process.¹⁶

Imperial Japan, under Emperor Hirohito and Hideki Tojo, took over the Asian continent beginning in the Manchuria region of China and would later succeed in conquering one-sixth of the Earth's surface.¹⁷ Fascist Italy under Benito Mussolini intended to rebuild the Roman Empire starting in Ethiopia.¹⁸ The United States would not enter the war until after the Japanese attack on Pearl Harbor on December 7, 1941. The United States declared war on Japan, and Nazi Germany declared war on the United States.¹⁹ Ironically, the United States would form an alliance with the Soviet Union under Joseph Stalin after Nazi Germany invaded in June 1941, though Stalin formed a non-aggression pact with Hitler a few years earlier. When Hitler attacked Poland from the west in September 1939, Stalin attacked Poland from the east. Looking to Russia as the prize in terms of natural resources and vast area, Hitler breached the non-aggression pact and attacked the Soviet Union in Operation Barbarossa on June 22, 1941.²⁰

Operation Barbarossa was a massive Nazi offensive entailing 3.2 million German troops attacking the Soviets along a two-thousand-mile front.²¹ In July 1943, the Allied invasion of

16. Aram Bakshain, *The Real Thousand-Year Reich*, THE NAT'L INT. (Oct. 21, 2016), <https://nationalinterest.org/feature/the-real-thousand-year-reich-18143>; *Lebensraum*, <http://encyclopedia.ushmm.org/content/en/article/lebensraum> (last visited Jan. 20, 2025); U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust> (last visited Sept. 12, 2024); U.S. HOLOCAUST MEMORIAL MUSEUM, NAZI IDEOLOGY AND THE HOLOCAUST 13, 119–20 (2007) (discussing the spread of the German “Aryan” as a superior race).

17. John Swift, *Mukden Incident*, BRITANNICA (Sept. 11, 2023), <https://www.britannica.com/event/Mukden-Incident>; see also Herbert Bix, *War Responsibility and Historical Memory: Hirohito's Apparition*, 6 ASIAN-PAC. J. 1, 3–4 (2008) (discussing Emperor Hirohito's imperialist tendencies).

18. Christopher Hibbert & John Foot, *Rise to Power of Benito Mussolini*, BRITANNICA (Aug. 23, 2023), <https://www.britannica.com/biography/Benito-Mussolini/Rise-to-power>.

19. *Japan Bombs Pearl Harbor: Hitler Declares War on the US*, ANNE FRANK HOUSE, <https://www.annefrank.org/en/timeline/124/japan-bombs-pearl-harbor-hitler-declares-war-on-the-us/> (last visited Aug. 27, 2024).

20. PETER KUZNICK & OLIVER STONE, THE UNTOLD HISTORY OF THE UNITED STATES 94 (2019).

21. *Id.* at 94–95 (2019).

Sicily forced the Nazis to fight a two-front war with the Allies, but the Allied invasion of Normandy on June 6, 1944 brought the Allies close to Germany.²² With the Soviets closing in from the east and the other Allies led by the United States closing in from the west, Nazi Germany surrendered on May 7, 1945.²³ World War II is often thought of as a valiant struggle against fascism and tyranny, but ironically Stalin, who has a legacy similar to Hitler to some, would play a pivotal role in defeating the Nazis.

After Nazi Germany was defeated, the Allies turned their attention to Imperial Japan. After waging a war against Japan for several years through a ruthless bombing campaign headed by General Curtis LeMay and an island-hopping campaign led by General Douglas MacArthur, the United States would inflict the final blow against Imperial Japan by dropping the atomic bombs “Little Boy” and “Fat Man” on the cities of Hiroshima and Nagasaki on August 6, and August 9, 1945.²⁴ Reflecting a change in the times, the Pew Research Center conducted a poll in 2015 saying that 56% of Americans believed the use of the atomic bomb was justified compared to 85% approval in 1945.²⁵ The end of World War II marked a remarkable shift in the world landscape for both the United States and the international community as a whole, and the end of the war marked the start of the international world order and human rights regime.

III. CONFLICT IN THE WORLD TODAY

The world is seeing widespread conflict in a fashion disturbingly similar to that of World War II. The Council on Foreign Relations currently estimates there are twenty-eight

22. *See id.* at 111. While the Germans fought the Americans and British in Sicily and mainland Italy prior to the Normandy invasion, D-Day was significant because it brought the Allies much closer to Germany on the Western Front.

23. *Id.* at 125.

24. *See Oliver Stone's Untold History of the United States*, “Chapter 3- The Bomb” (Showtime, Nov. 26, 2012); *Decision to Drop the Atomic Bomb*, HARRY S. TRUMAN LIBR. (last visited Dec. 16, 2024), <https://www.trumanlibrary.gov/education/presidential-inquiries/decision-drop-atomic-bomb>.

25. Bruce Stokes, *70 Years After Hiroshima, Opinions Have Shifted on Use of Atomic Bomb*, PEW RSCH. CTR. (Aug. 4, 2015), <https://www.pewresearch.org/short-reads/2015/08/04/70-years-after-hiroshima-opinions-have-shifted-on-use-of-atomic-bomb/>.

areas of conflict in the world right now.²⁶ Multiple major conflicts are occurring right now in areas with crucial geopolitics, and all sides seem to use World War II-style narratives to justify their sides of the conflict. Russian President Vladimir Putin invaded Ukraine in February 2022, and critics of the war (even some in the United States), as well as Putin himself, continually discuss the Ukrainian military and leadership as consisting of Ukrainian neo-Nazis.²⁷ Putin has stated that the war is intended to “demilitarize and de-Nazify Ukraine.”²⁸ Those who are pro-Ukraine liken Vladimir Putin to Adolf Hitler as a repressive totalitarian with an expansionist agenda.²⁹ In response to the neo-Nazi argument, pro-Ukraine voices cite that Ukraine President Volodymyr Zelensky is Jewish and neo-Nazi factions consist of a tiny portion of Ukraine’s fighting force and have limited political influence.³⁰ Depending on one’s views of what is going on in the Middle East, Nazi parallels are made to both Israel and the Palestinians alike.³¹

26. See generally COUNCIL ON FOREIGN RELS.: GLOBAL CONFLICT TRACKER, <https://www.cfr.org/global-conflict-tracker> (last visited May 14, 2024) (referencing criminal violence in Mexico, unrest in Haiti, the Venezuela crisis, instability in Afghanistan, confrontation in Taiwan, territorial disputes in the South China Sea, Turkish-Kurdish conflict, India-Pakistan conflict, terrorism and civil war/conflict across Africa, war in Yemen, war in Syria, Lebanon instability, and the North Korea crisis); see also *Methodology*, COUNCIL ON FOREIGN RELS.: GLOBAL CONFLICT TRACKER, <https://www.cfr.org/global-conflict-tracker/methodology> (last visited May 14, 2024) (describing methodology used by the Council on Foreign Relations is identified through their Preventative Priorities Survey (PPS), which asks government officials, academics, and foreign policy experts to assess ongoing and potential conflicts based on their likelihood of occurrence and their impact on U.S. interests).

27. Andrew Srulovitch, *Why Is Putin Calling the Ukrainian Government a Bunch of Nazis?*, ANTI-DEFAMATION LEAGUE (Mar. 4, 2022), <https://www.adl.org/resources/blog/why-putin-calling-ukrainian-government-bunch-nazis>.

28. See Michael Schmitt, *Russia’s “Special Military Operation” and the (Claimed) Right of Self-Defense*, LIEBER INST. (Feb. 28, 2022), <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

29. Michael Ruane, *Putin’s Attack on Ukraine Echoes Hitler’s Takeover of Czechoslovakia*, WASH. POST (Feb. 24, 2024, 1:15 PM), <https://www.washingtonpost.com/history/2022/02/24/hitler-czechoslovakia-sudeten-putin-ukraine/>.

30. See Srulovitch, *supra* note 27 (discussing that Nazi rhetoric in Ukraine is in the minority and politically insignificant, and thus does not accurately represent the whole of Ukraine).

31. *Brazil’s Lula Compares Israel’s War on Gaza with the Holocaust*, AL JAZEERA (Feb. 18, 2024), <https://www.aljazeera.com/news/2024/2/18/brazils-lula-compares-israels->

IV. HISTORY OF INTERNATIONAL HUMAN RIGHTS POST–WORLD WAR II

In October 1945, the world (especially north of the equator) was in shambles. The United Nations (U.N.) was formed to create a new international world order after the failure of the League of Nations to handle global issues.³² The Universal Declaration of Human Rights (UDHR) was written by a committee that included important figures from all over the world.³³ Some scholars criticize the UDHR as a document that represents ideological imperialism since most of the world's population was not represented in the U.N. at the time (the Axis powers were also excluded); however, the committee that drafted the UDHR was remarkably diverse, as hundreds of people with differing backgrounds were involved in the formulation process.³⁴

The entire human rights regime begins with Article 1 of the UDHR, which states, “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”³⁵ Article 2 lays out how every person has protections guaranteed by this document.³⁶ Article 3 states in a

war-on-gaza-with-the-holocaust; Sam Sokol, *Poll: Over Half of Israeli Jews See Comparison Between Holocaust and October 7*, TIMES OF ISR. (May 6, 2024), <https://www.timesofisrael.com/poll-over-half-of-israeli-jews-see-comparison-between-holocaust-and-october-7/>.

32. See *United Nations Charter (1945)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/united-nations-charter> (last visited Aug. 28, 2024) (discussing the creation of the United Nations following World War II to maintain international peace and security).

33. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 225 (2001). The committee included First Lady Eleanor Roosevelt, Peng Chun Chang of China, Charles Malik of Lebanon, Carlos Romulo of the Philippines, Hansa Mehta of India, and Hernán Santa Cruz of Chile.

34. *Id.* at 224–25 (“The genesis of each article, and each part of the article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.”).

35. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

36. See *id.* art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or

manner reflecting the importance of natural law and resembling the United States Constitution to some degree that “[e]veryone has the right to life, liberty and security of person.”³⁷ Article 4 states, “[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”³⁸ Article 5 states that, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³⁹ Article 6 guarantees everyone the right to recognition everywhere as a person before the law, while Article 7 mandates equal protection of the law.⁴⁰

The United States itself would have been considered a violator of the UDHR with its repressive racial policies and utilization of eugenics. In terms of how Black people were treated, the nation was segregated, with racial violence and discriminatory laws being especially prevalent in the Deep South (including Texas) where Jim Crow laws were a way of life.⁴¹ In its notorious *Plessy v. Ferguson* decision, the Supreme Court stated that a Louisiana state statute mandating separate train cars for Black people and White people was constitutional; although the Fourteenth Amendment guaranteed equal protection for both racial groups, separate treatment did not imply inferior treatment, and social equality was ultimately a legislative issue.⁴²

Eugenics were entrenched in the American way of life to the extent that state legislatures passed eugenics laws, and many people were forcibly sterilized as a result.⁴³ Connecticut was the first state to pass a eugenics law in 1895, which prohibited

international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”).

37. *Id.*, art. 3.

38. *Id.*, art. 4.

39. *Id.*, art. 5.

40. *See id.*, art. 6–7.

41. *See e.g.*, Bruce A. Glasrud, *Jim Crow's Emergence in Texas*, 15 AM. STUD. 47, 47–48, 51–52 (1974).

42. *Plessy v. Ferguson*, 163 U.S. 537, 540, 542–44, 547–48, 550–51 (1896).

43. Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. HIST. R. 63, 67, 69–70 (1998).

marriage with someone “epileptic, imbecile or feeble-minded.”⁴⁴ Indiana passed the nation’s first forced sterilization law in 1907 for “criminals, idiots, imbeciles, and rapists.”⁴⁵ The Supreme Court upheld Virginia’s forced sterilization law in *Buck v. Bell* (1927) under the Fourteenth Amendment on the basis that there was no due process issue because one who was sterilized had a hearing to determine whether they were feeble-minded with a guardian present (court-appointed or not).⁴⁶ The Court also said the fact that the sterilization procedure applied to inmates of state institutions and not the general public posed no equal protection issue.⁴⁷ It is estimated that between 1907 and 1963, over 64,000 Americans were involuntarily sterilized under eugenics legislation.⁴⁸ There were even so-called “ugly laws” on the books, which criminalized various groups of people appearing in public.⁴⁹

In addition to the scientific community, corporate America was one of the biggest enablers of eugenics in the United States as the Carnegie Institution, Rockefeller Foundation, and John Harvey Kellogg of Kellogg’s were some of its biggest sponsors.⁵⁰ Eugenics was studied at some of the nation’s most prestigious universities: Harvard, Yale, the University of Michigan, the University of Virginia, Northwestern, and many others all had eugenics departments.⁵¹ Eugenics even influenced United States immigration policy, and the Immigration Acts of 1917 and 1924

44. Heinonline Blogger, *The Complicated History of Eugenics in the United States*, HEINONLINE BLOG (Jun. 11, 2021), <https://home.heinonline.org/blog/2021/06/the-complicated-history-of-eugenics-in-the-united-states/>.

45. *Id.*

46. *Buck v. Bell*, 274 U.S. 200, 205-07 (1927).

47. Justice Oliver Wendell Holmes, who wrote the opinion in *Buck v. Bell*, stated, “Three generations of imbeciles are enough.” *Id.* at 207–08.

48. Heinonline Blogger, *supra* note 44.

49. See SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 24–25, 30, 32–33 (2009) (providing examples of “ugly laws” implemented in San Francisco, Chicago, and New Orleans).

50. William A. Schambra, *Philanthropy’s Original Sin*, NEW ATLANTIS (Summer 2013), <https://www.thenewatlantis.com/publications/philanthropys-original-sin>.

51. See e.g., P. Preston Reynolds, *UVA and the History of Race: Eugenics, the Racial Integrity Act, Health Disparities*, UVA TODAY (Jan. 9, 2020), <https://news.virginia.edu/content/uva-and-history-race-eugenics-racial-integrity-act-health-disparities>.

reflect how eugenics influenced immigration law in the early twentieth century.⁵²

Within the United States itself, Black men were studied in the Tuskegee Syphilis Experiment from 1932-1972 where under false pretenses, they were infected with syphilis to see what the effects of the disease would be when left untreated.⁵³ During World War II, animus against Japanese Americans (attributable to racism as well as news of Japanese atrocities during the war) took the shape of Japanese internment. On February 19, 1942, President Franklin Roosevelt signed Executive Order 9066 which allowed the Secretary of War to prescribe military areas to detain people under whatever restrictions the Secretary deemed necessary, without compensation, due process, or proof of wrongdoing; it was the law used to detain the Japanese on the mainland while those in Hawaii were largely subject to martial law.⁵⁴ Japanese American Fred Korematsu refused to leave his home in San Leandro, California and was arrested on May 30, 1942 and sent to prison; he filed suit with the ACLU against the United States to dispute the constitutionality of Executive Order 9066.⁵⁵ In *Korematsu v. United States*, the Supreme Court held that this executive order was constitutional because, regardless of the exercise of strict scrutiny based on ethnicity, the removal and

52. The Immigration Act of 1917 created a barred zone of immigration, meaning no immigrants from the Middle East to Southeast Asia could enter the United States. See Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876 (repealed 1952). Subsequently, the Immigration Act of 1924 prevented any alien ineligible for citizenship (i.e., Asians) from entering the country and limited entry to an annual quota of 150,000 immigrants per year based on national origin; immigration from each eligible nation was limited to 2% of the number of foreign-born persons of that nationality residing in the United States as of the 1890 census. See Immigration Act of 1924, ch. 190, §§ 11, 13, 28, 43 Stat. 153, 159, 162, 168 (repealed 1965); Michael Park, *Asian American Masculinity Eclipsed: A Legal and Historical Perspective of Emasculation Through U.S. Immigration Practices*, 8 MOD. AM. 5, 8–9 (2013); Stewart Chang, *Feminism in Yellowface*, 30 HARV. J.L. & GENDER 235, 242 n. 56 (2015).

53. Stephen B. Thomas & Sandra Crouse Quinn, *Light on the Shadow of the Syphilis Study at Tuskegee*, 1 HEALTH PROMOTION PRAC. 234, 234 (2000).

54. Ironically, Earl Warren was the Attorney General of California who led the Japanese internment effort, and he would go on to become Chief Justice of the United States Supreme Court and lead the Court's so-called golden era for progressive jurisprudence. See ERIKA LEE, *AMERICA FOR AMERICANS* 203–04 (2021).

55. *Id.* at 211.

internment of Japanese Americans was a national security action mired in “military necessity.”⁵⁶

Lynching was a form of racial terror against Black Americans that took place with great frequency.⁵⁷ Unlike Dr. Martin Luther King who attempted to bring change domestically through protest and political lobbying, African American human rights advocate Malcolm X attempted to use international law to hold the United States accountable for its apartheid system. Reflecting the split in the Civil Rights movement, Malcolm X once said, “the day the black man turns from civil rights to human rights, he will take his case into the halls of the United Nations in the same manner as the people in Angola, whose human rights have been violated by the Portuguese in South Africa.”⁵⁸ Malcolm X cited the UDHR along with the U.N. Charter on Human Rights and Genocide Convention as the international laws to use in order to build against the United States for its treatment of people of color in the U.N.⁵⁹ Contrary to Malcolm X and the Nation of Islam, advocates like Martin Luther King Jr. believed the way to effectuate positive change was through protest and lobbying politicians to get civil rights legislation signed into law to protect African American rights. Prior to the Civil Rights movement, the American medical and legal professions played leading roles in efforts designed to degrade, debase, humiliate, punish, or legally kill people all in the name of the law. The Jim Crow Era from 1877 to 1965 was an era where the law was used as a sword to harm people rather than a shield to protect people. These gatekeepers were pivotal to the Holocaust, and it is also worth noting that American eugenics influenced that of the Nazis.⁶⁰ Both the Jim Crow Era in the United States and Nazi Germany

56. LEE, *supra* note 54 at 211–12; *Korematsu v. United States*, 323 U.S. 214, 215–16, 223–24, 226–28 (1944).

57. One of the most infamous lynchings in American history was that of Emmett Till. See generally, Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 337, 348 (2016).

58. Charles Lewis Nier III, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations International Human Rights Provisions and Institutions*, 16 DICKINSON J. INT’L L. 149, 153 (1997).

59. *Id.* at 162, 182.

60. Edwin Black, *Hitler’s Debt To America*, THE GUARDIAN, (Feb. 5, 2004), <https://www.theguardian.com/uk/2004/feb/06/race.usa>.

showed how the professions like law and medicine can be detrimental to human rights.

Racial reckoning has been realized in America today with the killings of George Floyd, Breonna Taylor, Trayvon Martin, Ahmaud Arbery and discussion around issues of police brutality pertaining to race.⁶¹ Professional gatekeepers, those deemed to have important social responsibilities, such as lawyers, doctors, and journalists can risk becoming targets if they irk power or those aspiring for power.

Civilians are always potential targets in any war or conflict. The Israel-Hamas War is the contemporary conflict under the strictest scrutiny when it comes to this issue. Anti-Israel advocates tend to explain that the Israeli Defense Forces fight recklessly and ruthlessly in defiance of international law by disproportionately killing women and children in large numbers.⁶² In the Israel-Hamas War, Gaza's death toll has topped over 45,000 people, and these advocates argue over 20,000 Palestinian women and children killed in the conflict is not simply a cost of war but a result of belligerent and reckless fighting by Israel.⁶³ On the pro-Israel side of the argument, Hamas uses deceit to turn the public and international community against Israel.⁶⁴ Harvard Law Professor Emeritus Alan Dershowitz alleges that Hamas fights an effective propaganda war with its usage of human shields, a tactic he terms the "CNN strategy."⁶⁵

61. Thu T. Nguyen et al., *Progress and Push-back: How the Killings of Ahmaud Arbery, Breonna Taylor, and George Floyd Impacted Public Discourse on Race and Racism on Twitter*, 15 SSM - POPULATION HEALTH 1, 1, 3–4 (2021).

62. *West Bank: Spike in Israel Killings of Palestinian Children*, HUM. RTS. WATCH (Aug. 28, 2023), <https://www.hrw.org/news/2023/08/28/west-bank-spike-israeli-killings-palestinian-children>.

63. See Lilith Foster-Collins, *Death Toll in Israel-Hamas War Surpasses 45,000*, Newsweek (last updated Dec. 16, 2024, 6:39 PM EST), <https://www.newsweek.com/israel-gaza-death-toll-syria-airstrikes-2001246>; Meryl Thomas, *Israel Gaza: What Gaza's Death Toll Says About The War*, BBC (Dec. 20, 2023), <https://www.bbc.com/news/world-middle-east-67764664>.

64. See generally ALAN DERSHOWITZ, *WAR AGAINST THE JEWS: HOW TO END HAMAS BARBARISM* (2023).

65. *Id.* at 7–11 (2023). The CNN strategy entails Hamas anticipating Israel's response by using human shields that assure when targeting Hamas fighters, Israel will cause collateral damage to Palestinian civilians and once that happens, publicize dead and

Both the Nuremberg and Tokyo War Crimes Trials dated November 20, 1945, to October 1, 1946 and April 29, 1946 to November 12, 1948 respectively were supposed to effectuate change because these were international tribunals bringing the world together to hold perpetrators of the worst types of evil accountable for their crimes. These crimes included the Holocaust, killing of civilians, the Rape of Nanjing, and the Bataan Death March. As abhorrent as the Japanese and Nazis were during World War II in these endeavors, these international tribunals were highly controversial. The first primary issue was that these prosecutions occurred *ex post facto*, meaning there were no laws on the books that specifically outlawed what these Axis soldiers and officials did.⁶⁶ The precedent for prosecuting these defendants arose out of natural law alone; there was no positive law to apply, and the Axis powers certainly did not agree to prosecution by the Allies.⁶⁷ The Nuremberg Charter used to charge Nazi soldiers and officials addressed war crimes and crimes against humanity, murder and ill-treatment of the civilian population, slave labor, and persecution of the Jews.⁶⁸

Professor Hans Kelsen found the *ex post facto* argument weak because Nazi conduct was so heinous.⁶⁹ Law professor Mark Osiel said Nuremberg is seen with little legitimacy because both sides committed war crimes. Legal scholar Alpheus Mason described Nuremberg as victors' justice, and law professor David Luban said Nuremberg caused great confusion because the Charter criminalized aggression, so it ironically erected a wall around future aggressors.⁷⁰

The Tokyo War Crimes Tribunal used Nuremberg as precedent to prosecute Japanese military leaders and officials.⁷¹

injured children and seek condemnation by the international community and media against Israel. *See id.* at 15–17.

66. *See* Robert H. Jackson, *Nuremberg in Retrospect: Legal Answers to International Lawlessness*, 35 AM. BAR ASS'N J. 813, 815, 885 (1949) (addressing the Canadian Bar Association at Banff, Alta. on Sept. 1, 1949).

67. *Id.* at 815–16, 884–85.

68. ALSTON & GOODMAN, *supra* note 1, at 123–29.

69. *Id.* at 132.

70. *Id.* at 132–33.

71. DAVID COHEN ET AL., *THE TOKYO WAR CRIMES TRIBUNAL: LAW, HISTORY, AND JURISPRUDENCE* 86 (2018).

Emperor Hirohito of Japan was never executed or prosecuted as the Allies feared Japanese backlash. According to General MacArthur's command, the hanging or prosecution of the Emperor would be comparable to the crucifixion of Christ in the minds of the Japanese people.⁷² Emperor Hirohito would sit on the Japanese throne as emperor until 1989.

In modern times, some think the international community has weaponized the Rome Statute, which was enacted to hold international criminals accountable in the International Criminal Court, in order to attack Israel and frivolously charge its leaders for international humanitarian law violations.⁷³ Israel is fighting lawsuits by both the ICJ and ICC (as well as indictments by the ICC) with South Africa at the helm, who was notorious in the international community for its apartheid system of old. In the Russia-Ukraine conflict, Putin has been indicted by the ICC for forced transfer of children under Articles 8, 24, and 25 of the Rome Statute.⁷⁴

V. NEVER AGAIN AND THE SAD REALITY OF ITS INSIGNIFICANCE

After the Holocaust, the world said "Never Again" to mass murder against one group of people. Polish-Jewish human rights lawyer Raphael Lemkin even coined a new word called "genocide," which comes from the Greek word "genos," meaning "race, nation, and tribe," and the Latin word "caedere," meaning "to kill."⁷⁵ The

72. *Untold History: Chapter 1*, *supra* note 13.

73. See Jonathan Kuttub, *The International Criminal Court's Failure to Hold Israel Accountable*, ARAB CTR. WASHINGTON, D.C. (Sep. 12, 2023), <https://arabcenterdc.org/resource/the-international-criminal-courts-failure-to-hold-israel-accountable/>.

74. See Emma Graham-Harrison, *South Africa's ICJ Genocide Case Aimed at Defending Hamas, Israel Claims*, THE GUARDIAN (May 17, 2024), <https://www.theguardian.com/law/article/2024/may/17/south-africas-icj-genocide-case-aimed-at-defending-hamas-israel-claims>; Josef Federman, *War Crimes Prosecutor Seeks Arrest of Israeli and Hamas Leaders, Including Netanyahu*, AP NEWS (May 20, 2024, 3:38 PM), <https://apnews.com/article/icc-khan-netanyahu-070941d21ccd1f2b9611032b88527575>; *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT. (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

75. Thomas W. Simon, *Defining Genocide*, 15 WIS. INT'L L. J. 243, 243 (1996).

Genocide Convention of 1948 declared killing on the basis of nationality, race, religion, and ethnicity an international crime.⁷⁶ Instead of Never Again, we have seen a genocide or mass murder in almost every decade since the Holocaust. From 1965-1966, the world witnessed the Indonesian mass killings in the coup against Sukarno by Indonesian General Suharto and the Indonesian military with the help of the CIA.⁷⁷ From 1966-1976, there was Mao's Cultural Revolution in China.⁷⁸ After the Vietnam War, Southeast Asia witnessed great horrors from 1975-1979 with the Cambodian Genocide perpetrated by the Khmer Rouge in order to turn Cambodia into an agricultural utopia.⁷⁹ The 1980s saw Saddam Hussein's Iraq undertake a murderous campaign against its Kurdish population.⁸⁰ In the 1990s, there was the Rwandan Genocide against the Tutsi Tribe and the Serbian Genocide against Bosnia's Muslims.⁸¹

There are also a plethora of human rights issues in modern times, too. In Syria, there is a brutal civil war that just ended with new leadership, as well as a dire human rights situation.⁸² Former Syrian President Bashar Al-Assad left Syria for Moscow, while revolutionary Abu Mohammad al-Julani of the Hayat Tahrir al-Sham group is considered the de-facto leader of Syria. Al-Julani is under scrutiny for his previous work with Al-Qaeda as well as Abu Bakr al-Baghdadi (the founder of the Islamic State

76. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, S. EXEC. DOC. NO. 81-1, 78 U.N.T.S. 277.

77. Scott Brainard, *The Impact of Indonesian Agricultural Policies on Indigenous Populations, Natural Resources and the Economy: The Limits of Democratic Self-Determination Under Capitalist Regimes*, 43 MIA. INTER.-AM. L. REV. 165, 168, 168 n.17 (2011).

78. Yongyi Song, *Chronology of Mass Killings During the Chinese Cultural Revolution (1966-1976)*, SCIS. PO (Aug 25, 2022), <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/chronology-mass-killings-during-chinese-cultural-revolution-1966-1976.html>.

79. Jillian M. Young, *Cambodia's Accession to the World Trade Organization and its Impact on Agriculture*, 11 DRAKE J. AGRIC. L. 107, 114-16 (2006).

80. Sarah E. Whitesell, *The Kurdish Crisis: An International Incident Study*, 21 DENV. J. INT'L L. & POL'Y 455, 462.

81. Henry K. Kopel, *The Case for Sanctioning State Sponsors of Genocide Incitement*, 49 CORNELL INT'L L.J. 415, 430-34 (2016).

82. *Syrian Civil War*, Encyclopedia BRITANNICA (AUG. 17, 2024), <https://www.britannica.com/event/Syrian-Civil-War>.

of Syria and Iraq (ISIS)).⁸³ Human rights advocates have expressed various concerns about Saudi Arabia and North Korea, including access to basic freedoms.⁸⁴ Belarus, Russia, Turkey, and Iran are countries currently under similar scrutiny.⁸⁵ There are alleged abuses by China against its Muslim minorities (specifically Turkic minorities, such as the Uyghurs), reported abuses by Myanmar against the Rohingya Muslims, and civil war in Darfur.⁸⁶

In the Middle East, Israel believes it is fighting the good fight against terrorists and even lawfare in the international community to some degree as Zionists and Israel supporters consider the U.N. an anti-Israel organization, and some pro-Israel voices like Jewish-American conservative lawyer Mark Levin believe the ICC is simply a radical leftist, Islamist, and globalist court while Hamas believes it is fighting the good fight against, apartheid, imperialism, and violations of international law.⁸⁷ Many Zionists and Jewish voices believe Never Again is now since Hamas intends to rid Israel of the Jews, Iran wants to destroy Israel with a nuclear weapon, and Israel is under relentless pressure from the international community to defeat a determined enemy with one hand tied behind its back.⁸⁸ In addition, Jews are constantly harassed in public around the world, and some believe this occurrence is seen at American universities across the country.⁸⁹

83. See David Gritten, *What just happened in Syria and who's in charge?*, BBC AMERICA (Dec. 9, 2024), <https://www.bbc.com/news/articles/c99x011d432o>; Freddie Clayton & Ammar Cheikh Omar, *Syrian rebel leader's extremist past raises questions about his future*, NBC News (Dec. 9, 2024), <https://www.nbcnews.com/news/world/abu-mohammad-al-jolani-leader-syrian-rebel-hts-rcna183402>.

84. HUM. RTS. WATCH, WORLD REPORT 2024: EVENTS OF 2023 475, 537 (2024).

85. *Id.* at 72, 310, 517, 631.

86. *Id.* at 83, 230, 302.

87. See Mark Levin, *Why is Biden so damn silent about this?*, FOX NEWS, YouTube, <https://www.youtube.com/watch?v=n6Djeya-cRA>; Mark Levin Podcast, Mark Levin Audio Rewind - 11/21/24 at 02:35 (Nov. 22, 2024), <https://podcasts.apple.com/in/podcast/mark-levin-audio-rewind-11-21-24/id209377688?i=1000677851286>.

88. See HUM. RTS. WATCH, WORLD REPORT 2024: EVENTS OF 2023 at 168–73.

89. See Earle Mack, 'Never Again' Rings Hollow as Antisemitism Corrupts US Universities, THE HILL (Sept. 1, 2024 11:30 PM) <https://thehill.com/opinion/education/4649270-never-again-rings-hollow-as-antisemitism-corrupts-us-universities/>.

Pro-Palestine and pro-Israel voices are upset with how the United States has handled the conflict as some (both Democrat and Republican) believe the Biden Administration is effectively supporting both sides in large part because of electoral dynamics at play.⁹⁰ Many in our own country believe our basic human rights are under attack, regardless of political opinion

With so many human rights issues around the world, our right to speak freely and call attention to these wrongs is essential. The First Amendment in our Constitution is first for a reason. How can one advocate for human rights when one cannot even speak? Natural law bestows us with the right to free speech because it is an important piece of our broad rights to liberty.⁹¹ Founding Father and Bill of Rights author James Madison believed that for people to rule wisely, they must be free to think and speak without fear of reprisal so it is a precondition for self-government.⁹² We must remember, though, that some of the worst horrors of international crimes like genocide start with the spoken word, as Professor Gregory Stanton explains that dehumanization is a key part of any genocide in his Eight Steps of Genocide.⁹³ Furthermore, if you cannot hear a breadth of

90. See Joel Mathis, Kamala Harris walks ‘tightrope’ on Israel, Gaza, *THE WEEK* (Oct. 15, 2024), <https://theweek.com/politics/kamala-harris-israel-gaza-policy>; Marc Levy, Some Jewish voters in presidential swing states reconsider their longtime devotion to Democrats, *AP NEWS* (Oct. 21, 2024), <https://apnews.com/article/jewish-voters-pennsylvania-2024-elections-trump-harris-09297d8c0843ae2b1698c9d2dfb80fd9>.

91. Devin Watkins, How Natural Law Informs Our Understanding of the Constitution, *FEDERALIST SOC’Y* (Nov. 5, 2019), <https://fedsoc.org/commentary/fedsoc-blog/how-natural-law-informs-our-understanding-of-the-constitution>; see also Universal Declaration of Human Rights, *supra* note 35, art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”), Steven J. Hayman, Righting the Balance: an Inquiry into the Foundations and Limits of Freedom of Expression, 78 *B.U. L. REV.* 1275, 1287- 1290 (explaining that the Pennsylvania Declaration of Independence and James Madison’s notes for the First Amendment cite free speech as a natural right).

92. Jay Cost, James Madison’s Lesson on Free Speech, *NAT’L R.: CULTURE* (Sep. 4, 2017), <https://www.nationalreview.com/2017/09/james-madison-free-speech-rights-must-be-absolute-nearly/>.

93. American Rwanda Tribunal prosecutor and international law professor of the Chinese University of Hong Kong Gregory S. Gordon is an advocate for criminalizing inimical speech that encourages atrocities at the international law level. See *generally id.*; Gregory S. Gordon, Speech Along the Atrocity Spectrum, 42 *GA. J. INT’L & COMP. L.* 425,

opinions or facts through spoken word or the press, how do you fight to be free? You are not isolated if you are not aware that you are isolated.⁹⁴

The struggle for human rights is perennial because there are always new battles to fight, both close and far from home. In the United States, we have seen the dismantling of apartheid, the expansion of gender equality, the recognition of LGBTQ+ rights, furthering of indigenous peoples' rights, and the pursuit of environmental justice all influenced by the UDHR.

VI. WHERE HUMAN RIGHTS AND BUSINESS LAW PRACTICE OVERLAP

Corporate America does not have a great record of respecting human rights; one may argue that it has been one of the biggest banes to human rights in the United States and the world at large for a very long time. Prior to World War II, corporate America was one of the biggest enablers of the Nazis. During the Cold War-era, American corporations were friendly with some of the world's most notorious dictatorships and are believed to have been involved in the overthrow of many foreign governments.⁹⁵ Conservative economist Milton Friedman argued that the corporate social responsibility (CSR) of business is to maximize profits.⁹⁶ The business world has turned away from this outlook to some degree, as CSR has become a hot topic that people either praise or criticize. Some believe that CSR initiatives enhance profits, so shareholders and stakeholders win. Northwestern Law professor David Scheffer and Loyola University Chicago Law professor Caroline Kaeb explain that compliance with human

438-39; *see also* GREGORY S. GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION (2017).

94. North Korean human rights advocate Yeonmi Park brings attention to this issue and explains that censorship and isolation is why North Koreans do not revolt as growing up there, she thought she was at the center of the world. *See* Yeonmi Park, What I Learned About Freedom After Escaping North Korea, TED, YOUTUBE (Sept. 26, 2019), <https://www.youtube.com/watch?v=mLzTo-y8Ef0>.

95. Robinson Rojas, The United States and Its Friendly Dictators, ROBINSON ROJAS ARCHIVE, (Sept. 28, 2024) <https://www.rrojasdatabank.info/dictatrs.htm>.

96. Milton Friedman, *A Friedman Doctrine - The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sep. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

rights and CSR align with the Friedman Doctrine because corporations derive long-term profits and success from addressing reputational risk and steering clear of liability and legal risks.⁹⁷

Human rights-related disclosures in business are a work in progress in the United States. At the federal level, Congress paid attention to conflict in the Democratic Republic of the Congo when it passed the Dodd-Frank Act in 2010.⁹⁸ While it is one of the richest countries in the world in terms of resources and has a Gross Domestic Product (GDP) of 64.7 billion, the Democratic Republic of the Congo (DRC) is among the five poorest countries of the world, with 73.5% of the population living on less than \$2.15 a day in 2024; around one in six Sub-Saharan Africans in poverty reside in the DRC.⁹⁹ This country is also experiencing one of the world's longest ongoing conflicts, which is something of a continuation of the Rwandan Genocide and Civil War.¹⁰⁰ When the Tutsis prevailed over the Hutus in the Rwandan Civil War, many Hutus, some of whom also participated in the genocide, fled to the Congo. While there are dozens of rebel groups fighting against the Congolese government, the most prominent have been the M23 Rebels, a Tutsi faction that the Congolese accuse Rwanda (currently under a Tutsi government) of backing for political reasons. These armed groups, like M23, make money to purchase weapons by running illicit mining operations in the east of this massive country for precious minerals.¹⁰¹ All electronic devices are linked to the Congo because tin, tantalum, tungsten,

97. David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 *BERKELEY J. INT'L L.* 334, 383 (2011).

98. Mvemba Dizolele, *Dodd-Frank 1502 and the Congo Crisis*, *CTR. FOR STRATEGIC & INT'L STUD.* (Sept. 1, 2024, 10:00 PM), <https://www.csis.org/analysis/dodd-frank-1502-and-congo-crisis>.

99. See Eugene Puryear, *Crisis in the Democratic Republic of Congo*, *LIBERATION NEWS* (Dec. 26, 2023), <https://www.liberationnews.org/crisis-in-the-democratic-republic-of-congo/>; *The World Bank in DRC*, *WORLD BANK GRP.* (last visited Dec. 17, 2024), <https://www.worldbank.org/en/country/drc/overview>.

100. *Conflict in the Democratic Republic of Congo*, *COUNCIL ON FOREIGN RELS.: GLOBAL CONFLICT TRACKER*, <https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo> (last visited June 20, 2024).

101. Ken Matthysen, *Why the DR Congo Is Putting Apple on the Spot*, *INT'L PEACE INFO. SERV.* (May 15, 2024), <https://ipisresearch.be/weekly-briefing/why-the-dr-congo-is-putting-apple-on-the-spot/>.

and gold are used in all of these products.¹⁰² Additionally, the current boom of electrical cars is only possible due to the cobalt found in lithium batteries, most of which is from the Congo.¹⁰³

To address this humanitarian crisis in the Congo, Congress passed Section 1502 of the Dodd-Frank Act. Section 1502 amended the Securities Exchange Act of 1934 by directing the SEC to issue a rule requiring any reporting company,

that uses tin, tungsten, tantalum, and/or gold or “any other material or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of Congo or a neighboring country” if those materials are “necessary to the functionality or production of a product manufactured by those companies” to conduct a country-of-origin inquiry to determine whether any of these materials originated in the Democratic Republic of Congo or its neighboring countries or are from scrap or recycled sources and report its findings using a Specialized Disclosure Form (Form SD). If that inquiry determined that there is reason to believe the materials originated in covered countries and are not recycled or scrap, the company was required to conduct due diligence in accordance with the OECD Due Diligence Guidance and publish a Conflict Minerals Report.¹⁰⁴

During King Leopold II of Belgium’s reign from 1865 to 1909, the Congo experienced some of the worst horrors of the resource

102. CNBC, *The Disturbing Connection Between Your Phone and Violence in the Congo*, YOUTUBE (Feb. 15, 2023), <https://www.youtube.com/watch?v=japfUdleNvY>.

103. Freelance miners work long hours for little money in perilous conditions, breathing and touching toxic cobalt. Most of the official Congolese cobalt mines are Chinese-owned, with China having a 70-80% stake in the refined cobalt market and an approximately 50% stake in the battery market. As such, advocates against electric cars in the United States cite not only the price of the vehicles and new infrastructure, but also the primary benefit to China of electric cars. See Terry Gross, *How ‘Modern-Day Slavery’ in the Congo Powers the Rechargeable Battery Economy*, NPR (Feb. 1, 2023), <https://www.npr.org/sections/goatsandsoda/2023/02/01/1152893248/red-cobalt-congo-drc-mining-siddharth-kara>.

104. Rachel Chambers & David Birchall, How European Human Rights Law Will Reshape U.S. Business, 20 HASTINGS BUS. L. J. 3, 30 (January 2023) (citing 15 U.S.C. § 78m).

curse that plagues many countries. The CIA is also cited as a source of the Congo's troubles because the CIA played a part in overthrowing Patrice Lumumba in 1961 and supported Lumumba's successor, the dictator Joseph Mobutu.¹⁰⁵ Congress attempted to address the resource curse in this part of the world with Section 1502.¹⁰⁶ However, the due diligence part of the law was overturned on First Amendment grounds and is therefore no longer enforced by the SEC.¹⁰⁷

In *National Association of Manufacturers v. SEC*, the D.C. Circuit explained that the SEC requiring companies to state whether their minerals are "DRC-Conflict Free" violated the First Amendment in part because the SEC said this Rule was to further social benefits rather than economic benefits (the rationale behind securities disclosure laws and rules).¹⁰⁸ In addition, this policy issue was a matter of international relations where assessments and conclusions are based on informed judgment rather than concrete evidence, and that rationale did not justify compelled speech.¹⁰⁹

Under the First Amendment, the Court explained that government regulation of commercial speech cannot rest on "speculation or conjecture," and the effectiveness of this regime was never discussed extensively in Congress.¹¹⁰ The Court also cited previous case law to say that the commercial speech standard on disclosure from *AMI*, which cites the pivotal case *Zauderer*, is "purely factual and uncontroversial information."¹¹¹ The Court explained that letting conflict-free language stand gives the government tremendous power over speech, and saying

105. Stuart A. Reid, *Open the Congo files and face up to what the CIA did*, THE WASHINGTON POST (Oct. 24, 2023), <https://www.washingtonpost.com/opinions/2023/10/24/congo-lumumba-cia-amends/>.

106. David Robarge, *CIA's Covert Operations in the Congo, 1960-1968: Insights from Newly Declassified Documents*, 58 STUD. INTEL., Sept. 2014, at 2.

107. Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J. L. & BUS. 773, 792–94 (2022).

108. *Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n*, 800 F.3d 518, 522 (D.C. Cir. 2015).

109. *Id.* at 525.

110. *Id.* at 526 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

111. *Id.* at 527 (citing *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014)).

a product is “conflict free” is hardly factual and non-ideological.¹¹² Products and minerals do not fight, and compelling a stock issuer to say it has blood on its hands when products even only indirectly fund armed groups interferes with freedom of speech.¹¹³ While conflict mineral due diligence is no longer mandated, this part of the Dodd-Frank Act made the public aware of the ugly realities of the world’s supply chain. Similarly, Section 1504 required the SEC to make rules requiring corporations involved in resource extraction to disclose whether they have made payments to foreign governments to “further commercial development of oil, gas, or other natural minerals” as a way to force international companies to disclose what they pay to whom and allow stakeholders and NGOs to bring corruption actions.¹¹⁴ However, the general rule mandating these disclosures was scrapped by President Trump under the Congressional Review Act (CRA) on February 14, 2017.¹¹⁵

Even in the absence of enforcement of these specific due diligence measures, achieving public awareness is of no small importance. In some Asian countries, children as young as 13 continue to work in mines, even though the countries have ratified international child labor protection treaties.¹¹⁶ The International Labor Organization (ILO) Minimum Age Convention of 1973 sets the minimum age for employment or work at fifteen (thirteen for light work) and hazardous work at eighteen (sixteen under certain conditions).¹¹⁷ In Southeast Asia, the Philippines ratified this convention so Philippine law says the minimum age for work is fifteen and hazardous work is eighteen yet, in 2011, there was an estimated 3 million Philippine children working in hazardous conditions which includes working in

112. *Id.* at 529–30.

113. *Nat’l Ass’n of Mfrs. v. Sec. & Exch. Comm’n.*, 800 F.3d at 530.

114. *See Chambers & Martin, supra* note 107, at 792–94 (citing *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56,365 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240, 249)).

115. *Id.* at 793–94.

116. INT’L PROGRAMME ON THE ELIMINATION OF CHILD LAB., CHILD LABOUR IN GOLD MINING: THE PROBLEM 5–6 (2006); U.S. EMBASSY IN MONGOLIA, 2020 FINDINGS OF THE WORST FORMS OF CHILD LABOR: MONGOLIA 1–3 (2021).

117. ILO Minimum Age Convention, No. 138 (1973).

dangerous gold mining underwater and underground.¹¹⁸ In South Asia, India and Nepal are both signatories to this Convention yet child labor is prominent in the quarrying industries of both countries.¹¹⁹

While America's legal system historically has not favored those in foreign countries who sue U.S. companies for human rights abuses, the tide is starting to turn due to public reception of business ties to human rights abuses. The Alien Tort Statute ("ATS"), the primary U.S. law that has been used by plaintiffs alleging human rights abuses, has been litigated extensively as to whether it could be used by plaintiffs to hold businesses accountable for human rights abuses overseas. It reads: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹²⁰ The meaning of what is a law of nations has profoundly affected jurisprudence under this law as it pertains to business and human rights, but this statute was passed under the Judiciary Act of 1789 so before international criminal law was really a legal regime.

In *Kiobel v. Royal Dutch Petroleum*, Nigerian nationals sued Royal Dutch Petroleum for being complicit in the Nigerian government's human rights violations under the ATS.¹²¹ After the Second Circuit ruled that the ATS does not allow civil actions against corporations, the Supreme Court ruled that the ATS cannot be used to sue companies for human rights abuses overseas because of the presumption against extraterritorial application of U.S. law, which is in place to prevent foreign affairs complications.¹²²

More recently, the Supreme Court interpreted the ATS in a restrictive way in *Nestle USA, Inc. v. Doe*. In this case, Mali cocoa

118. Julianne Kippenberg et al., HUM. RTS. WATCH, "What ... If Something Went Wrong?" *Hazardous Child Labor in Small-Scale Gold Mining in the Philippines* 3, 8 (2015).

119. Romita Saluja, *How Child Labour in India Makes the Paving Stones Beneath Our Feet*, THE GUARDIAN (last updated May 9, 2024), <https://www.theguardian.com/news/2024/mar/28/how-child-labour-in-india-makes-the-paving-stones-beneath-our-feeet>; U.S. Dept. Lab., *2023 Findings of the Worst Forms of Child Labor: Nepal* 1 (2024).

120. 28 U.S.C. § 1350.

121. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 111–12 (2013).

122. *Id.* at 124–25.

farmers claimed they were trafficked into the Ivory Coast as child slaves to produce cocoa. Nestle and Cargill purchase, process, and sell cocoa, they did not own or operate farms, but they provided those farms with capital in exchange for exclusive rights to the cocoa.¹²³ While the Ninth Circuit had ruled that financing decisions are enough to hold a corporation liable for human rights abuses under the ATS, the Supreme Court said that general corporate activity alone cannot justify applying the ATS to domestic corporations.¹²⁴ In addition, the Supreme Court said the three historical ATS torts per *Sosa v. Alvarez-Machain* are “violation[s] of safe conducts, infringement of the rights of ambassadors, and piracy” as creating new causes under international law for legal action causes significant foreign policy concerns.¹²⁵ In practice, the ATS is quite limited when it comes to business and human rights and corporations have fared generally well when it comes to ATS litigation, but the great public relations damage done is undeniable. The fallout from bad public relations due to human rights issues can jeopardize companies in the public eye.

However, the Southern District of Florida witnessed a significant business and human rights milestone when a jury there found the banana giant Chiquita Brands liable for human rights abuses against Colombian nationals because the company financed the United Self-Defense Forces of Colombia (“AUC”), a right-wing paramilitary group designated as a terrorist organization by the U.S. in 2001 that was also involved in drug trafficking (the AUC disbanded in 2006 after reaching an agreement with the Colombian government).¹²⁶ Chiquita claims it paid this group to protect their interests in the country because the group’s leader Carlos Castaño threatened the company’s Colombian subsidiary with violence if the company did not pay the group.¹²⁷ The AUC engaged in attacks against suspected

123. *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 630 (2021).

124. *Id.* at 634.

125. *Id.* at 637; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

126. Vanessa Buschschlüter, *Banana Giant Held Liable for Funding Paramilitaries*, BBC (Jun. 11, 2024), <https://www.bbc.com/news/articles/c6pprpd3x96o>.

127. *Id.*; see also Daphne Ewing-Chow, *Chiquita Brands Found Guilty Of Funding Colombian Terrorist Group*, Forbes (Jun. 12, 2024, 11:49 AM),

leftist accomplices, and the recent jury verdict was rendered on harms against nine victims (AUC was found culpable for eight) while there were reportedly hundreds killed (with victims including unionists and banana workers).¹²⁸ In this civil case, the Court ordered Chiquita to pay the families of the eight victims \$38.3 million in damages.¹²⁹ With this case, there is now precedent for holding American corporations civilly liable overseas for human rights abuses against foreign nationals in spite of the narrowness of the Alien Tort Statute, which is groundbreaking.¹³⁰

Social media and technology have made consumers more cognizant of the companies they obtain their goods and services. In the sports world, FIFA is one example. Leading up to the 2014 World Cup in Brazil, an estimated 170,000 Brazilians were forcibly evicted from their homes according to the British government, and many Brazilians worked long hours and in hazardous conditions to prepare for the event.¹³¹ Leading up to the 2022 World Cup in Qatar, migrant laborers from the South Asian nations of India, Nepal, and Bangladesh reported inhumane treatment, and an estimated 6,500 laborers died in constructing stadiums and infrastructure for the event.¹³²

<https://www.forbes.com/sites/daphneewingchow/2024/06/11/chiquita-brands-found-guilty-of-funding-colombian-terrorist-group/> (describing how Chiquita was investigated by the Justice Department for making \$1.7 million in contributions to a designated terrorist organization between 1997 and 2004, and paid a \$25 million fine in 2007).

128. See Ewing Chow, *supra* note 127. The plaintiffs' lawyers also argued that the AUC displaced people in fertile parts of Columbia, so Chiquita could buy fertile land for cheap prices and turn plantain farms into banana farms. See also Kate Aronoff, *The Chiquita Verdict Was a Long Time Coming*, New Republic (Jun. 12, 2024), https://newrepublic.com/article/182589/chiquita-colombia-deaths-verdict?utm_source=newsletter&utm_medium=email&utm_campaign=tnr_weekly.

129. Ewing Chow, *supra* note 127.

130. Aronoff, *supra* note 128.

131. *The World Cup and Human Rights in Brazil*, FOREIGN & COMMONWEALTH OFF. (U.K.) (Mar. 12, 2015), <https://www.gov.uk/government/case-studies/the-world-cup-and-human-rights-in-brazil>; see also Ida Karlsson, *World Cup Workers Struggle For Basic Rights*, AL-JAZEERA (Jul. 3, 2014), <https://www.aljazeera.com/sports/2014/7/3/world-cup-workers-struggle-for-basic-rights>.

132. Pete Pattison & Niamh McIntyre, *Revealed: 6,500 Migrant Workers Have Died in Qatar Since World Cup Awarded*, THE GUARDIAN (Feb. 23, 2021, 1:00 PM), <https://www.theguardian.com/global-development/2021/feb/23/revealed-migrant-worker-deaths-qatar-fifa-world-cup-2022>.

However, FIFA does appear to be making a genuine effort to improve its human rights record.¹³³

In the fast food industry, the U.S. Department of Labor discovered McDonald's utilized child labor in locations nationwide.¹³⁴ In sports apparel and footwear, Nike's reputation took a hit when media reported that Nike achieved scale because it employed Asian workers in "sweatshop conditions" in countries like Indonesia, China, and Vietnam because countries like Taiwan and South Korea saw wages rise.¹³⁵

The Bangladeshi Sweat Shop scandal of 2001 also became big news in the U.S. clothing industry when it was discovered retailers were profiting from laborers paid extremely low wages and work in hazardous factories prone to deadly fires and building collapses.¹³⁶ In the Harper's Magazine article *Shopping for Sweat*, Ken Silverstein explained how Cambodia opened up trade with the United States in the 1990s when it agreed to implement better working conditions and subject itself to ILO

133. For the 2026 World Cup, FIFA appointed American human rights advocate, scholar, and businessman Matt Mullen to be Head of Human Rights for the 2026 human rights program. FIFA also recognized the First Nations and Māori cultures during the 2023 Women's World Cup in Australia and New Zealand. See *UN Human Rights Day: FIFA reaffirms its commitment to human rights and anti-discrimination*, Inside FIFA (Dec. 10, 2023) [hereinafter "FIFA's Commitment"]. Matt Mullen runs a human rights business consulting firm called Article 30 (named for Article 30 of the UDHR, which says that nothing in the UDHR justifies abridging rights protected by the declaration) and is at the forefront of the human rights due diligence movement in Asia as someone who completed his doctorate in Salaya, Thailand at Mahidol University. See *About A30*, A30, <https://www.a30humanrights.com/about> (last visited Sept. 1, 2024). While many say FIFA acted shamefully in not defending LGBTQ+ rights in Qatar or Russia, FIFA is taking action against Mexico because of its fans chanting homophobic remarks. See Cyd Zeigler, *Mexico is back in sports court as FIFA alleges more anti-gay slurs by fans*, Outsports (Feb. 24, 2024).

134. Mary Whitfill Roeloffs, *McDonald's Shareholders Demand Human Rights Investigation After Child Labor Called Out By Feds, Report Says*, FORBES (Jun. 23, 2023), <https://www.forbes.com/sites/maryroeloffs/2023/06/23/mcdonalds-shareholders-demand-human-rights-investigation-after-child-labor-called-out-by-feds-report-says/>.

135. Bianca Piazza, *"Just Do It," But at What Cost? Exploring the Complex History of Nike's Ethics*, GREENMATTERS (Aug. 7, 2023), <https://www.greenmatters.com/style/is-nike-ethical>; Ken Silverstein, *Shopping for Sweat*, HARPER'S MAG. (Jan. 2010), <https://harpers.org/archive/2010/01/shopping-for-sweat/>.

136. Barry Bearak, *Lives Held Cheap in Bangladesh Sweatshops*, N.Y. TIMES (Apr. 15, 2001), <https://www.nytimes.com/2001/04/15/world/lives-held-cheap-in-bangladesh-sweatshops.html>.

inspections, but wages stay flat (many workers live in squalor) because of demand, and Khmer union activists without ties to employers or the government live in danger.¹³⁷ There is an incentive to deceive the ILO during inspections, because violations equal closures and closures mean unemployment.¹³⁸ Industry consultant David Birnbaum explained that in the garment industry “ethical sourcing” is basically a public sourcing exercise to appease customers but that field felt the heat saying, “If you are an apparel importer, you have to accept that working in countries where police periodically machine-gun students or workers entails higher macro costs” and “similarly, as a garment buyer, you also have to accept the fact that working with some factories also carries higher indirect costs. If the factory looks like a cross between an orphanage and a prison camp, you have a potential problem.”¹³⁹ Companies are expected to take action because change in human rights is slow, but doing something is better than nothing. In the article *What Does That \$14 Shirt Really Cost?*, Rosemary Westwood details how for every generic \$14 shirt a Bangladesh factory makes, the laborer only earns \$0.12.¹⁴⁰

The luxury apparel companies Armani and Dior are similarly in sweatshop scandals of their own. Armani is under investigation by Italian authorities because one of its subsidiaries, Giorgio Armani Operations, is accused of outsourcing production of bags, belts, and leather products to Chinese-owned workshops on the outskirts of Milan.¹⁴¹ Investigators reported these workshops

137. Silverstein, *supra* note 135.

138. *Id.* Cambodia has lenient foreign ownership laws, so most of these factories are owned by Asian nationals from China, Taiwan, South Korea, and Hong Kong. While some cite the success of Japan, South Korea, Taiwan, and even Singapore in recent years as countries that had sweatshop phases amidst their textile-paved roads to prosperity, Silverstein explains that these countries also had restrictive trade policies, and companies could pay Asian workers more but chose not to. The United States confronted this debate, too, when child laborers at the turn of the century and early twentieth century worked in dangerous cotton mills.

139. *Id.*

140. Rosemary Westwood, *What Does That \$14 Shirt Really Cost?*, MACLEAN'S (May 1, 2013), <https://macleans.ca/economy/business/what-does-that-14-shirt-really-cost/>.

141. See Emilio Parodi, *Armani company put in receivership amid labour exploitation probe*, REUTERS (Apr. 15, 2024), <https://www.reuters.com/business/retail->

were staffed by undocumented Chinese and Pakistani workers paid two to three euros per hour, ten hours a day for sometimes seven days a week, making bags sold to the Armani subcontractors for ninety-three euros and ultimately resold to Armani for 250 euros.¹⁴² Once they reach the market, the general consumer is charged around 1,800 euros.¹⁴³ Armani claims it has control and prevention measures in place to minimize abuses in its supply chain, as the Milan prosecutor's office has been investigating fashion companies for outsourcing to subcontractors who exploit workers for years.¹⁴⁴ Reflecting ingrained business strategy, according to the Italian judges in the Armani case, the laborers were not only undocumented but had no employment contracts, were forced to eat and sleep in the facilities with degrading conditions, worked with machines that had safety devices deliberately removed, became exposed to dangerous chemical substances, and were denied medical examinations as well as training.¹⁴⁵ Similar to Armani, Dior's Italian subsidiary has also been placed under judicial receivership for failure to prevent human rights abuses in its supply chain, and the manufacturing of bags requires oversight of a special commissioner.¹⁴⁶ Dior is not facing criminal charges, but the court stated that it failed to take "appropriate measures to check the actual working conditions or the technical capabilities of the contracting companies."¹⁴⁷ Hence, as Armani and Dior are two prominent Italian fashion brands, Italy has come under scrutiny when it comes to human rights due diligence in the luxury apparel industry as it is also home to thousands of smaller

consumer/armani-group-company-receivership-over-labour-exploitation-probe-2024-04-05/.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*; Colleen Barry, *Giorgio Armani bags were produced by exploited Chinese workers near Milan, Italian police say*, AP NEWS (Apr. 5, 2024), <https://apnews.com/article/giorgio-armani-italian-fashion-supply-chain-abuses-exploitation-40cd94429e5a053c500383127a5c4ca2>.

146. Jasmin Malik Chua, *Dior Subsidiary Under Administration After Italian Labor Probe*, YAHOO! FINANCE (Jun. 11, 2024), <https://finance.yahoo.com/news/dior-subsidiary-under-administration-italian-214545454.html>.

147. *Id.*

manufacturers that produce 50-55% of the world's luxury products and leather goods.¹⁴⁸ The scrutiny businesses are facing with public awareness of the ugliness in the global supply chain has made the public expect companies to disclose what they are doing about it, as consumers themselves have an indirect part in furthering potential human rights abuses.

Reputational harm and risks from consumer boycotts and shareholder activism have made businesses and even law firms pay attention to what they are doing in terms of international human rights. Many companies at the very least have corporate social responsibility ("CSR") and/or human rights statements. Apple's human rights statement reads very closely to Article I of the UDHR, as it begins with "[a]t Apple, our respect for human rights begins with our commitment to treating everyone with dignity and respect. But it doesn't end there. It also means leading with our values. Our human rights policy governs how we treat everyone—from our customers and teams to our business partners and communities and to people at every level of our supply chain."¹⁴⁹ Apple acted accordingly with these words when an internal investigation led the company to temporarily stop buying cobalt from artisanal mines in the Congo, pledging to continue to work with local groups to improve conditions for workers and stop child labor before they resume their relationship.¹⁵⁰

Along with Target, Disney, Bud Light, the NBA, Nike, and Ben and Jerry's are all polarizing examples of CSR and human rights. Some believe Nike is a hypocritical company because they

148. Parodi, *supra* note 141. Italy's textile strongholds, including the Tuscan city of Prato, are home to many Chinese immigrants, where they work in the fashion apparel industry. Chua, *supra* note 146. While the words "Made in Italy" are always associated with quality luxury products, they only mean the product is planned, manufactured, and packaged in the country without specifying who made them in what conditions. Chinese-owned operations in the Italian apparel industry pose formidable competition to their Italian counterparts when it comes to speed, productivity, and price. It can be easy to overlook labor and workplace conditions since sellers always want the highest margins possible.

149. *Id.*

150. See Todd C. Frankel, *Apple cracks down further on cobalt supplier in Congo as child labor persists*, THE WASH. POST (Mar. 3, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/03/03/apple-cracks-down-further-on-cobalt-supplier-in-congo-as-child-labor-persists/>.

became advocates for social justice against racism and police brutality in the United States, yet they continue to profit from sweatshop labor.¹⁵¹ Nike's controversy to some was further evidenced by their decision to remove Houston Rockets apparel from the People's Republic of China when Rockets General Manager tweeted his support for human rights protests against the Hong Kong government.¹⁵² However, Nike is not the only organization believed to reprimand those who speak up. In the NBA, Turkish basketball player and human rights advocate Enes Kanter Freedom became a vocal critic of China, which he believes cost him his basketball career. Some observers agree with Kanter and his criticism of Nike for condemning injustices in the U.S. while remaining silent on human rights violations in China, going as far as calling Nike-affiliated athletes like LeBron James and Colin Kaepernick hypocrites.¹⁵³ In the same vein, Ben and Jerry's irked some consumers by becoming vocally pro-Palestine, closing

151. See *Our Commitment to the Black Community*, NIKE, <https://about.nike.com/en/impact-resources/our-commitment-to-the-black-community> (last visited Sept. 1, 2024); see also Vicky Xiuzhong Xu & James Leibold, *Your favorite Nikes might be from forced labor. Here's why.*, THE WASH. POST (Mar. 17, 2022), <https://www.washingtonpost.com/opinions/2020/03/17/your-favorite-nikes-might-be-made-forced-labor-heres-why/>.

152. See Ryan Woo & David Stanway, *Houston Rockets Nike merchandise disappears from China stores*, REUTERS (Oct. 11, 2019), <https://www.reuters.com/article/us-china-basketball-nba-nike/houston-rockets-nike-merchandise-disappears-from-china-stores-idUSKBN1WP109/>.

153. See David Hookstead, *Enes Kanter Freedom Praises The First Amendment, Calls It The 'Greatest Amendment Of All Time'*, DAILY CALLER (Dec. 13, 2021), <https://dailycaller.com/2021/12/13/enes-kanter-freedom-first-amendment-fox-news/>; see generally Ben Rohrbach, *Enes Kanter and the tangled web of the NBA, Nike, their biggest stars and China*, YAHOO! SPORTS (Nov. 24, 2021), <https://sports.yahoo.com/enes-kanter-and-tangled-web-of-nba-nike-lebron-james-china-230916548.html> (showcasing NBA player Enes Kanter's criticism of Nike for speaking out against injustices in the U.S. while staying silent on human rights violations in China, including Uyghur forced labor). Former Chinese Basketball Association President and NBA player Yao Ming invited Enes Kanter to visit China to get a better understanding of the country. Agence France-Presse, *Former NBA basketballer Yao Ming invites Beijing critic Enes Kanter to visit China*, HONG KONG FREE PRESS (last updated Jan. 18, 2022, 18:30), <https://hongkongfp.com/2022/01/18/former-nba-basketballer-yao-ming-invites-beijing-critic-enes-kanter-to-visit-china/>. Kanter responded that he accepts the offer and wants to see the "real China." New Day, *Enes Kanter Freedom accepts Yao Ming's offer, but with stipulations*, CNN SPORTS (Jan. 19, 2022), <https://www.cnn.com/videos/sports/2022/01/19/enes-kanter-freedom-responds-yao-ming-china-vpx.cnn>.

their shops in the Israeli Occupied Territories, and releasing Colin Kaepernick's Change the Whirled Non-Dairy Frozen Dessert™ – to speak up for social justice.¹⁵⁴ These examples are indicative of how this movement is not received with unanimous praise. In fact, there is a vocal crowd that believes CSR and work in human rights is nothing more than 'wokeness' and virtue-signaling.¹⁵⁵ These businesses do not care about human rights and are just engaging in wokeness to make a profit, preferably from 'social justice warriors' who are skeptical of big businesses. If human rights or social justice will come at the cost of profit, companies will not act on their so-called 'principles.' For companies that allegedly weaponize wokeness, we are now witnessing so-called 'conservative boycotts.'¹⁵⁶ Republican Senator Ted Cruz (R-TX) and former presidential candidate Vivek Ramaswamy have been vocal critics in this area with their books, respectively, *Unwoke: How to Defeat Cultural Marxism in America* and *Woke, Inc.: Inside Corporate America's Social Justice Scam*.¹⁵⁷ However, there is a compelling argument that

154. *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY'S, <https://www.benjerry.com/about-us/media-center/opt-statement> (last visited Sept. 1, 2024); *Colin Kaepernick's Change the Whirled Non-Dairy*, BEN & JERRY'S, <https://www.benjerry.com/flavors/colin-kaepernicks-change-the-whirled-non-dairy/pint> (last visited Sept. 1, 2024); See Dev Patnaik, *The Real Lesson From Ben & Jerry's (It's Not 'Go Woke And Go Broke')*, FORBES (Mar. 31, 2024), <https://www.forbes.com/sites/devpatnaik/2024/03/31/the-real-lesson-from-ben-jerrys-its-not-go-woke-and-go-broke/> (finding that sources of media believe that when a company decides to take a public stance it is bad for business).

155. See, e.g., Danielle E. Warren, "Woke" Corporations and the Stigmatization of Corporate Social Initiatives, 32 BUS. ETHICS Q. 169, 169 (2022).

156. See, e.g., Emily Steward, *The conservative boycott playbook is kind of working*, VOX (Aug. 31, 2023), <https://www.vox.com/money/23851108/bud-light-target-boycott-success-trans-issues-woke-capitalism> (noting that Bud Light's campaign with transgender influencer Dylan Mulvaney and Target's Pride collection has sparked a boycott amongst conservative consumers).

157. See generally Joseph Morton, *Texas Republican Sen. Ted Cruz steps up attacks on 'woke' corporations in latest book*, DALLASNEWS.COM (Nov. 7, 2023), <https://www.dallasnews.com/news/politics/2023/11/07/texas-republican-sen-ted-cruz-steps-up-attacks-on-woke-corporations-in-latest-book> (citing Cruz denounces 'cultural Marxism' and claims Democrats have turned Fortune 500 companies into their personal political enforcers); see generally Richard Morrison, *Review of Vivek Ramaswamy's Woke, Inc.*, COMPETITIVE ENTERPRISE INST. (Dec. 23, 2021), <https://cei.org/blog/review-of-vivek-ramaswamys-woke-inc> (quoting Ramaswamy from his book saying that wokeness is an invisible force in corporate America robbing people of their money, voice, and identity).

mandating human rights law in business practices, or at least following due diligence procedures and utilizing procedures and metrics to gauge human rights performance, will advance human rights in the world because it will enable companies to provide data and real-world results to states, stakeholders, and skeptics.¹⁵⁸

FIFA has a human rights statement, but companies who do not act on these statements are simply virtue-signaling or window-dressing.¹⁵⁹ Human rights should never be a matter of politics, but human rights in business practices are often thought of as left-leaning in the United States. University of British Columbia Law professor Li-Wen Lin observes that comparative experience shows that CSR is generally a left-leaning concept internationally, as France's human rights due-diligence law (the French Vigilance Law) was passed under a socialist government, China's CSR laws passed under the Chinese Communist Party (CCP), and South Africa, India, and Mauritius all saw their CSR laws pass under left-leaning governments.¹⁶⁰ In addition, left-wing politics generally emphasize egalitarianism and public control of major political and economic institutions, as well as government intervention and labor/equality issues.¹⁶¹

The U.N. Guiding Principles of 2011 by John Ruggie were a big step towards human rights and business getting materialized at the international level. As stated earlier, the U.N. Guiding Principles (UNGPs) endorsed human rights due diligence laws. Principle 3 of the UNGPs states, "In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, *requiring business enterprises to respect human rights*" as well as that states should ensure business enterprise laws

158. See Ariunaa Tumurtogoo, *Why should businesses respect human rights?*, U.N. DEV. PROGRAMME MONGOLIA (June 1, 2023), <https://www.undp.org/mongolia/blog/why-should-businesses-respect-human-rights>.

159. FIFA, FIFA STATUTES, REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES, STANDING ORDERS OF THE CONGRESS, art. 3 (May 2024), <https://digitalhub.fifa.com/m/16d1f7349fa19ade/original/FIFA-Statutes-2024.pdf> ("FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.").

160. Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World- Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429, 457 (2021).

161. *Id.*

enable respect for human rights, provide human rights guidance to businesses, and encourage and require (when appropriate) communication of how businesses address their human rights impacts.¹⁶²

Under Principle 12, the UDHR applies to businesses because it states, “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights understood, at a minimum, as those expressed in the International Bill of Human Rights.”¹⁶³ The commentary of Principle 12 explains that the International Bill of Human Rights consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹⁶⁴

Principle 13 states that to protect human rights, businesses must avoid causing or contributing to adverse human rights impacts and if they do occur, mitigate adverse impacts even if they did not contribute to those impacts.¹⁶⁵ This principle’s commentary states “activities” means actions and omissions, and “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”¹⁶⁶ The U.N. Guiding Principles inspired countries to pass laws mandating human rights due diligence (HRDD).

In 2017, France was the first country to pass its HRDD law, the French Vigilance Law; which applies to companies registered in France with 5,000 or more employees as well as the companies they own, subcontractor activities, and suppliers with whom the

162. John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 8, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *U.N. Guiding Principles*].

163. *Id.* ¶ 13.

164. *Id.*

165. *Id.* ¶ 14.

166. *Id.*

company has a commercial relationship.¹⁶⁷ Additionally, the law mandates that French companies have a plan for detecting risks and preventing serious violations to human rights, fundamental freedoms, health and safety, and the environment.¹⁶⁸ French companies must map out and analyze the risks as well as implement measures, such as an alert mechanism and monitoring scheme, to mitigate and address those risks.¹⁶⁹ While failure to follow this law or act vigilantly leads to civil liability based on fault, proving a breach of vigilance to satisfy causation can be difficult when the primary perpetrator of the human rights violation is a subsidiary, supplier, or other affiliate of the corporation.¹⁷⁰ While there are no criminal penalties in the statute, the law contains an injunction mechanism as well, allowing an interested party to seek an injunction from the courts that requires a company to comply with the law after receiving notice and failing to correct course.¹⁷¹ In the Netherlands, the Dutch Child Labor Due Diligence Act mandates due diligence in all businesses that supply goods and services to the Netherlands, covering companies with no corporate presence in the country, if there is a “reasonable suspicion” of child labor as defined by the ILO within the supply chain.¹⁷² Similarly, Switzerland enacted the Swiss Conflict Minerals and Child Labor Due Diligence Law covering Swiss companies (as well as Swiss-organized subsidiaries of foreign-based multinational companies) and mandates due diligence when child labor is reasonably suspected within its supply chain or when procuring tungsten, tin, tantalum, and gold from high-risk areas.¹⁷³

In Germany, the country’s Supply Chain Due Diligence Act currently applies to German companies and subsidiaries with at least 1,000 employees, and covers child labor, slavery, employment discrimination, torture, violation of right to life, and

167. Chambers & Martin, *supra* note 107, at 797.

168. *Id.* at 797 n. 109.

169. *Id.* at 797–98.

170. *Id.* at 798.

171. *Id.* at 798–99.

172. Chambers & Birchall, *supra* note 104, at 13.

173. *Id.* at 14–15.

physical harm.¹⁷⁴ This statute mandates that applied companies incorporate due diligence processes under Section 3(1), and that covered companies are on the hook for their indirect suppliers when companies have substantiated knowledge of possible human rights violations by the supplier.¹⁷⁵ German companies that violate the statute are required to pay financial penalties, however there is no liability under civil law for such violations.¹⁷⁶ In Norway, the Norwegian Transparency Act applies to companies with 40 or more employees and mandates that due diligence procedures in company supply chains are in accordance with the Organization for Economic Co-operation and Development (OECD), and include a requirement for a living wage.¹⁷⁷ In the European Union (EU), there is the Corporate Sustainability Due Diligence Directive that mandates EU member states, as well as non-EU companies above a certain size, to incorporate mandatory human rights due diligence and environmental policies starting in 2027.¹⁷⁸ The covered companies are EU companies with more than 1,000 employees on average, and a net worldwide turnover of more than EUR 450 million; and non-EU companies generating a net turnover of more than EUR 450 million within the EU.¹⁷⁹ The obligations apply to a company's upstream and downstream business partners, and

174. *Id.* at 15.

175. Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten (Supply Chain Due Diligence Act), July 22, 2021, Elektronischer Bundesanzeiger [eBA] at 2959, 2021 (Ger.) (explaining the requirements including but not limited to establishing a risk management system, performing regular risk analyses, issuing a policy statement, establishing a complaints procedure, reporting, and documenting); see Chambers & Birchall, *supra* note 104, at 15–16.

176. *Id.* at 16.

177. *Id.*

178. *Id.* at 17; see Michael R. Littenberg, et al., *EU Corporate Sustainability Due Diligence Directive Effective Date Set – A Deep-dive and Baker's Dozen of Take-aways for U.S.-based Multinationals*, ROPES & GRAY (July 8, 2024), <https://www.ropesgray.com/en/insights/viewpoints/102jc7u/eu-corporate-sustainability-due-diligence-directive-effective-date-set-a-deep-d>.

179. *Landmark EU “Corporate Sustainability Due Diligence Directive” Imposing Human Rights and Environmental Due Diligence Obligations on EU and Non-EU Companies Approved by European Parliament*, GIBSON DUNN (Apr. 30, 2024), <https://www.gibsondunn.com/landmark-eu-corporate-sustainability-due-diligence-directive-imposing-human-rights-and-environmental-due-diligence-obligations-on-eu-and-non-eu-companies-approved-by-european-parliament/>.

these human rights and environmental obligations include integrating due diligence into policies and management systems, identifying and assessing actual and potential adverse human rights and environmental impacts and providing remediation to those affected by actual adverse impacts.¹⁸⁰

In Japan there are HRDD guidelines, but Human Rights Now helped draft a Japanese HRDD law for the National Diet (Japan's national legislature) that applies to "the national government, local governments, and all business operators that engage in business in Japan" under Article 3.¹⁸¹ Along similar lines as other HRDD statutes, this Japanese draft law mandates the following due diligence obligations: establishing and publishing policies regarding respect for human rights, identifying and periodically analyzing negative impacts on human rights, and implementing measures to prevent or mitigate any of the identified negative human rights impacts that may occur as well as addressing or correcting any that actually have occurred.¹⁸² In East Asia, South Korean lawmakers have proposed a bill requiring HRDD for employers, which could make South Korea the first nation in the region to have mandatory HRDD.¹⁸³ In Latin America, Brazilian lawmakers introduced Bill 572/22 in March 2022 which would require HRDD.¹⁸⁴ With these HRDD laws taking effect in nations that are some of America's biggest trade partners, it is imperative

180. *Id.*

181. *English text of HRN's Recommended "Human Rights Due Diligence Bill" for Japan*, HUM. RTS. NOW (Nov. 21, 2023), https://hrn.or.jp/eng/news/2023/11/21/hrdd_bill/.

182. *Id.* (listing out the provisions of Article 4, section 1 of the Human Rights Due Diligence Bill).

183. See Lavanga Wijekoon et al., *South Korea Proposes Mandatory Human Rights Due Diligence Obligations on Employers*, LITTLER (Jan. 16, 2024), <https://www.littler.com/publication-press/publication/south-korea-proposes-mandatory-human-rights-due-diligence-obligations>. The South Korean law is known as the "Act on Human Rights and Environmental Protection for Sustainable Business Management" and it would apply to companies registered in Korea or internationally that have Korean branches and operations with over 500 employees or revenue equal to or greater 200 billion Korean Won (approximately \$153 million U.S. dollars). See *id.*

184. *Engaging with business in Latin America*, GLOB. BUS. INITIATIVE, <https://gbihr.org/business-practice-portal/latin-america> (last visited Dec. 19, 2024).

that American business lawyers become familiar with human rights principles to provide both effective and ethical counsel.¹⁸⁵

VII. WHERE TEXAS STANDS AND WHY ALL THIS MATTERS FOR TEXAS LAWYERS

Human rights due diligence matters for Texas lawyers specifically because of the increasingly large corporate presence of companies that are established internationally, including across Europe and Japan. Texas is not only home to fifty-five Fortune 500 companies and ninety-five Fortune 1,000 companies, but nearly half of the American Lawyer's AM Law 100 firms (the publication's annual ranking of the 100 largest law firms in the United States) are also present in Texas.¹⁸⁶ Texas leads the nation in exports, is a top destination for Foreign Direct Investment, as well as being an epicenter for global business and trade, with more than 1,900 foreign corporations doing business in the state.¹⁸⁷ Texas consistently ranks as one of the best states for business with pro-business policies and no state income tax.¹⁸⁸ British firms such as Ashurst and Clifford Chance are coming to

185. While China, South Africa, India, Mauritius, and Indonesia all have unique laws addressing corporate social responsibility policies and practices in their countries, the issue of forced labor specifically is addressed by laws in other countries including Canada's Fighting Against Forced Labour and Child Labour in Supply Chains Act, the United Kingdom's Modern Slavery Act, and the Modern Slavery Acts of Australia and New Zealand. See generally Lin, *supra* note 161, at 435 (exploring the different CSR requirements internationally to show how more than expressive legislation is needed globally); see generally Karina Karakulova, *Breaking New Regulatory Ground: Due Diligence Obligations in Corporate Supply Chains*, INST. S'HOLDER SERVS. INSIGHTS (Nov. 14, 2023), <https://insights.issgovernance.com/posts/breaking-new-regulatory-ground-due-diligence-obligations-in-corporate-supply-chains/> (exploring the global CSR requirements to show the rapidly developing international regulatory systems).

186. See Tom Labinski, *Texas leads nation with 55 companies on annual Fortune 500 list*, STATESMAN.COM (June 5, 2023), <https://www.statesman.com/story/news/local/2023/06/05/texas-fortune-500-companies-list-2023-tesla-dell-oracle-austin/70290189007/>; see Rebecca Adlington, *Taking a Closer Look at the Booming Legal Market in Texas*, LINKEDIN (May 30, 2024), <https://www.linkedin.com/pulse/taking-closer-look-booming-legal-market-texas-rebecca-adlington-1wftf/>.

187. *Texas Trade & FDI*, TEX. ECON. DEV. & TOURISM (last updated Aug. 2024), <https://gov.texas.gov/business/page/foreign-direct-investment>.

188. See David Beren, *These Are By Far the Most Business-Friendly States*, 24/7 WALL ST. (Dec. 14, 2024), <https://247wallst.com/news/2024/12/14/these-are-by-far-the-most-business-friendly-states/>.

Houston, Austin is becoming a legal hub for tech giants like Tesla and start-ups such as “Silicon Hills”, and Dallas leads the nation in partner headcount growth with 48% increase among the AM Law 100 firms between 2018 and 2024.¹⁸⁹ For reference, Dallas saw 91% partner growth between 2019 and 2024 in mergers and acquisitions, while Houston’s partner growth generally was 15% between 2018 and 2024, only behind Dallas, Atlanta, New York City, Philadelphia, and Miami.¹⁹⁰

As a Texas lawyer, human rights are not only about helping your clients maneuver a complicated international business transaction. Instead, they are about understanding ethics, clients, and being a decent person in the office, courtroom, and outside the profession as an effective steward of the community because the root of human rights is human dignity. The Texas Rules of Professional Conduct do give us guidance on how to advise clients on potential human rights issues.¹⁹¹ Imagine that an important client of yours is undertaking a project in Indonesia to build a location with roads giving companies access to oil reserves. Later, because nearby forest is inhabited by tigers, monocled cobras, and Komodo dragons, the client hires a security company. A Google search shows that the security company has been hired by Western companies before, has a record of forced eviction of Indonesian farmers as well as displacement of the indigenous Korowai tribe, and resistance in those cases was met with violence. The ethical dilemma you face is between your duty to represent your client diligently, and your duty to inform your client of the security company’s troubling record. Should you insert language to control the actions of the company considering their concerning human rights record? On a broader question, remember the UDHR is a declaration rather than a binding piece of law and that U.N. General Principles, like other U.N. declarations, do not have legal status as law but rather reflect an emerging consensus that corporations have obligations related to international human rights. That is not to say human rights-

189. See Adlington, *supra* note 186.

190. *Id.*

191. See TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.03(b), R. 2.01 (2022) (requiring lawyers to keep clients informed of relevant updates and require the rendering of candid advice which may require lawyers to bring up human rights issues).

related laws do not exist in the United States, they are just not nearly as comprehensive or as organized as they are in other countries.

VIII. WHERE UNITED STATES BUSINESS LAW STANDS ON HUMAN RIGHTS

In the United States, the Foreign Corrupt Practices Act (FCPA) is considered the heart of corporate compliance law, and it closely intersects with human rights.¹⁹² Congress enacted the FCPA in 1977 to promote democratic values around the world through international business, an aim related to furthering human rights in addition to fighting corruption. This made the United States a global leader in fighting bribery and corruption, which encouraged other countries to discourage bribery. This created a more attractive environment internationally, as host and source countries became more conducive to business; foreign countries knew American companies followed responsible business practices, because it was the law.¹⁹³ Business lawyers advise clients to draft ethics rules to mitigate FCPA violations under federal sentencing guidelines as part of prudent practice.¹⁹⁴

The United States has addressed human rights due diligence in the garment industry. The Uyghur Forced Labor Prevention Act states that any item coming to a U.S. importer from the Xinjiang Autonomous Region of the People's Republic of China will be seized or denied importation unless within thirty days of the notice of detention, the importer can rebut the presumption in writing that the goods are on the statute's entities list as

192. See Chambers & Martin, *supra* note 107, at 815–16.

193. *Id.*

194. The International Corporate Accountability Roundtable (ICAR) drafted the FCPA-HR model as a way to use the FCPA's prohibitive language to prohibit businesses from knowingly participate in the commission of a human rights violation for business purposes rather than use disclosure-based framework. See *id.* at 819. Corruption is linked to human rights because the countries most endowed with abundant natural resources are often plagued by corruption and human rights issues. See *id.* at 824. The U.N. Working Group on Business and Human Rights advises companies to conduct both human rights and anti-corruption due diligence across their supply chains because business, human rights, and anti-corruption agendas are all linked. See *id.* at 824–25.

required under Section 3 (b) of the statute.¹⁹⁵ In other words, importers must establish by documentary evidence that a chain exists from raw materials to finished goods in which no forced labor was used and the risk of forced labor was mitigated in the supply chain. This law was influenced by alleged human rights violations by the CCP against Uyghurs in the Xinjiang province of western China, a vast region about four times the size of California that provides around 20% of the world's cotton.¹⁹⁶ Products from this area are assumed to be made with forced labor unless rebutted because the Uyghurs live in labor camps in Xinjiang run by the Chinese authorities where there have been reports of forced labor as well as political indoctrination, forced assimilation into the Han Chinese majority, and reports of rape, forced sterilization, and torture.¹⁹⁷ The Chinese government has denied these allegations, arguing that it is providing vocational training to alleviate poverty, as well as detaining and surveilling Uyghurs to fight Islamic terrorism because Uyghurs have worked with ISIS, and others work with the East Turkestan (another term for Xinjiang) Islamic Movement.¹⁹⁸ Chinese officials have

195. See Uyghur Forced Labor Prevention Act, 22 U.S.C. § 6901. However, doing due diligence on cotton from the Xinjiang Autonomous Region is not easy because of the lack of tracing technologies and inability to obtain credible audits in China, so importers normally contest that the rebuttable presumption applies by arguing no connection to the Xinjiang Autonomous Region, or they will utilize “go-arounds” such as having goods processed elsewhere so no connections to Xinjiang are known or goods can be transported into the United States from Canada or Mexico if they are denied entry directly to the United States (note however that the USMCA prohibits forced labor). See Chambers & Birchall, *supra* note 104, at 40 n.203–41 n.205.

196. See HUM. RTS. WATCH, “BREAK THEIR LINEAGE, BREAK THEIR ROOTS”: CHINA’S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER MUSLIMS 1 (2011) [hereinafter HUM. RTS. WATCH]; see Alix Kroeger, *Xinjiang cotton: How do I know if it’s in my jeans?*, BBC NEWS (Mar. 26, 2021), <https://www.bbc.com/news/world-asia-china-56535822>.

197. See HUM. RTS. WATCH, *supra* note 196, at 2–3, 23–24; see also *Prohibiting Import Of Forced Labor Goods*, INTERFAITH CTR. ON CORP. RESP., <https://www.iccr.org/focus-area-template-3/> (last visited Sept. 15, 2024).

198. See HUM. RTS. WATCH, *supra* note 196, at 9–10, 25, 28; see Lindsay Maizland, *China’s Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN REL. (Sep. 22, 2022), <https://www.cfr.org/backgrounder/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights>; see also Jeffrey D. Sachs, *The Xinjiang Genocide Allegations Are Unjustified*, PROJECT SYNDICATE (Apr. 20, 2021), <https://www.jeffsachs.org/newspaper-articles/apfjc5yg352d554k2ar2wwwkk8ryw9>; Cui Jia and Mao Weihua, *Xinjiang vows to fight against US sanctions*, China Daily Hong Kong, <https://www.chinadailyhk.com/hk/>

also invited foreign journalists and diplomats to visit Xinjiang in response to allegations of human rights violations.¹⁹⁹

Compared to the United States, the United Kingdom has addressed human rights issues related to slavery and human trafficking more generally as the 2013 Amendments to the UK Companies Act requires listed companies to report on human rights issues where necessary to understand the company's business.²⁰⁰ Section 54 of the United Kingdom's Modern Slavery Act of 2015 requires certain organizations to develop a slavery and human trafficking statement each year.²⁰¹ This section reads that, "The slavery and human trafficking statement should set out what steps organizations have taken to ensure modern slavery is not taking place in their business or supply chains."²⁰² Another area the United States addresses human rights is with sanctions laws as they are generally supposed to be guided by human rights because the United States is expected to act as a leader for democracy on the world stage. One major example is the Global Magnitsky Human Rights Accountability Act, which allows the U.S. government to sanction perpetrators of certain gross human rights violations against those who act as whistleblowers or human rights defenders by denying visas to enter the U.S. and freezing their U.S. property and interests in property.²⁰³ Other examples include the Iran Threat Reduction and Syria Human Rights Act of 2012, the Countering America's

article/602810.

199. Agence France-Press, *supra* note 153.

200. INT'L BAR ASS'N, PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS 17 (2016), https://media.business-humanrights.org/media/documents/files/documents/IBA_Practical_Guide.pdf [hereinafter PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS].

201. Modern Slavery Act 2015, c. 30, § 54 (UK).

202. *Id.*; see PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS, *supra* note 200, at 17.

203. Chambers & Martin, *supra* note 107, at 825–26. The Global Magnitsky Act was named for Sergei Magnitsky, a Russian lawyer who exposed Russian government officials for stealing money from his client, American businessman Bill Browder's Hermitage Fund. See Mark Hudspeth, *Bill Browder on Putin, the Magnitsky Act, and unmasking Russian money laundering*, CBS NEWS (April 10, 2022), <https://www.cbsnews.com/news/bill-browder-vladimir-putin-magnitsky-act-russian-money-laundering/> (detailing how Sergei Magnitsky helped his client Bill Browder uncover fraud occurring in Russia, and the Magnitsky Act that resulted).

Adversaries through Sanctions Act, and the Uyghur Human Rights Policy Act among multiple others.²⁰⁴ These laws all reflect the argument that American sanctions laws are rooted in the United States leading as a democracy, because they respectively address the supposed threat of a nuclear Iran as well as human rights issues in Syria and Iran; supposed hostilities and human rights violations by Russia, Iran, and North Korea; and alleged violations in Xinjiang by CCP officials.²⁰⁵ However, it must be stated that many believe the argument that American sanctions laws and foreign policy are more like a tool of American hegemony than serving to further human rights and democracy. In customs, Section 307 of the Tariff Act of 1930 bans importation of any products mined, produced, or manufactured in whole or in part by forced labor, but the Obama administration gave the law teeth in 2016 by implementing a measure that eliminated the consumptive demand clause, which for nearly a century provided an exclusion from the import ban for goods made with forced labor not produced enough domestically to meet national demand.²⁰⁶ There is also Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 which allows victims to sue trafficking perpetrators if they can prove by a preponderance of the evidence that those perpetrators benefitted from a venture they knew or should have known involved trafficking or forced labor,²⁰⁷ but the D.C. Circuit held in *Doe v. Apple* that only the statute's criminal provisions apply extraterritorially and not the civil causes of action.²⁰⁸

Human rights due diligence, as well as corporate compliance and corporate social responsibility measures, have been a force for good in the law that has made businesses become better actors. Securities law has become somewhat immersed in this space as well. When it comes to disclosures in securities

204. See generally Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-58 (2012); Countering America's Adversaries through Sanctions Act, 22 U.S.C. § 9401; Uyghur Human Rights Policy Act, 22 U.S.C. § 6901.

205. See generally Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-58 (2012); Countering America's Adversaries through Sanctions Act, 22 U.S.C. § 9401; Uyghur Human Rights Policy Act, codified at 22 U.S.C. § 6901.

206. Chambers & Birchall, *supra* note 104, at 32–33.

207. *Id.* at 33.

208. *Id.*

regulation, public companies are now required to make climate-related disclosures because it is an area of risk/value and investors are making investments based on environmental, social, and governance (ESG) initiatives with the sustainable investing trend so companies must be truthful about laudable causes they are working to accomplish.²⁰⁹ The human rights due diligence field, however, is largely focused around “soft law” rather than hard law. The definition of “soft law” is debated, but it frequently describes non-binding instruments such as codes of conduct, non-binding resolutions, standards, and guidelines.²¹⁰ The human rights gap is very real, as every human rights issue is not going to be codified in a treaty or another country’s laws. Reflecting the importance of HRDD and the U.N. General Principles, the U.S. State Department endorsed both items being incorporated into business operations in its National Action Plan on Responsible Business Conduct.²¹¹ In the 2024 National Action Plan, the State Department explains that the United States is committed to the U.N. General Principles, and that the agency supports HRDD as it both addresses potential harms by businesses to human rights, and it is intertwined with other due diligence practices imperative to responsible business conduct such as those related to the environment and fighting corruption (both of which implicate human rights).²¹² The State Department says it expects U.S. firms to follow HRDD principles aligned with international standards in the UNGPs, especially in conflict-affected areas, and cites the following as important HRDD

209. See *Fact Sheet: ESG Disclosures for Investment Advisors and Investment Companies*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/files/ia-6034-fact-sheet.pdf> (last accessed Jan. 7, 2025). Elon Musk is a vocal critic of ESG. See Christiaan Hetzner, *Elon Musk blasts ESG as ‘the devil’ after tobacco stocks beat Tesla in sustainability indexes*, YAHOO! FINANCE (June 15, 2023), <https://finance.yahoo.com/news/elon-musk-blasts-esg-devil-154219376.html> (explaining how Elon Musk became a critic of the ESG – accusing the ESG of “greenwashing” – and S&P sustainability index after Tesla was removed from the S&P 500).

210. Giulia Bosi, *Overcoming the “Soft vs Hard Law” Debate in the Development of New Global Health Instruments*, OPINIOJURIS (Nov. 30, 2021), <https://opiniojuris.org/2021/11/30/overcoming-the-soft-vs-hard-law-debate-in-the-development-of-new-global-health-instruments/>.

211. U.S. DEPT OF STATE, U. S. GOV’T NAT’L ACTION PLAN ON RESPONSIBLE BUS. CONDUCT (2024).

212. *Id.* at 8–9.

principles: metrics to assess and address risks, ongoing assessment, monitoring, and evaluation, consistent stakeholder engagement, public communication, grievance mechanism, and alignment with human rights instruments (including the UDHR).²¹³

There is a gray area between hard law and soft law, as hard laws or treaties do not govern every human rights issue you might confront. International human rights law is usually abstract; entails a soft law ecosystem of norms, principles, and procedures; and many soft laws will say something along the lines of “in compliance with international law, including human rights, humanitarian and refugee law” rather than substantive, concrete human rights content.²¹⁴ As a general matter, this area of law is vague and it is difficult to know how international law violations are minimized and what obligations guide states to that end, considering there is no world legislature or supreme court passing bills and upholding laws making clear what concrete international law violations are.²¹⁵ The human rights gap is very real, which results in particularly weak and harmful norms that can lead to human rights violations. Being knowledgeable about the hard and soft laws surrounding human rights is critical to providing professional and ethical services to your client as well as good business practice. However, at the same time, nations are attempting to turn HRDD and other CSR laws from soft law into hard law. CSR legislation is an oxymoron of sorts because it appears to impose legal obligations on companies, but it is soft in nature because of vague behavioral requirements as well as weak compliance mechanisms.²¹⁶ In the United States, there are a couple of due diligence laws at the state level too. California has the Transparency in Supply Chains Act, which requires corporations doing business in California with annual worldwide

213. *Id.*

214. *Soft Law, Hard Consequences*, OHCHR, <https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/UNSRCTbrieferSoftLaw.pdf> (last visited Sept. 24, 2024).

215. See Anthony D’Amato, *IS INTERNATIONAL LAW REALLY “LAW”?*, 79 NW. U. L. REV. 1293, 1312–13 (1984-1985).

216. CSR legislation has been referred to as “soft hard law.” Lin, *supra* note 160, at 464–65.

revenues above \$100 million to disclose on their websites any initiatives they are undertaking to eliminate coercive labor practices in their supply chain.²¹⁷ This law was studied by Adam Chilton and Galit Sarfaty who, in 2017, published that just under 80% (79.2%) of firms required to comply with the law have such a disclosure on their website.²¹⁸ However, according to Chilton and Sarafaty, there is no private right of action for consumers aggrieved by these firms and the exclusive remedy is injunctive relief by the California Attorney General though the state's Attorney General has not yet brought a case under this statute.²¹⁹ So, this law is really soft law, though the effect in California is very real. The New York State Senate introduced the "Fashion Sustainability and Social Accountability Act" in January 2022 to mandate significant human rights and environmental due diligence as well as disclosure obligations on fashion manufacturers and retailers operating in the state of New York.²²⁰ While Texas does have a conservative legislature, so HRDD laws might not happen for a some time, applying HRDD practices would show that Texas companies and law firms are serious about furthering Texas as a corporate and legal hub not only nationally, but internationally as well. Though current United States law on HRDD is piecemeal, change is coming by way of international action. HRDD is prudent and should be one of the boxes in any international business transaction checklist. If a human rights issue slips through the cracks, not only are remediation and closure difficult, but the public relations fallout and the risk of extremely complicated litigation come into fruition.

IX. THE TEXAS STATE BAR RULES AND HUMAN RIGHTS

The Texas Disciplinary Rules of Professional Conduct is also applicable to human rights. The Preamble of the Texas Disciplinary Rules of Professional Conduct states, "lawyers, as

217. Chambers & Martin, *supra* note 107, at 789–790 (citing CAL. CODE. § 1714.43(c)(1)–(5)).

218. Chambers & Birchall, *supra* note 104, at 39.

219. *Id.*

220. *Id.* at 35.

guardians of the law, play a vital role in the preservation of society.”²²¹

Rule 1.02(c) states, “A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.”²²² If a client expects representation the Rules do not permit, the lawyer must explain the relevant limitations on the lawyer’s conduct, and these could provide an ideal avenue to counsel the client on human rights violations related to the client’s business.²²³ Rule 1.02 goes further with Comment 7 stating, “A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct.”²²⁴

Rule 1.02 Comment 8 instructs on what to do in the event the lawyer discovers client wrongdoing:

When a client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer may not reveal the client’s wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client’s unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.²²⁵

Rule 1.02 Comment 11 states that certain situations warrant a lawyer using “reasonable efforts to dissuade a client from

221. TEX. DISCIPLINARY RULES PROF’L CONDUCT Preamble ¶ 1.

222. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.02(c).

223. *See id.* at R. 102(f).

224. *Id.* at R. 1.02 cmt. 7.

225. *Id.* at R. 1.02 cmt. 8.

committing a crime or fraud.”²²⁶ Because of human rights treaties and customary international law, soft law is slowly hardening, and private and civil actors are now considering potential harm to human rights as well as corporate social responsibility when managing risks, so both factors make human rights impacts important to advise clients about.²²⁷

Louis Bedford and Keith Lacey from the University of Texas Law School Human Rights Clinic argue that the UNGPs inform professional responsibilities of the Texas lawyer, working as both an advisor giving candid advice and an advocate providing competent representation.²²⁸ Under Rule 2.01, “In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”²²⁹ Clients must receive counsel about human rights risks when doing business in areas with these laws, even though they might be abstract or opaque.²³⁰ Bedford and Lacey explain that the Texas Disciplinary Rules of Professional Conduct align with the UNGPs because the Texas rules of conduct were based on the American Bar Association’s (ABA) Model Rules of Professional Conduct, and the ABA endorsed the UNGPs.²³¹ Rule 2.01 aligns with UNGP 17 through advising the HRDD practices of assessing actual and potential human rights impacts, integrating and acting upon those findings, tracking responses, and communicating how impacts are addressed is an important part of being an effective advisor.²³² While Texas is a huge corporate hub as well as the tenth largest economy in the world (Brazil is ninth which reflects the scale of Texas’ economy),²³³ Bedford and Lacey argue human rights awareness is a crucial part of Texas lawyer professional responsibility because of the significant trade with the nations of Central and South America (prone to human

226. *Id.* at R. 1.02 cmt. 11.

227. Louis Bedford and Keith Lacey, *Texas Bar Association—Bringing Human Rights and Business Principles to Texas* 9, HUM. RTS. CLINIC UNIV. TEX. SCH. L. (Dec. 22, 2017), <https://law.utexas.edu/clinics/2018/01/23/texas-bar-assoc-memo/>.

228. *Id.* at 6.

229. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 2.01.

230. *See* Bedford & Lacey, *supra* note 227, at 6.

231. *Id.*

232. *See id.* at 6–7.

233. *Id.* at 10–11.

rights risks), as well as Texas' considerable ties to global industries, the most notable being the energy and extractive services industry.²³⁴ Much like the garment, mineral, and agricultural industries, the oil industry is very prone to human rights and corruption issues. Reflecting a human rights gap in Texas' professional responsibility code, Bedford and Lacey explain that Texas Rule 2.01 differs from ABA Model Rule 2.1 in that ABA states a lawyer may refer to "*considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.*"²³⁵ Human rights would come to mind easily under the ABA Model Rule 2.1 as human rights is a moral and social factor to inform professional judgment.

X. APPLYING INTERNATIONAL HUMAN RIGHTS TO TEXAS LAW PRACTICE

With the Texas Disciplinary Rules of Professional Conduct not mentioning human rights directly, questions of human rights can become very tricky for lawyers so that is one reason legal ethics is starting to address human rights. The International Bar Association (IBA) provides answers for how the United Nations Guiding Principles can be incorporated into legal ethics codes all over the world.²³⁶ The pioneer of the UNGPs, a special representative of the U.N. Secretary on Business and Human Rights, has explained that the UNGPs are based on three pillars: (1) the state protecting human rights against abuses by third parties, including by implementing laws, policies, and regulations; (2) businesses have a duty to respect and protect human rights; and (3) victims should have access to remedies for harms from business-related human rights abuses.²³⁷

Following the original UNGP guidance in 2014, the IBA went on to issue its even more influential counterpart in 2015 to inspire bar associations to promote, develop, and launch human rights

234. *Id.* at 11.

235. *Id.* at 17.

236. See INT'L BAR ASS'N, IBA BUSINESS AND HUMAN RIGHTS GUIDANCE FOR BAR ASSOCIATIONS (2015), <https://www.ibanet.org/document?id=Business%20and%20Human%20Rights%20Guidance%20for%20Bar%20Associations> [hereinafter IBA BUSINESS AND HUMAN RIGHTS GUIDANCE].

237. *Id.* at 1–3.

initiatives relevant to practitioners in their jurisdictions.²³⁸ The goals of the IBA were to help lawyers understand the relevance of human rights to client business transactions, provide incentive to utilize the UNGPs, and positively represent the legal profession and bar associations as business and human rights champions in local forums.²³⁹ In Article 1, the IBA recommends bar associations create a body dedicated to studying international human rights.²⁴⁰ In Article 2, the IBA advises human rights relies on various practices to achieve progress which includes setting specific objectives, devising realistic timescales in establishing and managing human rights initiatives, and identifying indicators of success.²⁴¹ In Articles 3 and 4, the IBA endorses raising awareness of business and human rights instruments and principles among all bar members.²⁴² In Article 5, the IBA advises reviewing ethical codes of conduct and disciplinary rules to strengthen alignment of those rules with international human rights.²⁴³ As business and human rights issues can be very abstract, the IBA does advise technical assistance when it comes to adopting practices related to business and human rights issues in Article 6.²⁴⁴ Article 7 suggests bar associations share examples of best practices related to business and human rights.²⁴⁵ Because recognition can be a strong incentive to set high standards, Article 8 advises bar associations to recognize practitioners for outstanding performance in terms of protecting human rights in business.²⁴⁶ Because protecting human rights is the job of the state, Article 9 encourages bar associations to discuss human

238. *See id.* at 4; *see generally* *Intl. Bar Association's global public consultation on draft guidance for lawyers on application of UN Guiding Principles*, BUS. & HUM. RTS. CTR. (Apr. 13, 2015), <https://www.business-humanrights.org/en/latest-news/intl-bar-associations-global-public-consultation-on-draft-guidance-for-lawyers-on-application-of-un-guiding-principles/> (providing IBA's timeline for developing business and human rights guidance for lawyers).

239. *See* IBA BUSINESS AND HUMAN RIGHTS GUIDANCE, *supra* note 236.

240. *See id.* art. 1.

241. *Id.* art. 2.

242. *Id.* art. 3, 4.

243. *Id.* art. 5.

244. *See id.* art. 6.

245. *See* IBA BUSINESS AND HUMAN RIGHTS GUIDANCE, *supra* note 236 art. 7.

246. *See id.* art. 8.

rights initiatives with government officials as well as other stakeholders.²⁴⁷

The Texas State Bar and its members have significant moral, legal, and business reasons to act on human rights, and the IBA provides a concise human rights framework in to look through and act on. The IBA acknowledges that the “internationally recognized human rights” laid out in the U.N.’s declaration include, but are not limited to, a person’s rights to life and health, to be free from slavery and servitude, to have access to due process, the ability to adjudicate grievances, and the rights of children to avoid forced labor conditions.²⁴⁸ The Texas Disciplinary Rules should mandate lawyers to refrain from assisting a client whose objectives or practices violate internationally recognized human rights and rise to the level of prohibited criminal and fraudulent activity included in the Texas Disciplinary Rules. There should be a requirement that lawyers dissuade clients from acting in ways that adversely affect international human rights. To do so, the Texas State Bar should look at guidance from other legal societies such as those in Europe where lawyers are required to obtain information from potential clients related to their compliance with certain corrupt practice laws.

So, what policies should law firms implement? There are many reasons for a law firm to have a human rights policy. One, it is moral and proper to enact one. It will also help to rebut the presumption of wrongdoing should a client conflict or government investigation arise and help mitigate damages. However, it might also provide compliance with the laws and regulations of other countries. A human rights statement is an example of leadership in that firm’s bar, and it will provide an example for other firms and serve as a model for other bars and legal societies. The Advocates for International Development (A4ID) provide helpful guidance and training on what a law firm’s human rights policy can and should state.²⁴⁹ One size does not fit all, and every law

247. *See id.* art. 9.

248. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); *see also* IBA BUSINESS AND HUMAN RIGHTS GUIDANCE, *supra* note 222, at 2 n.1.

249. *See* Advocates for International Development (A4ID), <https://www.a4id.org/> (last visited Oct. 14, 2024).

firm has a finite amount of resources to devote to an HRDD program. In addition to the IBA and A4ID, the Organization for Economic Co-operation and Development (OECD) is a valuable resource to consult when formulating the human rights policies and practices for your firm's international practice areas.²⁵⁰ At a high level, Part 16 of the UNGPs provide suggestions for how to internalize human rights principles into any business operation.²⁵¹

As a law firm facing outside clients, there are a variety of ways to mitigate potential human rights issues. Some suggestions include, but are not limited to, an intake questionnaire, internal compliance audits, training seminars for client executives, compliance manuals for client employees, and train-the-trainer programs. On due diligence, this area is especially important, as this is where a law firm and business clients turn their human rights statements into reality. Due diligence practices by law firms will vary with the client and the firm's relationship with the client, but in many cases, the firm can create a questionnaire that the client must complete before international mergers and acquisitions, joint ventures, and license and distribution arrangements can commence. The OECD advises setting expectations and pre-qualification processes for suppliers and other applicable business relationships, and engaging in a practical risk assessment.²⁵² On human rights, the OECD emphasizes the importance of communication to all stakeholders impacted by business operations through direct consultation and outside assistance if gathering information and working with

250. See e.g., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUS. CONDUCT, OECD (2018), <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [hereinafter OECD DUE DILIGENCE].

251. U.N. Guiding Principles, *supra* note 162, ¶ 16 ("As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that: (a) Is approved at the most senior level of the business enterprise; (b) Is informed by relevant internal and/or external expertise; (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise").

252. OECD DUE DILIGENCE, *supra* note 250, at 24.

stakeholders directly is not feasible.²⁵³ Firms can insist on human rights compliance opinion letters for deal closings. There are also questionnaires available that cover diversity, environmental issues, anti-bribery, human rights, child labor, and health and safety. The Japanese Federation of Bar Associations Guidance on Human Rights Due Diligence provides a valuable example of a Model CSR Code of Conduct.²⁵⁴

If a law firm discovers its lawyers have contributed to an international human rights violation, the UNGPs state that firms should have a remediation process in place to address negative human rights impacts that it causes or contributes to.²⁵⁵ It must be determined whether the wrong was accidental or deliberate, and the law firm should examine the disciplinary rules of state, federal, and international jurisdictions for applicable guidance.²⁵⁶ It is also prudent practice for law firm management to look at its malpractice insurance policy for potential coverage issues involving human rights matters.²⁵⁷ Because law firms are business themselves, with potential issues in their own practices and supply chains, compliance in vetting and supply chain due diligence are also applicable to law firm management. Regulations mandate compliance, but compliance always begets opportunities. There is a very real chance that a client might be in need of a human rights audit, which major accounting firms are starting to address.²⁵⁸ As challenging as they may be, human rights audits are both the right and smart thing to do.

253. *Id.* at 27.

254. The Model CSR Code of Conduct provides an extensive list of provisions purchasers should include in their agreements with suppliers including, but not limited to, requiring suppliers to implement an HRDD policy as well as update purchasers on their compliance with the CSR Code of Conduct and advising purchasers to put in agreements inspection/audit rights. See JAPAN FEDERATION OF BAR ASSOCIATIONS, GUIDANCE ON HUMAN RIGHTS DUE DILIGENCE 70–72 (2015), <https://www.nichibenren.or.jp/en/document/opinionpapers/20150107.html> [hereinafter JAPAN FEDERATION OF BAR ASSOCIATIONS].

255. U.N. Guiding Principles, *supra* note 162, ¶ 15.

256. See JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 254, at 13.

257. See *generally* PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS, *supra* note 200, at 38.

258. See Muhammad Azizul Islam, Tackling Modern Slavery: What Role Can Accountants Play?, INT'L FED'N OF ACCTS. (Feb. 12, 2018), <https://www.ifac.org/knowledge-gateway/discussion/tackling-modern-slavery-what-role-can-accountants-play>.

Because the current lay of the land is confusing in the United States, and human rights due diligence applies in piecemeal fashion, a somewhat comprehensive yet efficient program is a win-win. The IBA provides effective guidance for business lawyers on human rights issues in the *IBA Practical Guide on Business and Human Rights for Business Lawyers*.²⁵⁹ In this document, the IBA explains that lawyers work on behalf of businesses and law firms themselves are businesses with supply chains and hiring practices so human rights is applicable to the business lawyer generally.²⁶⁰ The IBA emphasizes that a human rights policy statement should be based on engagement with stakeholders and embedded in the enterprise through appropriate governance, internal controls, processes, incentives, and training.²⁶¹ This guide provides its readers concrete examples of human rights issues in law practice including hiring practices, consumer protection, privacy, supply chains harming human rights, and environmental hazards.²⁶² Like all areas of law, human rights evolves and new areas of risk emerge so contract terms, risk management, and potential litigation are all important areas to pay attention to.²⁶³ The IBA notes that the UNGPs do not abridge the professional responsibilities of lawyers—for example, defense lawyers are still expected to vigorously defend their clients in the event of human rights harms—but the rules provide helpful guidance as they inform judgement as well as the law in many jurisdictions.²⁶⁴ Even if human rights law is not directly examined, human rights are crucial for reputational and strategic purposes, which is why businesses now expect counsel on human rights risks from the law firms and attorneys they hire.²⁶⁵ In order to build credibility, the IBA believes law firms should develop internal firm capacity

259. See generally PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS, *supra* note 200.

260. See *id.* at 14.

261. *Id.* at 19.

262. See *id.* at 20–21.

263. See *id.* at 23–26.

264. See *id.* at 27–29.

265. See PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS, *supra* note 200, at 30–31.

on business and human rights, identifying problems that other businesses have faced by not confronting their human rights issues in similar situations, and working with bar associations to provide business and human rights training and guidance.²⁶⁶ A couple notes of caution the IBA makes are that when a client is involved in human rights wrongdoing, a prevention or mitigation course of action might align with the UNGPs more than withdrawal, and attorneys should check their firm's liability insurance coverage because there is a good chance advising on soft laws like the UNGPs might not be covered.²⁶⁷

The Japan Federation of Bar Associations also provides a useful, comprehensive guide for how business lawyers should approach HRDD. These Japanese practices could be utilized by a Texas business lawyer who seeks to address human rights in practice. At the beginning of the document, it explains that human rights expectations are high in the business world, and management must understand the gravity of impacts caused by human rights problems as culture starts at the top.²⁶⁸ Not only do human rights motivate workers, but it makes brand names appreciate in value.²⁶⁹ The Japan Federation explains that if domestic laws are enforced poorly or unfairly, businesses must honor international codes, even if it is difficult, because making a sincere effort to promote human rights equals sustainable growth.²⁷⁰ According to the Japan Federation, periodic review is needed because situations change and human rights of certain peoples such as indigenous peoples, women, children, disabled persons, migrant workers, and religious, national, and ethnic minorities might require special attention.²⁷¹ Interestingly, the Japan Federation draws attention to the fact that human rights risk is based on internationally recognized human rights, and, much like the United States, Japan has not approved some of the major international human rights conventions and treaties, so sensitivity to human rights is important to instill in the business

266. *Id.* at 36.

267. *See id.* at 36, 38.

268. JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 254, at 14.

269. *Id.*

270. *Id.* at 26–27.

271. *Id.* at 29.

culture.²⁷² It is suggested that the human rights policy should incorporate an understanding of human rights with the company's unique perspectives, including its traditional values.²⁷³ The Japan Federation explains that the human rights policy must have binding effect with disciplinary action along with showing examples of what constitutes wrongdoing.²⁷⁴ On HRDD, the Japan Federation states that the starting point is potential impacts of business operations on a wide range of rights holders with prioritization focusing on severity of impact and probability of impact occurring.²⁷⁵ Periodic review of human rights policies by external experts is advised.²⁷⁶ Businesses must think about human rights issues most related to their industries and this guidance lays out typical risk areas for a variety of stakeholders.²⁷⁷ Findings of human rights impacts should be integrated across the business and different divisions are appropriate for that task depending on the issue.²⁷⁸ The Japanese also believe training is a key part of making human rights part of company culture.²⁷⁹ Human rights are abstract, and human rights issues have many qualitative factors, but the Japanese explain that two quantitative metrics are feasible – those that demonstrate resources invested in human rights initiatives or degree of effort devoted to HRDD (including number of supplier audits conducted or percentage of employees completing human rights training) and indicators that present remediation outcomes and number of incidents of human rights abuses (number of contracts terminated due to human rights concerns or percentage of employees who have experienced discrimination or harassment based on employee surveys).²⁸⁰ This guide also provides some valuable answers to frequently asked questions.²⁸¹

272. *See id.* at 32.

273. JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 254, at 35.

274. *See id.* at 35–36.

275. *Id.* at 37–38.

276. *Id.* at 39.

277. *See id.* at 40; *see e.g., id.* at 43–46.

278. *Id.* at 47–48.

279. JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 254, at 49.

280. *See id.* at 52.

281. *See generally id.*

There are a few differences between Europe and the United States that will be especially relevant to Texas as HRDD slowly becomes more mainstream. First, labor practices in Europe are very different from those in the United States. Under the EU Directive, the right to organize is protected under Article 20 of the UDHR, Article 8 of the International Convention on Economic, Social, and Cultural Rights, and ILO Freedom of Association and Protection of the Right to Organize and Right to Organize and Collective Bargaining Conventions; although the U.S. forbids employers from interfering with employee efforts to organize under the National Labor Relations Act, companies go to great lengths to curtail labor organizing and some say the National Labor Relations Board is a weak enforcer of labor rights.²⁸²

One reason corporations have flocked to Texas is that it is a right-to-work state.²⁸³ When it comes to agriculture, the EU Directive requires due diligence on U.S. farms and ranches, which is complicated to achieve in practice.²⁸⁴ One problem is that manufactured products tend to have many ingredients, so tracing efforts are highly complex and expensive; a line will need to be drawn for raw materials integral to the product which need to be covered.²⁸⁵ Texas is one of the biggest agricultural states in the nation.²⁸⁶ On the forced labor issue, the EU Directive follows the ILO Forced Labor Convention, which says that forced labor exclusion is work carried out under the supervision of a public authority, but private companies are allowed to benefit from

282. Chambers & Birchall, *supra* note 104, at 45–46; *see generally* LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS, Cornell Univ. Press (2004).

283. *See* So-Called “Right to Work”, UNITED ASS'N LOCAL UNION NO. 146, <https://ualocal146.org/so-called-right-to-work-laws-harm-texans/> (last visited Aug. 31, 2024) (stating that in 1993, Texas passed a “Right to Work” statute, which contributed significantly to a construction boom. As a result of the law's passage, many corporations have moved to the state, creating a high demand for skilled tradespeople to build their facilities).

284. Chambers & Birchall, *supra* note 104, at 48.

285. *Id.*

286. *See* Lisa Minton & Astrid Alvarado, Fiscal Notes, A Review of the Texas Economy: Agriculture Industry Grows Texas, COMPTROLLER.TEXAS.GOV, <https://comptroller.texas.gov/economy/fiscal-notes/archive/2022/oct/agriculture.php>, (last visited Aug. 31, 2024) (noting that Texas has the greatest number of farms and acres of farmland in the United States).

prison labor in the United States under the Prison Industry Enhancement Certification Program.²⁸⁷ This issue is important in Texas because Texas has the nation's largest inmate population.²⁸⁸

Additionally, migrant labor is common in Texas as not only an agricultural state but a border state; labor rights abuses are also common, and many have suffered labor trafficking in recent years, as Texas has a high undocumented population at 1.6 million.²⁸⁹ Due diligence efforts will likely be complicated because of how these wrongdoings occur discreetly and are underreported as well as the current border crisis impacting many states, Texas in particular among them. The border crisis will affect due diligence efforts because of human smuggling enabled by drug cartels bringing in a large number of people, fentanyl and other drugs coming into the country in large volumes, and human trafficking in the form of not only labor trafficking but child labor as well as sex trafficking.²⁹⁰ These potential issues show that

287. Chambers & Birchall, *supra* note 104, at 49–50.

288. See E. Ann Carson & Rich Kluckow, *Prisoners in 2022 – Statistical Tables*, BUREAU OF JUST. STAT., 7 (2023), <https://bjs.ojp.gov/document/p22st.pdf> (reporting that in 2022, Texas had 139,631 prisoners in state and federal correctional facilities, the most of any state in the nation).

289. Chambers & Birchall, *supra* note 104, at 50; see e.g., Travis P. Hill, *In Texas, undocumented immigrants have no shortage of work*, THE TEX. TRIB. (Dec. 16, 2016), <https://www.texastribune.org/2016/12/16/undocumented-workers-finding-jobs-underground-econ/> (noting the labor abuses undocumented workers in Texas experience, such as receiving compensation below the federal minimum wage and going weeks without receiving payment for their labor); see also *Human trafficking, forced labor charges are first under ICE's new labor exploitation program focusing on abusive employers*, U.S. IMMIGR. AND CUSTOMS ENF'T (Nov. 29, 2021), <https://www.ice.gov/news/releases/human-trafficking-forced-labor-charges-are-first-under-ices-new-labor-exploitation> (recounting the labor trafficking and forced labor scheme involving H-2 visa holders, uncovered by U.S. Immigration and Customs Enforcement's Homeland Security Investigations, which occurred in a few U.S. states, including Texas); Jeffrey S. Passel and Jens Manuel Krogstad, *What we know about unauthorized immigrants living in the U.S.*, PEW RSCH. CTR. (Jul. 22, 2024), <https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us/>.

290. See generally Jasmine Laws and Billal Rahman, *Human Trafficking Is on the Rise, What Will the Next President Do About It?*, NEWSWEEK (last updated Nov. 7, 2024, 6:42 AM EST), <https://www.newsweek.com/human-trafficking-rise-what-will-next-president-do-about-it-1978643>; Jennie Taer, *Biden-Harris admin loses track of 320,000 migrant children—with untold numbers at risk of sex trafficking and forced labor*, NEW YORK POST (Aug. 21, 2024), <https://nypost.com/2024/08/21/us-news/biden-harris-admin->

prudent practice for Texas business lawyers would be to ask these questions early on and address HRDD to both international and domestic clients because it is the law in countries with major economies. Even if the sporadic HRDD laws in the United States do not apply, clients can then be cognizant of human rights risks, avoid public relations damage, and potentially dodge complex litigation.

XI. CONCLUSION

The UDHR is a pivotal document, as relevant seventy-five years ago as it is now. It is important that we look at ourselves in the mirror as a country as human rights start at home. First Lady and Universal Declaration of Human Rights author Eleanor Roosevelt once said, “[w]here, after all do human rights begin? In small places, close to home—so close and so small they cannot be seen on any maps of the world... Without concerted citizen action to uphold them so close to home, we shall look in vain for progress in the larger world.”²⁹¹ Every day, we hear about human rights issues close and far away in the news, where one atrocity follows another. Even here in the United States, people of color, women, indigenous peoples, LGBTQ+ individuals, and the disadvantaged and disenfranchised see their rights infringed daily. Because human rights impact all of us here at home and across the world, the professional responsibilities of lawyers and practice management in both law and business must incorporate human rights. In Texas, lawyers have a responsibility to the state bar, their clients, their firms, and themselves to ensure human rights and the rule of law are supported. Compliance with human rights principles is right, smart, and begets opportunity in continuing the fight for dignity. People should always remember that, under Article 1 of the Universal Declaration of Human Rights, there is no such thing as a lesser person, and we all have the duty to demand dignity and be excellent to each other.

loses-track-of-320000-migrant-children/; Priscilla Alvarez and Evan Perez, *Trump team resurfaces plans to designate Mexican cartels as terror organizations*, CNN (Jan. 8, 2025, 7:00 AM EST), <https://www.cnn.com/2025/01/08/politics/donald-trump-mexican-cartels/index.html>.

291. Preface to 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES iv (Cynthia Soohoo, Catherina Albisa & Martha F. Davis, eds., 2008).

