



RED FLAGS

LIABILITY RISKS FOR COMPANIES
OPERATING IN HIGH-RISK ZONES

The legal liabilities of a company operating internationally are not limited to the domestic laws in the countries where it operates. Laws at home and in third countries may also apply. As new international standards are incorporated into national laws, and as courts take a more expansive view of legal responsibility, the web of liability is expanding.

Exposure is greatest in high-risk zones such as wars, areas of widespread violence and human rights abuses, or in states ruled by repressive regimes. In particular, business activities can create liabilities under laws governing international sanctions, financial misconduct, and international crimes (e.g. torture, atrocities, and mass killings).

Companies, their board members, executives or employees, can all be held accountable for corporate and individual actions. Liability can arise when the crimes are committed by others, such as business or trading partners and security providers. Crimes committed near company operations by others may generate liability. Even inaction may result in liability.

Ignorance is no defence. Industry codes of conduct and international guidelines are useful signposts, but they may not be sufficient to ensure that companies steer clear of these liabilities.

This document lists activities which should raise a 'red flag', warning companies of possible legal risks, and the need for urgent action. The activities identified below are drawn from a review of existing international law and court cases in more than a dozen jurisdictions. In the Internet version of this guide, each red flag is hyperlinked to a thorough summary of the relevant laws and cases. Summaries are updated on a regular basis. This document does not constitute legal advice.

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1. Expelling people from their communities

The threat or use of violence to force people out of their communities can be a crime under international law. A company may face liability if it has gained access to the site on which it operates, where it builds infrastructure, or where it explores for natural resources, through forced displacement.

A Japanese company was sued in Japan for its involvement in the alleged involuntary resettlement of people in Indonesia prior to the building of a dam. The company has challenged the claims and the case is pending.

2. Forcing people to work

Companies using people working against their will through the threat or use of violence may face liability. The use of such labour by a joint venture partner or state security forces may also pose a liability risk.

An American oil company was sued in the United States for the alleged use of forced labour by the Burmese military prior to the construction of an oil pipeline. The company challenged the claims in court. The parties ultimately reached an out of court settlement.

3. Handling questionable assets

Receiving funds which may have been associated with criminal activities exposes companies and individuals to legal risks. Holding, managing or hiding such funds, including funneling suspicious funds into legitimate financial channels, may result in prosecution and lawsuits.

In 2005, an American bank pled guilty in a US court and paid a \$16 million fine to clear up criminal charges laid in relation to suspicious transactions involving the assets of Chilean dictator Augusto Pinochet.

4. Making illicit payments

Any significant off-the-book financial transactions may create legal liabilities under laws against corruption or bribery. Charges may be brought outside the country where the transaction takes place. Even where corruption is a common occurrence, a liability risk remains.

In 2003, an American company executive was charged in the US for allegedly arranging for \$78 million in kickbacks to Kazakh officials in order to obtain oil and gas contracts in Kazakhstan. The accused is challenging the charges and the case is pending.

5. Engaging abusive security forces

The use of disproportionate force by government or private security forces acting on behalf of a company can create liabilities for the company itself. These liabilities may arise even where the actions of the security forces (e.g. killing, beating, abduction, rape) were neither ordered nor intended by the company. Legal risks may be greater where security forces have a history of abusive conduct.

A US oil company operating in Nigeria was sued in a US court after government soldiers engaged to provide security to the company allegedly shot demonstrators at an off-shore oil platform. The company has challenged the claims and the case is pending.

6. Trading goods in violation of international sanctions

A company may be held liable for buying, selling or transporting products, commodities or assets originating from or going to a country, group or individual under international sanctions. The most common embargo is on arms, but increasingly sanctions are imposed on specific commodities, such as diamonds, timber, and on financial assets.

A court in the Netherlands temporarily imprisoned a Dutch businessman for alleged violations of UN sanctions against Liberia by arranging for arms imports. The accused challenged the allegations and the conviction was overturned on appeal.

7. Providing the means to kill

Businesses may face liabilities if they provide weapons or dual-use equipment to governments or armed groups who use those products to commit atrocities. This may be the case even where import and export regulations are fully respected.

A court in the Netherlands imprisoned a Dutch businessman for providing chemical components which the Iraqi military used against Kurdish civilians in 1988. The accused challenged the allegations. On appeal, the court confirmed the conviction, increasing the sentence to 17 years.

8. Allowing use of company assets for abuses

Company facilities and equipment used in the commission of international crimes can create liability for the company, even if it did not authorise or intend such use of those assets.

Indonesian villagers sued an American oil company in a US court, claiming they were tortured by Indonesian armed forces protecting the oil company's facilities, and that some of the abuses took place on the company's facilities. The company has challenged the claims. The case is pending.

9. Financing international crimes

Providing financial resources to those who commit international crimes may result in liability, if those resources substantially contribute to those crimes being committed. The risk of liability increases if the company persists in doing business with the violators, particularly once the violations are common knowledge.

A German businessman who made contributions to the SS during World War II was convicted after the war of being an accessory to a criminal organisation. An indictment by an international tribunal is still pending against a Rwandan businessman connected to the Interahamwe during the 1994 genocide. In 2007, a US company pled guilty under US anti-terrorism laws for making a payment to a Colombian militia known to be a violent paramilitary organisation.

In the interest of accuracy, the summaries of cases referred to under each Red Flag are based wherever possible on court documents or other official sources publicly available as of March 2008.

More information, including cases that illustrate the kinds of liabilities associated with particular Red Flags, can be downloaded from www.redflags.info

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