

# A EUROPEAN LEGISLATION ON CORPORATE DUTY OF VIGILANCE AND LEGAL LIABILITY?

An idea whose time has come



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## In a Nutshell

As things stand today, there is still no binding European or international legal framework, firstly to establish the legal liability of multinational corporations in the area of human rights and environmental protection, and secondly to guarantee access to justice and remedies for those affected by the activities of multinationals.

In 2017, France paved the way with its adoption of the law on the duty of vigilance. Since then, the calls for EU laws or an international treaty on corporate civil and criminal liability have multiplied. **A diverse coalition – ranging from Pope Francis to the United Nations Special Rapporteurs, academics, human rights defenders, the Commission of the Bishops' Conferences of the European Union, associations, trade unions and public human rights bodies – has emerged, calling for enshrining the principles on the legal liability of corporations for harm they cause or contribute to throughout their value chains.**

## Key Messages

- In 2011, the United Nations Human Rights Council unanimously adopted the **UN Guiding Principles on Business and Human Rights, establishing the duty of States to implement judicial mechanisms to ensure access to justice** for those whose rights are affected by business enterprises.
- The issue at stake is not determining **whether** the duty of vigilance will become a reality in European and international law, but rather **when**.
- The duty of vigilance rests on **two interdependent pillars**:
  1. a **duty of vigilance** to effectively prevent human rights and environmental abuses,
  2. **effective access to justice** on the grounds of corporate civil and/or criminal liability for any affected person.

# Access to Justice: A David-and-Goliath Battle

The fragmentation of companies into supposedly autonomous and independent entities, and the increasing use of subcontracting arrangements are now major obstacles for individuals and communities trying to obtain justice when their fundamental rights are violated by multinational companies.

In the wake of the Rana Plaza collapse in April 2013, which caused the deaths of 1,138 women workers in Bangladesh, lawyers for the victims had extremely limited access to remedy in the Bangladeshi courts because the contracting companies had no assets in that country. **In such circumstances, proceedings drag on for years and rarely lead to satisfactory solutions for the victims.** It thus took almost two years for the families of the victims to receive compensation from an ad hoc fund financed by *voluntary* contributions from the multinationals involved in the disaster. As the report [The Broken Lives of Rana Plaza](#) shows, the compensation paid out by the Rana Plaza Donors Trust Fund was derisory to say the least: the families of the deceased received just under 10,000 euros each. The survivors, who were left severely disabled from the disaster and unable to return to work, received compensation in the order of 1,800 euros, barely enough to cover their immediate health costs.

However, it **currently remains a major challenge to prove the legal liability of contracting companies with regard to the actions of their subsidiaries, suppliers or subcontractors abroad** in order to obtain damages and interest commensurate with the loss suffered. Six years after the collapse of Rana Plaza, not one of the major Western companies that subcontracted part of their production there has been investigated. These denials of justice remain unresolved. Unless European and international law change, access to justice will remain an impossible task.

Indeed, to absolve themselves of all responsibility, the parent companies take advantage of the many legal loopholes created by their break-up into subsidiaries and by the contractual clauses that tie them to their suppliers. In 2008, for example, leaks in two pipelines owned by the oil giant Shell caused a major ecological disaster in the Niger Delta. Land and water pollution exposed the local populations to serious health risks and made farming and fishing impossible. Almost ten years passed before clean-up work began. And when the affected communities tried to seek redress in Nigerian and British courts, the parent company **refused to admit responsibility**, arguing that it was not liable for the negligence of its Nigerian subsidiary, despite being its sole owner.

The **UN Guiding Principles on Business and Human Rights** recognise the existing obligations of States and courts in the home countries of business enterprises to protect human rights and the environment and to **ensure that companies domiciled in their jurisdiction are not complicit in serious violations abroad.** Even so, victims face grave miscarriages of justice, with courts refusing to rule on the grounds that it is too difficult to investigate, that the statute of limitations has passed, or that they lack jurisdiction under the principle of *forum non conveniens*, since the events took place abroad. In 2019, for example, a [German court](#) refused to hand down a ruling in the case of a fire that had claimed the lives of 258 people in the Pakistani factories owned by a supplier of the German discount store Kik, on the grounds that the statute of limitations had expired under Pakistani law.

Even before legal proceedings are initiated, those who speak out against this impunity and the harmful consequences of their activities for the environment and people are **systematically persecuted. Since 2015, the Business & Human Rights Resource Centre has identified 1,780 cases of violence (attacks, harassment, murders) against rights defenders who stood up to corporations.** In its annual report on the situation of land and environmental defenders, Global

Witness noted that in 2018, three environmental defenders were murdered every week around the world. In 2019, the number of environmental activists who lost their lives rose further to 212 murders in that year.

These figures are steadily increasing and serve as a reminder of the urgent need to move beyond a vision of corporate social responsibility (CSR) almost exclusively based on voluntary commitments.

**A legal vacuum has formed as the value chains of large companies have expanded.** It is this legal void that needs to be addressed today in order to hold multinational corporations accountable in the courts.

In recent years and months, a major political process had begun to establish the legal liability of companies under national, European and international law, and to guarantee access to effective remedies in the case of human rights and environmental abuses by multinational corporations.



# The Political Process: A Timeline

2011



June 17, 2011

**The United Nations Human Rights Council unanimously adopted the [Guiding Principles on Business and Human Rights](#).** Considered a reference text in international law, it defines the issues relating to corporate responsibility according to three complementary pillars:

1. The duty of States to protect against human rights abuses by third parties, including business enterprises;
2. The responsibility of business enterprises to respect human rights;
3. The need to ensure access to effective remedy, to guarantee that any affected individual or group has access to compensation.

Principles 25 and 26 clearly set out the need to establish judicial mechanisms in order to implement this third pillar:

*"As part of their duty to protect against business-related human rights abuse, **States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy [...]** States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including **considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy**"*

While these Principles establish a number of obligations, they are not binding. Since their adoption in 2011, rights defenders, associations, trade unions and social movements have mobilised to get them transcribed them into national, European and international law. The aim is to guarantee access to justice for all those whose rights are violated by companies.

2012



December 13, 2012

**The Forum citoyen pour la RSE (Citizens' Forum for CSR) and the Collectif Ethique sur l'étiquette (French member of the Clean Clothes Campaign) organised a conference at the French National Assembly: "Duty of States – Responsibility of Multinationals – Preventing and Remedying Abuses against Human Rights and the Environment".** Following the conference, four Members of Parliament set up a parliamentary think tank to draw up concrete proposals with a view to *"making parent companies responsible for the activities of their subsidiaries and sub-contracting companies, in France and abroad."*

2014



June 26, 2014

**Ecuador and South Africa tabled a resolution at the UN Human Rights Council in order to establish an [intergovernmental working group](#) "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".**

Every year since then, negotiations have been held at the Palais des Nations in Geneva to make progress on a draft treaty that defines the legal liability of States and companies to ensure that human rights and the environment are protected and respected in all economic activities, especially those of a transnational character.

2017



March 27, 2017

**France adopted a [law on the duty of vigilance of parent and instructing companies](#).** This law requires companies to identify risks and effectively prevent serious violations of human rights and fundamental freedoms, human health and safety, and the environment, throughout their value chain. In the event of human rights or environmental abuses, any person with a legitimate interest in the matter can bring a liability action before the courts. The company is thus accountable for its actions before the courts, and may be required to remedy the damage suffered.

2019



February 2019

**The European Parliament's Subcommittee on Human Rights published a [study detailing the 35 cases brought before the European courts by people and communities outside the EU affected by the activities of European companies](#).** After analysing the multiple legal, procedural and practical barriers that these victims have faced in their search for justice, the report recommends, inter alia, establishing the duty of vigilance of European companies, facilitating mechanisms for access to justice, and extending the jurisdiction of European courts on extraterritorial issues involving European companies.



March 19, 2019

**The Responsible Business Conduct Working Group of the European Parliament published the [Shadow EU Action Plan on Responsible Business Conduct](#) which aimed to establish proposed actions and objectives for the MEPs who would sit in the European Parliament during the 2019-2024 term.**

2020



April 29, 2020

The European Commissioner for Justice Didier Reynders announced during a webinar that his office was working on a European directive on the duty of vigilance. The aim was

*“to make sure that responsible business conduct and sustainable supply chains become the norm, a strategic orientation for businesses [...] since voluntary action to address human rights violations, corporate climate and environmental harm, although incentivised through reporting, has not brought about the necessary behavioural change”*



October 22, 2020

The European Parliament adopted a legislative report with 377 votes to 75 and 243 abstentions calling on the EU Commission to present an EU legal framework to halt and reverse EU-driven global deforestation. The text clearly establishes in section 5.2 mandatory due diligence and civil liability for corporations, as well as the conditions for access to information and remedy, and issues relating to the burden of proof.



December 1, 2020

The European Council approved conclusions calling on Member States and the Commission to promote human rights in global supply chains and decent work worldwide. In the text, the European Council called on the Commission to:

*“Table a proposal for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains. This could include a definition of what kind of risk management process companies need to follow to identify, prevent, mitigate and account for its adverse human and labour rights and environmental impacts”*

# The duty of vigilance: preventing abuses, recognising companies' civil and criminal liability for damages

In this context, [European](#) and [French](#) civil society has set out the main criteria to be taken into account in the drafting and adoption of such European legislation on the duty of vigilance.

## The issue is twofold:

- **Recognising companies' duty of vigilance** to identify risks and prevent, through effective measures, any human rights violation and any serious environmental damage in their value chain, throughout the world.
- **Establishing the legal liability** of parent and instructing companies, in both civil and criminal matters, in order to provide access to justice for individuals and communities whose human rights or environment are abused by the activities of business enterprises established or operating within the European Union. This applies whether the violations are perpetrated by those business enterprises directly, or through their subsidiaries, suppliers, subcontractors and business relationships.

In the pages that follow, we will see how **the need to anchor the duty of vigilance on these two pillars has gained ground**. There is now a broad consensus on the necessity of preventing violations and ensuring access to justice for business-related human rights and environmental abuses.

# Support for the duty of vigilance



June 2017

At its sixty-first session, the Committee on Economic, Social and Cultural Rights adopted its [General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities](#).

In the introduction, the Committee highlighted the fact that *"under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice"*. This was followed by a strong argument in favour of the duty of vigilance and the adoption by UN Member States of legal provisions that would *"prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control"*. In conclusion, detailing the general principles for access to remedy, the Committee stated that:

*"States parties must **provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability**. This should preferably take the form of ensuring access to independent and impartial judicial bodies: the Committee has underlined that **"other means [of ensuring accountability] used could be rendered ineffective if they are not reinforced or complemented by judicial remedies."***



July 18, 2017

The United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises published a [report on the concept of access to effective remedies](#).

In the report, the United Nations working group condemns the fact that *"Obtaining effective remedies in the event of business-related human rights abuses therefore remains an exception rather than the rule"*. It recalls that **"The right to an effective remedy is a human right widely recognized under international human rights law and national laws"**. Having issued this observation and reminder of international law, the Working Group notes that *"Effective remedies for business-related human rights abuses, taken in a holistic sense to fulfil individual and societal goals, should result in some form of corporate accountability and vice versa"*. It issues a recommendation to

*"Pay attention to effective remedies when fulfilling the duty to protect human rights, which entails **establishing effective judicial and non-judicial remedial mechanisms capable of providing effective remedies in practice"***



October 15, 2018

At the opening of the fourth negotiating session of the United Nations intergovernmental Working Group on a treaty on multinationals and human rights, [Archbishop Ivan Jurkovic, representative of the Holy See](#), expressed his support for the ongoing negotiations. In his address, he emphasised that *"A binding instrument would raise moral standards, change the way international corporations understand their role and activity and help clarify the extraterritorial obligations of States regarding the acts of their companies in other countries"*. He concluded his speech with these words:

*"Our efforts during this week of negotiation should be oriented in elaborating an instrument that could represent a useful tool. In order for this to happen, however, it is necessary to place the human person, with his or her dignity, at the center of our work and to **establish the legal liability for the conduct of business enterprises that result in human rights abuses at home or abroad. Such responsibility should, as appropriate, be criminal, civil or administrative"***



April 29, 2019

The Commission of the Bishops' Conferences of the European Union published its [contribution in view of the renewal of the EU Action Plan on Human Rights and Democracy \(2020-2024\)](#). This Commission, which is made up of bishops delegated by the Catholic Bishops' Conferences of the Member States of the European Union, discussed business and human rights issues in the section on economic, social and cultural rights. COMECE called on the European Council to take steps, in particular through:

*"adopting binding and effective human rights due diligence legislation, including a specific EU Action Plan on Business and Human Rights, [...] playing a constructive role in the on-going negotiations on an international legally binding instrument at the United Nations to regulate the activities of multinational companies and other business enterprises with respect to human rights, [...] promoting effective redress mechanisms for victims of human rights violations resulting from business activities"*



November 15, 2019

Pope Francis, who hosted the World Congress of the International Association of Penal Law in Rome, outlined the challenges of contemporary international law, in emerging from what he calls the "idolatry of the market":

*"The fragile, vulnerable person finds himself "defenceless before the interests of a deified market, which become the only rule". Today, some economic sectors exercise more power than the States themselves: a reality that is even more evident in times of globalization of speculative capital. The principle of profit maximization, isolated from all other considerations, leads to a model of exclusion – automatic, no? – that violently inflicts on those who suffer its social and economic costs in the present, while condemning future generations to pay for its environmental costs [...] **One of the frequent omissions of criminal law, a consequence of selectivity in sanctioning, is the scarce attention – or lack therefore – to crimes committed by the most powerful, in particular the macro-delinquency of corporations. I am not exaggerating with these words.** I appreciate that your Congress has taken this issue into consideration. Global financial capital is the source of serious crimes not only against property but also against people and the environment. It is organized crime that is responsible, among other things, for the over-indebtedness of states and the plundering of the natural resources of our planet. **Criminal law must not remain unconnected with conduct in which, by taking advantage of asymmetrical situations, a dominant position is exploited to the detriment of collective welfare"***



December 2, 2019

More than 100 European civil society organisations called for [European legislation on the duty of vigilance for multinational companies](#). The signatory associations, social movements and trade unions stated that

*"We want companies and investors to be required to carry out human rights and environmental due diligence [...] If a company fails to respect its obligations and abuses do occur, **avenues must be available to hold it to account in court and for victims of abuses to receive justice and remedy"***



July 16, 2020

The [Special Rapporteur on the situation of human rights defenders, Mary Lawlor](#), presented her first annual report to the UN General Assembly, in which she ***“outlines herein how she intends to approach and develop the subject of her mandate in the coming years”***. She condemns *“a worrying tendency to silence critics of businesses”* and notes that *“Many of the most violent attacks on defenders occur in the context of major business projects”*. In her final recommendations, the Special Rapporteur Mary Lawlor emphasises that States must

*“Combat impunity for threats and violations aimed at human rights defenders by undertaking impartial enquiries and **ensure that perpetrators stand trial and that victims obtain compensation [...] Support the draft United Nations instrument on business and human rights”***



September 1, 2020

[Pope Francis, in his message for the World Day of Prayer for the Care of Creation](#), stated that

*“Indigenous communities must be protected from companies, particularly multinational companies, that **“operate in less developed countries in ways they could never do at home”**, through the destructive extraction of fossil fuels, minerals, timber and agroindustrial products. This corporate misconduct is a “new version of colonialism” (Saint John Paul II, Address to the Pontifical Academy of Social Sciences, 27 April 2001), one that shamefully exploits poorer countries and communities desperately seeking economic development. We **need to strengthen national and international legislation to regulate the activities of extractive companies and ensure access to justice for those affected”***



September 1, 2020

A coalition of associations mobilised in Brussels on this draft European directive published a position paper detailing the **“principal elements” underpinning this directive**. ECCJ, Amnesty International, the International Federation for Human Rights (FIDH), CIDSE, Friends of the Earth Europe, Oxfam, Global Witness, Anti-Slavery, the Clean Clothes Campaign, the European Centre for Human and Constitutional Rights (ECCHR) and ActionAid explicitly stressed that

*“Business enterprises must be **liable for human rights and environmental adverse impacts in their global value chains and within their operations and business relationships”***



September 7, 2020

At a hearing organised by the European Parliament's DROI subcommittee, Théo Jaekel, an expert on corporate responsibility at Ericsson, expressed the support of this Swedish multinational enterprise for a European duty of vigilance legislation, in order to ensure effective access to justice for those affected:

*"We strongly welcome and support the need for mandatory human rights and environmental due diligence legislation. An effective legislation can create legal certainty, a level-playing field and provide access to remedy for impacted stakeholders [...] we acknowledge the need for enforcement mechanisms to make sure the legislation is effective [...] Most importantly, **any liability provisions need to both ensure effective deterrent for companies but also adequate remedy for impacted stakeholders**"*



September 28, 2020

More than 230 bishops and cardinals from all over the world launched a global call for the duty of vigilance **and its implementation through a European directive and a United Nations treaty in order** "to stop corporate abuse and guarantee global solidarity". The 233 bishops and cardinals stated:

*"We call on all governments to uphold their obligations under international law to protect human rights and prevent corporate abuses. In that sense we welcome the results of the above-mentioned European Commission's study and the announcement by the EU Commissioner for Justice of mandatory and robust legislation. **The legislation should introduce mandatory environmental and human rights due diligence, that is, to identify, assess, stop, prevent and mitigate the risks and violations to the environment and all human rights throughout the supply chains of businesses and to substantially improve the possibilities of affected people to claim for compensation in national civil courts [...]** Accordingly, all states should also ensure their constructive and active participation in the UN negotiations for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"*



October 6, 2020

The EU Fundamental Rights Agency (FRA) published a report on access to effective remedies. This report summarised two years of research during which experts from the EU agency interviewed legal experts and practitioners in seven EU Member States (Finland, France, Germany, Italy, the Netherlands, Poland and Sweden). Pursuant to the study, the director of the agency, Michael O'Flaherty, issued a clear call for the European Union and its Member States to facilitate access to justice for those affected by business-related human rights abuses:

*"**The scales of justice are tipped more towards big business than victims. But businesses large and small need to be held to account for their actions, no matter where they occur. In today's globalised world, these actions can affect the human rights of someone far away [...]** The EU and its Member States need to level the playing field so **victims can seek and get justice simply and effectively for any violation of their rights**"*

The FRA report makes a series of recommendations on access to information, class actions, associations' interest to act, the strengthening of non-judicial mechanisms, the financial costs of legal proceedings, the law applicable in transnational disputes, and the duty of vigilance. On this point, the FRA recommends, among other things, that

*"**The EU should ensure that future legislation on mandatory horizontal due diligence covers both environmental and human rights impacts of business operations, [...]** it should establish consequences for companies not complying with the regulation, and **ensure access to remedy for rights holders affected by corporate malpractice**"*



November, 2020

The German Federal Ministry for Economic Cooperation and Development and the Business & Human Rights Resource Centre published a report, under the German Presidency of the European Council, entitled "[Towards EU Mandatory Due Diligence Legislation. Perspectives from Business, Public Sector, Academia and Civil Society](#)". **Olivier de Schutter**, UN Special Rapporteur on Human Rights and Extreme Poverty, and **Sharan Burrow**, general secretary of the International Trade Union Confederation, stressed the importance of **strengthening access to justice**. They highlighted one pitfall to avoid: this directive must not become an improved extra-financial reporting tool, or a measure that, under the pretext of focusing on the prevention of human rights and environmental abuses, makes access to remedy more complex:

*"Due diligence should not degrade into a box-ticking exercise, shielding companies from any form of liability provided they follow the standard list of "do's" and "do not's". This is why **HRDD and potential civil liability for violations occurring in the supply chain should be treated as two separate, albeit complementary, duties** [...] In our view, even if HRDD duties (as may be prescribed under the future EU framework) are fully complied with, this should not result in a guarantee of legal immunity from civil liability claims [...] HRDD is essential to ensure that the EU contributes to a form of economic globalisation that contributes to human development. **It should not become a substitute for ensuring a right to remedy for victims of corporate negligence**"*

HUMAN  
RIGHTS  
WATCH

November 13, 2020

The human rights defence association [Human Rights Watch](#) published its own recommendations on this EU legislation on the duty of vigilance. The association stressed that

*"The legislation should ensure that those affected around the world have a **clear path to judicial remedies, including access to domestic courts**. Whether a business enterprise conducted effective human rights due and environmental diligence in good faith, should be considered as a factor in any litigation, but should not provide legal immunity. The burden of proof should rest with a business enterprise to demonstrate their human rights and environmental due diligence efforts were effective"*

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