

A HANDBOOK FOR PRACTITIONERS | UNITED STATES OF AMERICA

Civil Liability for Human Rights Violations



AUTHORS

Paul Hoffman

Director at Civil Rights Litigation Clinic,
UC Irvine School of Law

[PROFILE](#)

Andrew Van Ligten

Certified Law Student, Civil Rights Litigation Clinic,
UC Irvine School of Law

FREQUENTLY USED ABBREVIATIONS

ATS	Alien Tort Statute
FLSA	Fair Labor Standards Act
FTCA	Federal Tort Claims Act
IIED	Intentional Infliction of Emotional Distress
Section 1983	42 U.S. Code § 1983
TVPA	Torture Victim Protection Act
TVPRA	Trafficking Victims Protection Reauthorization Act

Legal Disclaimer: The information materials and opinions contained in this publication are for general information purposes only, are not intended to constitute legal or other professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. We do not accept any responsibility for any loss which may arise from reliance on information or materials contained in this publication. You should consult a suitably qualified lawyer on any specific legal problem or matter.

Publication Information: This country report is one of the 19 reports prepared for a [comparative project on civil liability for human rights violations](#) led by the Bonaverio Institute of Human Rights. It follows a unified template, and some terms in this report were defined consistently for the purposes of the project. To access other country reports and introduction from the project team, please [click here](#).

All online resources cited and/or referenced in this report were accessed on 1 April 2022. Publication Date: October 2022

Cover photo by Arthur Brognoli (courtesy of Unsplash).



CONTENTS



RETURN TO THIS
TABLE OF CONTENTS





VIEW THE START OF
THE CURRENT SECTION



INTERACTIVE

TABLE OF CONTENTS

Page	Content	Average Read Time
P4	Overview of Jurisdiction	1 minute 
P5	Introduction 	2 minutes
P7	General Questions	1 minute
P8	Question 1	9 minutes
P13	Question 2	4 minutes
P16	Question 3	3 minutes
P17	Question 4	2 minutes
P18	Question 5	2 minutes
P19	Question 6	4 minutes
P22	Question 7	3 minutes
P24	Question 8	1 minute
P25	Case Scenarios	1 minute
P26	Case Scenario 1	3 minutes
P28	Case Scenario 2	4 minutes
P30	Case Scenario 3	4 minutes



UNITED STATES OF AMERICA



The US legal system provides statutory and common law remedial schemes at the national, state, and local levels. Section 1983 is the primary vehicle for the vindication of constitutional rights in both federal and state courts. Civil liability can be also achieved through claims under the Alien Tort Statute (ATS), the Torture Victim Protection Act and conventional tort litigation. The ATS has been for some time the most prominent vehicle for bringing human rights lawsuits against state and non-state actors before US courts, but the trend of limiting the scope of the ATS by the US Supreme Court has led to dismissal of many cases brought against non-citizens for conduct occurring outside the US. Human rights protections in US law are not ordinarily based on international law. The US has been hesitant to accept international human rights obligations or ratify the major human rights treaties.

INDICES

26/167

Democracy Index
2021 Ranking

83/100

Freedom House
2022 Score

27/180

Transparency International
Corruption Index 2021 Ranking

The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: [Democracy Index](#) by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); [Freedom House](#) (rates people's access to political rights and civil liberties with 100 being an optimal score); and [Transparency International Corruption Index](#) (ranks 180 countries by their perceived levels of public sector corruption).



Introduction

1. The US legal system provides remedies for human rights violations at the national (federal), state and local level. This complex web of overlapping sources of rights protection requires human rights practitioners to refer to multiple sources for effective representation.
2. Human rights protections in US law are not ordinarily based on international law.¹ The United States has repeatedly failed to ratify vital [human rights treaties](#) or has attached reservations [limiting the domestic impact](#) of the treaties, and judicial doctrine has limited the application of customary international law as domestic law.² As a result, human rights litigation in the United States almost exclusively arises from domestic sources of law.
3. The Constitution of the United States³ recognises many human rights, including the rights of personal freedom and freedom of speech, for example. State constitutions also provide their own guarantees of human rights and, depending on the state, might provide a more robust recognition of human rights than that of the Constitution of the United States.⁴ In some circumstances, international law has had an indirect impact on domestic law, and US domestic law is consistent with international human rights protections. However, there are some notable exceptions.
4. The US Constitution, generally speaking, is not a self-executing basis for civil claims. The US Supreme Court held that there could be damages claims against federal officials based directly on violations of the Constitution in *Bivens*,⁵ but in the last 40 years has repeatedly narrowed the circumstances in which federal courts will recognise such claims. Congress has provided statutory tort remedies based on the actions of federal officials in the [Federal Tort Claims Act](#) (FTCA)⁶ subject to many limitations and exceptions. However, Congress has provided for civil remedies for constitutional violations and some statutory violations committed by state and local actors in 42 U.S. Code § 1983 ([Section 1983](#)).⁷

1 Roxanna Altholz, 'Chronicle of a Death Foretold: The Future of US Human Rights Litigation Post- Kiobel' (2014) 102(6) *California Law Review* 1495, 1514.

2 Human Rights Watch, '[United States Ratification of International Human Rights Treaties](#)', (2009); United Nations Human Rights Office of the High Commissioner, '[Status Of Ratification](#)'.

3 [Constitution of the United States](#).

4 See Loretta H Rush and Marie Forney Miller, 'A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties' (2018) 82(4) *Albany Law Review* 1353, 1380.

5 *Bivens v Six Unknown Named Agents*, 403 US 388 (1971) (Supreme Court) (SC).

6 [28 U.S. Code §§ 2671–80](#); See generally Kevin M Lewis, '[Federal Tort Claims Act \(FTCA\): A Legal Overview](#)' (Congressional Research Service, 20 November 2019).

7 Civil Action for Deprivation of Rights, [42 U.S. Code § 1983](#).

[Section 1983](#) is the primary vehicle for the vindication of constitutional rights in both federal and state courts. There are many other statutory and common law remedial schemes at the national, state, and local levels. These remedial schemes vary greatly from state to state and are too varied to cover in an introduction like this. Some remedial schemes do implement international human rights more directly. These include the Alien Tort Statute (ATS),⁸ the Torture Victim Protection Act (TVPA),⁹ and the Trafficking Victims Protection Reauthorization Act (TVPRA)¹⁰ as well as state statutes such as the New York State Human Rights Law.¹¹

5. Practitioners must approach human rights litigation in the United States mindful of the different tools, causes of actions, and remedies found in state and federal constitutions, common law, and statutes.

⁸ Alien Tort Statute, [28 U.S. Code § 1350](#).

⁹ [Torture Victim Protection Act of 1991](#), Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (codified at 28 U.S. Code § 1350).

¹⁰ [Trafficking Victims Protection Reauthorization Act of 2008](#), Pub. L. No. 110-457, 122 Stat. 5044 (codified at 18 U.S. Code §§ 1581-1596).

¹¹ [New York City Human Rights Law](#), NYC Admin Code §§ 8-301, 8-401-04, 8-502 (2017).



General Questions



Q1

Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

Assault or unlawful arrest and detention of persons

6. There are civil remedies against public bodies, corporations, and individuals at every level of the US legal system for these violations. These remedies are subject to some exceptions and limitations depending on the basis for the legal claim. If committed 'under the colour of law',¹² such actions would violate the US and most state constitutions. Many states provide remedies in their statutory or common law for such actions. If corporations or individuals act in concert with state officials in such matters, they may also violate constitutional provisions. If not, these violations can almost always be remedied based on state or local statutory or common law.

Section 1983

7. Section 1983 provides a statutory [cause of action](#)¹³ against state or local actors who violate federal constitutional or statutory rights while acting [under the colour of law](#).¹⁴ Among the rights enforceable under Section 1983 is the right against unreasonable search and seizure under the Fourth Amendment of the US Constitution. This provides the basis for victims of [assault or unlawful arrest and detention](#) to pursue a claim against police and their agents under Section 1983.¹⁵ It should be noted that Section 1983 claims are subject to defences, immunities and other limitations which may restrict the circumstances in which remedies are available. In particular, the US Supreme Court has expanded the doctrine of qualified immunity to restrict the availability of Section 1983 remedies unless a defendant has violated 'clearly established' law.¹⁶ It should also be noted that, generally, [state governments cannot be sued](#) under Section 1983 or sued in federal court because of the Eleventh Amendment.¹⁷ However, municipalities, local government entities like cities and counties, may be sued under Section 1983.¹⁸

¹² 'Under the colour of law' is a legal term of art traditionally understood to mean that the wrongdoer 'exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'. *West v Atkins*, 487 U.S. 42, 48 (1988) (SC).

¹³ Martin A Schwartz, '[Section 1983 Litigation](#)' (2014) Federal Judicial Center.

¹⁴ See generally Michael Avery, David Rudovsky and Karen M Blum, *Police Misconduct: Law and Litigation* (3rd edn, Thomson/West 2003).

¹⁵ *Manuel v City of Joliet, Ill.*, 137 S.Ct. 911 (2017) (SC); *Savino v City of New York*, 331 F.3d 63 (2d Cir. 2003) (US Court of Appeals, Second Circuit).

¹⁶ See generally *Ashcroft v al-Kidd*, 563 US 731 (2011) (SC); Joanna C Schwartz, 'How Qualified Immunity Fails' (2017) 127(1) Yale Law Journal 1.

¹⁷ *Pennhurst State School and Hospital v Halderman*, 465 U.S. 89, 100-01 (1984) (SC); *Employees v Missouri Public Health & Welfare Department*, 411 U.S. 279, 280 (1973) (SC).

¹⁸ *Monell v New York City Dept of Social Services*, 436 U.S. 658, 690 (1978) (SC).

SPOTLIGHT: SECTION 1983

Perhaps the most important civil rights statute in the United States is Section 1983. Passed in 1871 as a part of the '[Ku Klux Klan Act](#)', the statute was intended to protect recently freed slaves in the South from violence, intimidations, and deprivations by white-led state governments. In theory, Section 1983 would provide a federal remedy to override unconstitutional state laws and insert a layer of federal government protections between Jim Crow-era southern governments and African Americans. Following the retreat of Reconstruction, however, Section 1983 and its promise as a shield and sword against the violent and oppressive excesses of white southern governments went unfulfilled.

Only in 1961 did Section 1983 begin to emerge as a tool to check the abuses of state officials in [Monroe v Pape](#). *Monroe* opened the door to federal court houses in states where unconstitutional conduct often went unremedied. Importantly, *Monroe* established that a federal remedy was available under Section 1983 even if a remedy was theoretically available under state law. Further, *Monroe* established that even state officials acting illegally were acting 'under the color of law' under Section 1983. Finally, *Monroe* provided guidance to future courts by recognising that Section 1983 operated within 'the background of tort liability', thus allowing tort principles, such as secondary liability and causation, to be imported directly into Section 1983 litigation. With the door open, Section 1983 litigation has expanded to permit liability against not just state agents, but also [municipalities and local government entities](#).

This steady expansion following *Monroe*, however, has been met with some hostility from the US judiciary, particularly the Supreme Court. In response to an increase in Section 1983 and other civil rights claims against state actors, the Supreme Court has limited the remedy dramatically through judicially-created doctrines such as qualified and absolute immunity. Additionally, though this limitation pre-dated the expansion of Section 1983, the Supreme Court has held that state governments enjoy sovereign immunity from civil liability under the [Eleventh Amendment of the Constitution](#).

ATS claims

8. It is possible that ATS claims may be brought by aliens who are subjected to assault or unlawful arrest and detention within the United States. The ATS grants US district courts [original jurisdiction](#) over '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'.¹⁹ These require, however, that the claims also rise to the level of customary

¹⁹ [28 U.S. Code § 1350](#).

international law violations,²⁰ and the Supreme Court has recently added the requirement that the facts of such cases must 'touch and concern' the United States.²¹ There is disagreement among US courts concerning the [mens rea requirement](#) for an ATS claim.²² This trend of limiting the scope of the ATS has led to dismissal of many cases brought against non-citizens for conduct occurring outside the United States.²³

Bivens claims

9. A [Bivens](#) claim may be available against federal government officials who subject victims to assault or unlawful arrest and detention.²⁴ *Bivens* itself provided a cause of action in response to a violation of the Constitution's proscriptions against unreasonable search and seizures.²⁵ The Supreme Court has since sharply limited the circumstances in which it will recognise *Bivens* claims arising from the US Constitution, but there will likely continue to be such remedies for these violations.

Statutory and common law tort claims

10. US tort law in all States will provide civil remedies to individuals subjected to assault or unlawful arrest or detention, regardless of whether the perpetrator is a public or private actor. Such claims are governed by the relevant State's tort law, including the State's defences and immunities. Claims involving the acts of federal employees may be brought against the US under the FTCA, which borrows the substantive law of the state in which the injury occurred.²⁶ It should be noted that the FTCA is subject to various additional [limitations and immunities](#).²⁷

Battery

11. The tort of **battery** provides a cause of action against a defendant who acts intentionally to cause harmful or offensive contact with the victim.²⁸ In cases of excessive use of force by police, battery claims are often alleged alongside constitutional claims for the injury to the unlawfully detained individual.²⁹

Assault

12. The tort of **assault** provides a remedy against police and private actors who act to intentionally cause the victim reasonable apprehension of immediate harmful or offensive conduct.³⁰ An assault claim may be brought where, for example, a client is unlawfully arrested or detained and placed in reasonable apprehension of harmful or offensive conduct.³¹

20 *Sosa v Alvarez-Machain*, 542 U.S. 692, 732 (2004) (SC). Successful ATS claims must be based on the same level of evidence and specificity of 18th century norms recognised in Blackstone's time (eg piracy, attacks on Ambassadors). *ibid* 724.

21 *Kiobel v Royal Dutch Petroleum Co*, 569 U.S. 108, 124 (2013) (SC) (holding ATS claims must 'touch and concern the ... United States with ... sufficient force to displace the presumption against extraterritorial application').

22 Srish Khakurel, 'The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute' (2018) 59(8) *Boston College Law Review* 2953, 2966-2969; also cf *Presbyterian Church of Sudan v Talisman Energy, Inc* 582 F.3d 244 (2d Cir. 2009) (US Court of Appeals, Second Circuit) (purpose standard) with *Mehinovic v Vuckovic*, 198 F. Supp.2d 1322 (N.D. Ga. 2002) (US District Court, Northern District of Georgia) (knowledge standard).

23 *Doe v Cisco Systems, Inc*, 66 F.Supp. 3d 1239, 1247 (N.D. Cal. 2014) (US District Court, Northern District of California, San Jose Division); *Kaplan v Central Bank of the Islamic Republic of Iran*, 961 F.Supp.2d 185, 205 (D.D.C. 2013) (US Court of Appeals, District of Columbia Circuit).

24 *Bivens* (n 5); but see *District of Columbia v Carter*, 409 U.S. 418, 424-25 (1973) (SC) (holding Section 1983 unavailable against federal officials).

25 *Bivens* (n 5) 389; See *Carlson v Green*, 446 U.S. 14, 17 (1980) (SC) (extending *Bivens* Eighth Amendment cruel and unusual punishment).

26 *Tekle v US*, 511 F.3d 839 (9th Cir. 2006) (US Court of Appeals, Ninth Circuit); *Arrington v US*, 473 F.3d 329, 336-38 (D.C. Cir. 2006) (US Court of Appeals, District of Columbia Circuit).

27 Lewis (n 6).

28 Restatement (Second) of Torts § 13 ([American Law Institute](#), Philadelphia).

29 *Raiche v Pietroski*, 623 F.3d 30, 40 (1st Cir. 2010) (US Court of Appeals, First Circuit); *Lund v Henderson*, 22 F.Supp.3d 94, 105 (D. Mass. 2014) (US District Court, District of Massachusetts).

30 Restatement (Second) of Torts (n 28) § 21.

31 *Kennedy v Town of Billerica*, 617 F.3d 520, 539 (1st Cir. 2010) (US Court of Appeals, First Circuit).

False imprisonment

13. The tort of **false imprisonment** provides a cause of action against an actor whose conduct leads another to be confined by physical force or barriers.³² False imprisonment actions may be brought against police officers where the arrest was not privileged, meaning where the arrest was unlawful.³³

Intentional Infliction of Emotional Distress (IIED)

14. The tort of **IIED** imposes liability on defendants who through extreme and outrageous conduct intentionally, or in some cases recklessly, cause another severe emotional distress.³⁴ The extreme and outrageous nature of the conduct may arise from an abuse of one's power, particularly that of a police officer.³⁵ In claims against police for assault or unlawful arrest and detention, IIED claims can find success when pleaded alongside other claims such as battery or assault where the officer's conduct is deemed sufficiently outrageous.³⁶

Environmental harms

15. Environmental law in the United States relies heavily on federal and state regulation. The preservation of private rights and the assertion of private remedies are often pursued through regulation and community involvement. The courts have been restrictive in [recognising the standing](#) of environmental organisations to bring such cases, particularly if they cannot identify [concrete, redressable injuries](#) in fact.³⁷ However, civil claims may be brought against human rights violators whose conduct results in environmental harm through conventional tort law, Section 1983 claims, and various state claims. Environmental ATS claims have not been successful.³⁸

Section 1983

16. Scholars have long argued that Section 1983 can be a [useful tool](#) to remedy environmental harms.³⁹ In response to the [Flint Water Crisis](#), litigants brought Section 1983 claims alleging that the conduct of state officials violated their rights under the Constitution.⁴⁰ These claims would likely have to show that the state conduct was so discriminatory against historically disadvantaged groups as to give rise to an equal protection violation under the Fourteenth Amendment.⁴¹

32 Restatement (Second) of Torts (n 28) § 35.

33 *Posr v Doherty*, 944 F.2d 91, 97 (1991) (US Court of Appeals, Second Circuit) (permitting liability for false arrest of protester).

34 Restatement (Second) of Torts (n 28) § 46.

35 *Carter v District of Columbia*, 795 F.2d 116, 139 (D.C. Cir. 1986) (US Court of Appeals, District of Columbia Circuit); *Greene v Shegan*, 123 F.Supp.3d 88, 92 (D.D.C. 2015) (US District Court, District of Columbia); Restatement (Second) of Torts (n 28) § 46, comment e.

36 *Bender v City of New York*, 78 F.3d 787, 791 (2d Cir. 1996) (US Court of Appeals, Second Circuit); *Barbosa v Conlon*, 962 F.Supp.2d 316, 334 (D. Mass. 2013) (US District Court, District of Massachusetts); *Taylor v State*, 617 So.2d 1198, 1204 (La. App. 1993) (US Court of Appeal, Louisiana, Third Circuit).

37 *Lujan v Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992) (SC); *Juliana v United States*, 947 F.3d 1159, 1171-73 (9th Cir. 2020) (US Court of Appeals, Ninth Circuit).

38 *Flores v Southern Peru Copper Corp*, 343 F.3d 140, 161-71 (2d Cir. 2003) (US Court of Appeals, Second Circuit); *Beanal v Freeport-McMoran, Inc*, 197 F.3d 161, 166-67 (5th Cir. 1999) (US Court of Appeals, Fifth Circuit); *Sarei v Rio Tinto Plc*, 650 F.Supp.2d 1004, 1025 (C.D. Cal. 2009) (US District Court, Central District of California).

39 Julia Prochazka, '[Back to its Roots: How §1983 Must Return to its Origins to Provide a Remedy for the Inupiat Against Oil Drilling in Alaska's Arctic Circle](#)' (2017) 12(3) *Northwestern Journal of Law and Social Policy* 130, 134-35.

40 Anthony Cavender, '[Sixth Circuit Holds that Some Official Actions Taken in the "Flint Water Crisis" Could Be Constitutional Due Process Violations](#)' (2019) *JDSUPRA*; *Guertin v Michigan*, 912 F.3d 907, 926-27 (6th Cir. 2019) (US Court of Appeals, Sixth Circuit); *Boler v Earley*, 865 F.3d 391 (6th Cir. 2017) (US Court of Appeals, Sixth Circuit); *Mays v Snyder*, 916 N.W.2d 227, 240 (Mich. Ct. App. 2018) (Court of Appeals, State of Michigan).

41 The Fourteenth Amendment has been interpreted as creating substantive due process claims for individuals whose civil rights have been violated.

Statutory and common law tort claims

17. The tort of **nuisance** imposes liability on perpetrators whose conduct causes environmental harms affecting public health and safety.⁴² A nuisance can be public or private,⁴³ but individuals may only bring private nuisance claims. A private nuisance imposes liability on a defendant whose conduct interferes with another's use or enjoyment of their land.⁴⁴ Remedies for nuisance claims include monetary damages or injunctive relief and can be pursued in federal or state court.⁴⁵ Plaintiffs can seek monetary damages for environmental harm or injunctive relief to prevent the continuance of environmentally harmful conduct.⁴⁶
18. The tort of **negligence** imposes liability on a tortfeasor who negligently harms another. Negligence claims arise when perpetrator's conduct falls below a reasonable standard of care⁴⁷ and such claims have been brought in environmental disaster litigation like the lawsuits against Exxon concerning the [Exxon-Valdez oil spill](#).⁴⁸

Harmful or unfair labour conditions

TVPRA claims

19. The TVPRA provides causes of action against perpetrators and beneficiaries of trafficking and forced labour.⁴⁹ Specifically, the victims must prove that the defendant was either the perpetrator or knowingly benefited from participation in a venture they knew or should have known engaged in [forced labour or trafficking](#).⁵⁰ Remedies under the TVPRA include civil damages, punitive damages, and damages for injuries and emotional distress.⁵¹ The TVPRA explicitly provides for [extra-territorial jurisdiction](#) where the human trafficking crimes occurred abroad.⁵² Courts have interpreted [Section 1595](#) of the TVPRA of 'evinced a clear indication of extraterritorial effect' sufficient to apply certain conduct committed abroad.⁵³ Section 1596 provides that 'the courts of the United States have extraterritorial jurisdiction over an offence (or any attempt or conspiracy to commit an offence)' under the TVPRA⁵⁴ where the offender is a US national, a lawful permanent resident, or the offender is present within the US regardless of nationality.

42 *Jordan v Luippold*, 114 P.2d 917, 918 (Okla. 1941) (Supreme Court of Oklahoma) (finding both a public and private nuisance).

43 Restatement (Second) of Torts (n 28) § 821A.

44 Restatement (Second) of Torts (n 28) § 821D; See *Smith v Carbide & Chemicals Corp*, 507 F.3d 372, 379 (6th Cir. 2007) (US Court of Appeals, Sixth Circuit); *Pruitt v Allied Chemical Corp*, 523 F.Supp. 975, 976 (E.D. Va. 1981) (US District Court, Eastern District of Virginia).

45 Restatement (Second) of Torts (n 28) § 821B, comment i.

46 *Cox v City of Dallas, Texas*, 256 F.3d 281, 289–91 (5th Cir. 2001) (US Court of Appeals, Fifth Circuit) (ordering an injunction inter alia to monitor dump sites for health risks and remediate site to non-hazardous conditions).

47 Restatement (Second) of Torts (n 28) § 821B.

48 Steven Mufson, 'BP's 'gross negligence' caused Gulf oil spill, federal judge rules' (2014) *Washington Post*; *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (US Court of Appeals, Fifth Circuit); *Exxon Shipping Co v Baker*, 554 U.S. 471 (2008) (SC).

49 *Barrientos v CoreCivic Inc*, 951 F.3d 1269, 1272 (11th Cir. 2020) (US Court of Appeals, Eleventh Circuit); *Adia v Grandeur Management Inc*, 933 F.3d 89, 94 (2019) (US Court of Appeals, Second Circuit).

50 [15 U.S. Code § 1589](#).

51 [18 U.S. Code § 1595](#); *Ditullio v Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (US Court of Appeals, Ninth Circuit); *Rana v Islam*, 210 F.Supp.3d 508, 516 (S.D.N.Y. 2016) (US District Court, Southern District of New York).

52 This explicit provision of [extra-territorial application](#) overcomes US doctrines developed to limit the extra-territorial reach of U.S. laws, such as the presumption against extra-territoriality.

53 See *Roe v Howard*, 917 F.3d 229, 240–43 (4th Cir. 2019) (holding [18 U.S. Code § 1595](#) of the TVPA satisfied the RJR Nabisco two-step framework to determine the extra-territorial application of US law).

54 This extra-territorial jurisdiction extends to violations under 18 U.S. Code §§ 1581, 1583, 1584, 1589, 1590, or 1591. [18 U.S. Code § 1596\(a\)](#).

ATS claims

20. As stated in [8] above, the ATS provides a cause of action for torts in violation of customary international law or the treaties of the United States.⁵⁵ Forced labour or human trafficking both violate customary international law. Generally, however, successful forced labour claims have involved fact patterns including trafficking, physical violence, and/or confinement.⁵⁶ By comparison, claims alleging only poor working conditions have been unsuccessful, as not rising to the level of violations of the law of nations.⁵⁷

FLSA claims

21. The [Fair Labor Standards Act \(FLSA\)](#)⁵⁸ provides federal guidelines to regulate minimum wage, overtime, record keeping, and child labour standards across the United States. The FLSA provides a [cause of action](#)⁵⁹ to employees against their employers who act in violation of the [minimum wage](#)⁶⁰ or [maximum hours](#)⁶¹ provisions of the FLSA. The private cause of action provides for mandatory [attorneys' fees and costs](#).⁶² The FLSA also contains [civil penalties](#) for violations of its [child labour provisions](#).⁶³



What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

Section 1983 claims

22. A plaintiff bringing a claim under [Section 1983](#) must prove that: (a) the defendant deprived the plaintiff of a federal right;⁶⁴ and (b) when depriving the plaintiff of their federal rights, the defendant was acting under the colour of law.⁶⁵

23. Generally, Section 1983 claims may only be brought against individuals acting under the colour of state law, such as police officers, state executive officers, and even elected officials.⁶⁶ However, Section 1983 liability may be pursued against a municipality (local government) where the violative conduct ['implements or executes](#) a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers'.⁶⁷

⁵⁵ Alien's Action for Tort, [28 U.S. Code § 1350](#).

⁵⁶ *ibid*; *Aragon v Che Ku*, 277 F.Supp.3d 1055, 1067–69 (D. Minn. 2017) (US District Court, District of Minnesota); *Adhikari v Daoud & Partners*, 697 F.Supp.2d 674, 687 (S.D. Tex. 2009) (US District Court, Southern District of Texas); *Licea v Curacao Drydock Co*, 584 F.Supp.2d 1344, 1361–63 (S.D. Fla. 2008) (US District Court, Southern District of Florida).

⁵⁷ See *Velez v Sanchez*, 693 F.3d 308, 321–23 (2d Cir. 2012) (US Court of Appeals, Second Circuit); *Roe v Bridgestone Corp*, 492 F.Supp.2d 988, 1015–19 (S.D. Ind. 2007) (US District Court, Southern District of Indiana).

⁵⁸ See [Fair Labor Standards Act](#), Pub. L. No. 52 Stat. 1060 (1938) (FLSA), codified as amended at 29 U.S. Code §§ 201–19 (2014).

⁵⁹ Penalties, [29 U.S. Code § 216\(b\)](#).

⁶⁰ Minimum wage, [29 U.S. Code § 206](#).

⁶¹ Maximum hours, [29 U.S. Code § 207](#).

⁶² § 216(b) (n 59); *Wright v Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960) (US Court of Appeals, Fourth Circuit) ('With respect to the counsel fee, the court has no discretion to deny it; the law's requirement of an award is mandatory and unconditional.')

⁶³ Child labour provisions, [29 U.S. Code §§ 212](#), 216; FLSA (n 58); *Lynnville Transp, Inc v Chao*, 316 F.Supp.2d 790 (S.D. Iowa 2004) (US District Court, Southern District of Iowa). The FLSA does not provide for a damages remedy for violations of its child labour provisions. See *Breitweiser v KMS Industries Inc*, 467 F.2d 1391 (5th Cir. 1972) (US Court of Appeals, Fifth Circuit).

⁶⁴ Federal rights include those guaranteed by the Constitution or statutory rights unambiguously recognised by Congress as creating such a right. *Gonzaga v Doe*, 536 U.S. 273, 280 (2002) (SC).

⁶⁵ See *Gomez v Toledo*, 466 U.S. 635, 640 (1980) (SC).

⁶⁶ States are immunised from such claims under the [Eleventh Amendment](#) and suits may proceed only upon waiver or consent of the state.

⁶⁷ *Monell* (n 18) .

24. Finally, private actors may be liable under Section 1983 for acting under the colour of law where: (a) the private actor has a [‘symbiotic relationship’](#) with the state;⁶⁸ (b) the private actor performs a [traditionally public function](#);⁶⁹ (c) the private actor has a [‘sufficiently close nexus’](#)⁷⁰ with the state; (d) the private actor and the state engaged in [joint action](#);⁷¹ or (e) the private actor and the state were [pervasively entwined](#).⁷²

Bivens claims

25. A plaintiff bringing a *Bivens* claim must prove that: (a) the defendant violated the plaintiff’s constitutional rights; and (b) the defendant was acting under the colour of law.⁷³

ATS claims

26. A plaintiff bringing a claim under the [ATS](#) must prove that: (a) the defendant committed a tort in violation of customary international law or US treaties that [touch and concern](#) the United States;⁷⁴ and (b) as a result of defendant’s conduct, the plaintiff suffered an injury.

TVPPRA claims

27. The [TVPPRA](#) allows claims against both direct perpetrators and those who financially benefit from forced labour, forced child labour, and human trafficking.
28. A plaintiff bringing a forced labour claim against the defendant under a perpetrator theory must prove that: (a) the defendant knowingly [provided or obtained the labour](#) of the plaintiff; (b) the defendant coerced the plaintiff to perform said labour through: (i) force, physical restraint, or threats of force or physical restraint; (ii) serious harm or threats of serious harm; (iii) abuse or threatened abuse of law or legal process; (iv) any scheme, plan or pattern intended to cause the plaintiff to believe that, if the plaintiff did not perform such labour, plaintiff or another person would suffer serious harm or physical restraint.⁷⁵
29. A plaintiff bringing a trafficking claim under a beneficiary theory must prove that: (a) the defendant knowingly benefited financially or by receiving anything of value; (b) from participation in a venture; and (c) the defendant knew or recklessly disregarded the fact that the venture was engaged in forced labour or human trafficking.⁷⁶

Statutory or common law tort claims

Battery claims

30. A plaintiff bringing a tort claim of **battery** must prove that: (a) the defendant acted with intent to cause harmful or offensive contact⁷⁷ with the victim; and (b) the

68 See *Burton v Wilmington Parking Authority*, 365 U.S. 715, 724–25 (1961) (SC); cf *Moose Lodge No. 107 v Irvis*, 407 U.S. 163, 175 (1972) (SC); *Rendell-Baker v Kohn*, 457 U.S. 830, 842–43 (1982) (SC).

69 *ibid* at 842.

70 *Blum v Yaretsky*, 457 U.S. 991, 1004 (1982) (SC); *Jackson v Metropolitan Edison Co*, 419 U.S. 345, 351 (1974) (SC).

71 *Adickes v Kress & Co*, 398 U.S. 144, 152 (1970) (SC).

72 *Brentwood Academy v Tennessee Secondary School Athletic Assn*, 531 U.S. 288, 296–98 (2001) (SC).

73 *Case v Milewski*, 327 F.3d 564, 566 (7th Cir. 2003) (US Court of Appeals, Seventh Circuit) (finding the elements for a *Bivens* claim are the same as a § 1983 claim).

74 *Kiobel* (n 21)

75 See pertinent provisions on forced labour, [18 U.S. Code §§ 1589, 1595](#); and eg *Barrientos* (n 49) 1272–73.

76 Civil Remedy, [18 U.S. Code §§ 1589, 1595](#); see *Ricchio v McLean*, 853 F.3d 553, 556–58 (1st Cir. 2017) (US Court of Appeals, First Circuit); *AB v Marriott International, Inc*, 455 F.Supp.3d 171, 181 (E.D.Pa. 2020) (US District Court, Eastern District of Pennsylvania).

77 Harmful or offensive conduct need not be excessively injurious and can be thought of as conduct that is offensive to a reasonable sense of personal dignity. Restatement (Third) of Torts § 3(b) ([American Law Institute](#), Philadelphia).

defendant's conduct caused harmful contact with the plaintiff's person directly or indirectly.⁷⁸

31. Because police officers, unlike ordinary citizens, sometimes have the right to use some force in the performance of their duties, state law tort claims against police officers for battery may require establishing that the use of force was unreasonable.⁷⁹

Assault claims

32. A plaintiff bringing a tort claim of **assault** must prove that: (a) the defendant acted with the intent to cause harmful or offensive contact, or an imminent apprehension of such contact; and (b) as a result of defendant's conduct, the plaintiff was put in immediate apprehension of such contact.⁸⁰

False imprisonment claims

33. A plaintiff bringing a tort claim of **false imprisonment** must prove: (a) the defendant acted with the intent to confine the plaintiff within fixed boundaries; (b) the defendant's conduct directly or indirectly resulted in the plaintiff's confinement; and (c) the plaintiff was conscious of the confinement or harmed by it.⁸¹
34. To satisfy element (b) confinement may be shown to be by either a physical barrier, force or threat of force, the failure of the perpetrator to act, or the improper assertion of legal authority.⁸²

IIED claims

35. A plaintiff bringing a tort claim of **IIED** must prove that: (a) the defendant engaged in extreme and outrageous conduct; (b) the defendant acted intentionally or recklessly; (c) the defendant's extreme and outrageous conduct caused the victim emotional distress; and (d) as a result of the defendant's conduct, the plaintiff suffered severe emotional and/or mental distress.⁸³
36. Conduct is extreme and outrageous under element (a) when it is 'beyond the bounds of human decency such that it would be regarded as intolerable in a civilised community'.⁸⁴

Nuisance claims

37. A plaintiff bringing a tort claim of **private nuisance** must prove that (a) the defendant's conduct was the legal cause of an invasion of the plaintiff's interest in the private use and enjoyment of land; (b) the defendant's invasion was intentional;⁸⁵ and (c) the defendant's invasion was unreasonable.⁸⁶

78 Restatement (Second) of Torts (n 28) § 13.

79 In California, for example, California Penal Code section 835a permits police officers to use reasonable force, and for this reason the state requires proof that an officer's contact was unreasonable to support a battery claim. See [Edson v City of Anaheim, 63 Cal. App. 4th 1269, 1272 \(1998\)](#) (California Court of Appeal, Fourth District of California, Division Three).

80 Restatement (Second) of Torts (n 28) § 21.

81 Restatement (Second) of Torts (n 28) § 35.

82 *Enright v Groves*, 560 P.2d 851 (Colo. Ct. App. 1977) (Colorado Court of Appeals, Division Three).

83 Restatement (Second) of Torts (n 28) § 46.

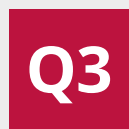
84 Restatement (Third) of Torts (n 77) § 46, comment d.

85 Negligence or recklessness may also establish liability. See Restatement (Second) of Torts (n 28) § 822.

86 *ibid.*

Negligence claims

38. A plaintiff bringing a tort claim of **negligence** must prove that: (a) the defendant owed a legally recognised duty to the plaintiff; (b) the defendant breached this duty; (c) the defendant's negligent conduct caused the plaintiff's injury; (c) the defendant's negligent conduct proximately caused the plaintiff's injury; and (d) the plaintiff suffered a legally cognisable injury.⁸⁷



Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

39. The law of the United States recognises **aiding and abetting** and **conspiracy liability** as a form of complicit or accessory conduct that could be applicable in relation to the three defined harms. Secondary liability in the form of conspiracy and aiding and abetting developed as common law tort principles and are applicable in both common law tort claims and statutory claims that incorporate tort law.⁸⁸
40. Conspiracy and aiding and abetting liability is cognisable in common law tort claims and various statutory claims. Such liability may be imposed on an indirect tortfeasor for tort claims such as nuisance or trespass resulting from environmental damage similar to that in Case Scenario 2 or assault and battery claims arising in Case Scenarios 1 and 3. Additionally, various civil and human rights statutes discussed as remedies for all three Case Scenarios import conspiracy liability from traditional tort law. These statutes include Section 1983⁸⁹ and the TVPA⁹⁰. Section 1985, passed in conjunction with Section 1983, provides a civil action against state actors who conspire to interfere with civil rights.⁹¹ State statutory claims may also import conspiracy and aiding and abetting liability,⁹² and a practitioner should research the relevant state statutes to determine the cognisability of conspiracy liability in the relevant jurisdiction.⁹³

Aiding and abetting

41. In purely domestic cases, aiding and abetting has three elements: (a) the defendant must aid a third party that performs a wrongful act that causes an injury; (b) the defendant must be generally aware of their role as part of an overall illegal or tortious activity at the time that they provide assistance; and (c) the defendant must knowingly and substantially assist the principal violation.⁹⁴ Aiding and abetting liability is cognisable under both TVPA and ATS,⁹⁵ but there is division over what legal standards apply. A [split](#) has developed among the various circuits of the federal judiciary concerning the *mens rea* required to impose liability.⁹⁶

87 Restatement (Second) of Torts (n 28) § 281.

88 *Meyer v Holley*, 537 U.S. 280, 285-86 (2003) (SC); see *Chavez v Carranza*, 559 F.3d 486, 498-99 (6th Cir. 2009) (US Court of Appeals, Sixth Circuit), certiorari denied, 558 US 822 (2009) (SC) (recognising ordering, aiding, abetting, command responsibility and conspiracy liability under the TVPA).

89 See eg *Dennis v Sparks*, 449 U.S. 24, 28-29 (1980) (SC); *Adickes* (n 71) 150-52.

90 *Carranza* (n 88) 499.

91 Conspiracy to Interfere with Civil Rights, [42 U.S. Code § 1985](#); see eg *Griffin v Breckenridge*, 403 U.S. 88, 103 (1971) (SC).

92 For example, California's Fair Employment Housing Act imposes liability for aiding and abetting and conspiracy liability. California Gov. Code § 12940(i); see *Smith v. BP Lubricants USA Inc*, 64 Cal. App. 5th 138, 146 (2021) (California Court of Appeal, Fourth District, Division Three).

93 [Civil Rights Laws and Resources](#), FindLaw.

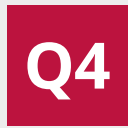
94 *Halberstam v Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (US Court of Appeal, District of Columbia Circuit); see Restatement (Second) of Torts (n 28) § 876(b); see also *Central Bank, NA v First Interstate Bank of Denver, NA*, 511 US 164, 181 (1994) (SC) (recognising Halberstam as a 'comprehensive opinion' on aiding and abetting liability).

95 *Carranza* (n 88) 499. See also Restatement (Second) of Torts (n 28) § 876(b).

96 Khakurel (n 22).

Conspiracy

42. Conspiracy liability is generally applicable in every jurisdiction in the United States. The elements required to impose conspiracy liability differ from jurisdiction to jurisdiction. Practitioners bringing claims in a particular jurisdiction should research the relevant legal test for the relevant jurisdiction. Generally, however, conspiracy liability may be imposed on an actor for harm inflicted on a third party by the tortious conduct of another if the indirect actor '(a) does a tortious act in concert with the other or pursuant to common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.'⁹⁷



When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or an independent contractor in a supply chain?

43. Traditional common law in the United States permits a parent company to be held liable for the wrongful act and/or omissions of a subsidiary or independent contractor under both an agency and alter ego theory.

Alter ego/piercing the corporate veil

44. To hold a parent company liable for the wrongful acts of a subsidiary, a plaintiff must establish two elements: (a) that there is such a unity of interest and ownership that the separate personalities no longer exist and (b) that failure to disregard their separate identities would result in fraud or injustice.⁹⁸

Agency principles

45. Under common law agency principles, a parent company may be held liable for the conduct of its subsidiaries and agents.⁹⁹ Some of the principles of liability include actual or apparent authority, ratification, wilful participation, and vicarious liability.

Direct liability – actual and apparent authority

46. The authority of the subsidiary may be either actual or apparent. To prove a subsidiary had actual authority to bind the parent company, a plaintiff must show that the parent company manifested to the subsidiary its desire that the subsidiary should act on the parent's behalf, and the subsidiary manifested assent or otherwise consented so to act.¹⁰⁰ By contrast, a plaintiff alleging apparent authority must prove that the plaintiff reasonably believed the subsidiary had authority to act on the parent company's behalf, and that this belief was traceable to the parent company's conduct.¹⁰¹

⁹⁷ Restatement (Second) Second of Torts (n 28) § 876.

⁹⁸ *Doe v Unocal Corp*, 248 F.3d 915, 926 (9th Cir. 2001) (US Court of Appeals, Ninth Circuit).

⁹⁹ *Chowdhury v Wordtel Bangladesh Holding, Ltd*, 746 F.3d 42, 53 n.11 (2d Cir. 2014) (US Court of Appeals, Second Circuit); *Bowoto v Chevron Texaco Corp.*, 312 F.Supp.2d 1229 (N.D. Cal. 2004) (US District Court, Northern District of California); Restatement (Third) of Agency § 1.01 ([American Law Institute](#), Philadelphia).

¹⁰⁰ *Transamerica Leasing, Inc v La Republica de Venezuela*, 200 F.3d 843, 849–50 (D.C. Cir. 2000) (US Court of Appeal, District of Columbia Circuit); Restatement (Third) of Agency (n 99) § 2.01.

¹⁰¹ *Transamerica Leasing* (n 100) 850; see Restatement (Third) of Agency (n 99) § 2.03.

47. Proving an agency relationship is challenging. It is not enough, for example, to show a parent-subsidary relationship,¹⁰² ownership, or overlapping management.¹⁰³ Instead, courts look to whether the parent manifests its desire to the subsidiary to act on the parent's behalf, and the subsidiary manifests assent or otherwise consents so to act.¹⁰⁴
48. Finally, a parent company can be bound by the acts of a subsidiary where the parent company ratifies the subsidiary's conduct.¹⁰⁵ A parent company ratifies the acts of their subsidiary by (a) manifesting assent that the subsidiary's act shall affect the parent company's legal relations of (b) conduct justifying a reasonable assumption that the parent company so consents.¹⁰⁶ Put another way, 'if the principal engages in conduct that could be explained only by the principal's agreement to be bound by the agent's act, then the principal has ratified the act'.¹⁰⁷

Vicarious liability

49. Under vicarious liability principles, parent companies can be held liable for the acts and omission of their employees or agents for conduct that occurs in the scope of their employment.¹⁰⁸ To hold a principal vicariously liable a plaintiff must show (a) that the principal had control or the right to control the conduct of the agent's work and (b) the agent was acting in the scope of their employment.¹⁰⁹



What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?

50. The law of remedies in the United States provides flexible options that a practitioner must consider. A basic underlying concept of American remedies is the goal of restoring the harmed party to their rightful position, ie the position the injured party would have been in but for the wrong committed. The availability of remedies will depend on the jurisdiction and the claims asserted.

Damages

51. Damages are usually available for these violations. Damages may be either compensatory or punitive. Compensatory damages are damages tailored to specifically compensate the plaintiff for the injury suffered. Compensatory damages may provide remuneration for both economic and non-economic injuries. Economic injuries include, for example, medical and hospital bills incurred, or financial losses suffered. Non-economic damages may seek to compensate an individual who suffered trauma or some reputational harm. Punitive damages are intended to deter future misconduct and to punish egregious conduct.

¹⁰² *Manchester Equipment Co v American Way & Moving Co*, 60 F.Supp.2d 3, 7 (E.D.N.Y 1999) (US District Court, Eastern District of New York); also *Motorsport Engineering, Inc v Maserati SPA*, 316 F.3d 26, 30 (1st Cir. 2002) (US Court of Appeals, First Circuit).

¹⁰³ *United States v Bestfoods*, 524 U.S. 51, 62 (1998) (SC)

¹⁰⁴ Restatement (Third) of Agency (n 99) § 1.01.

¹⁰⁵ *GDG Acquisitions LLC v Government of Belize*, 849 F.3d 1299, 1308 (11th Cir. 2017) (US Court of Appeals, Eleventh Circuit); Restatement (Third) of Agency (n 99) § 4.01.

¹⁰⁶ Restatement (Third) of Agency (n 99) § 4.01(2).

¹⁰⁷ *GDG Acquisitions* (n 105) 1309-10.

¹⁰⁸ Restatement (Third) of Agency (n 99) § 7.01, 07; See eg *Arguello v Conoco, Inc*, 207 F. 3d 803 (5th Cir. 2000) (US Court of Appeals, Fifth Circuit).

¹⁰⁹ Restatement (Third) of Agency (n 99) § 7.07.

Restitution

52. Restitution is an equitable remedy that requires defendants to disgorge financial gains where the defendant's retention of the gains would constitute unjust enrichment. Unlike the somewhat mechanical formulae of damages, restitution is pursued under equitable considerations of fairness and justice. The proper nomenclature and identity of a restitutionary claim is dependent on the jurisdiction the case arises in, though typical formulations include unjust enrichment, subrogation, and disgorgement. Equitable cases lie solely before a judge, and no jury is empanelled to decide the merits of equitable claims.

Injunctions

53. Injunctions either order a defendant to take some action or prohibit a defendant from taking some action. Injunctions are often sought to legally prevent a party from interfering in a specific legal interest of another by forcing compliance with a court order. A defendant who violates an injunction is subject to sanction via the remedy of contempt which may impose fines or possibly even imprisonment depending on the gravity of the violation. In appropriate cases, preliminary injunctive relief is available to prevent a future injury.

Declaratory relief

54. Declaratory relief results in a judicial statement of the parties' legal position with respect to the matter under consideration. While declaratory relief does not require certain actions by plaintiff or defendant, it legally recognises the rights expressed therein. Such a declaratory judgment may be used in the future to enforce the rights and obligations of others who violate the rights judicially recognised in the declaratory judgment and may be the basis for future injunctive relief.



What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

Advantages

Multiple avenues and sources of rights and remedies

55. The discussion above demonstrates the variety of civil remedies (state or federal; statutory or common law) available to address human rights violations in the United States. The result of this variety, in many cases, is a recognised remedy applicable to the violation suffered by a victim, with a developed body of precedents to develop a sound claim. In some cases, the claim may not fit well within, say, a federal Section 1983 claim because the right enshrined in the Constitution is limited. However, state constitutions often contain more comprehensive protections of rights which can provide a remedy unavailable through federal law.

56. Another valuable outcome of the variety of sources of law and rights, is the availability of multiple forums to pursue claims. At the outset of litigation, an advocate must decide whether to bring a claim in state or federal court. Many competing considerations may shape this decision.

57. The defendant, however, has some say in what venue the case is litigated. For example, claims based on federal law, like Section 1983 claims or TVPRA claims, may be removed to federal court on a motion from either party. The possibility of removal may shape the claims an advocate should pursue. If, for example, the conduct was clearly violative of [rights protected by state law](#)¹¹⁰ and the state law provides a remedy, an advocate may wish to pursue only the state law claims if they feel their chances of success are [greater in state court](#).¹¹¹

Fee-shifting statutes

58. The issue of funding is an important consideration when bringing a claim, and the legal system of the United States provides avenues to potentially support costly litigation. Generally, parties in the United States pay their own expenses rather than the 'loser pays' formula followed by most civil law systems. The Supreme Court has [upheld this 'American Rule'](#) and it is still followed today.¹¹² Despite the American Rule, both the federal government and states have adopted fee-shifting statutes allowing plaintiffs to recover fees incurred while pursuing human rights claims.

59. Congress has passed fee-shifting statutes that allow for recovery of attorneys' fees in [civil rights cases](#), [TVPA cases](#), [FLSA cases](#), and [cases brought against the US or US officials](#).¹¹³ Courts retain discretion to award attorneys' fees, though successful plaintiffs are [presumptively entitled to fees](#).¹¹⁴ Attorneys' fees may be awarded to successful defendants, but the granting of such fees is rare and only appropriate where the plaintiff's claim was [frivolous, unreasonable, or without foundation](#).¹¹⁵

Disadvantages

Immunities

60. Human rights litigation in the US is most seriously undermined by the broad swath of immunities granted to public officials and entities. The scope of liability describes the conduct or circumstances covered by the immunity; the application of the immunity refers to who, exactly, can assert said immunity; and the level of immunity describes how much immunity a defendant enjoys, whether it be absolute or qualified or limited to some remedies, but not others.

61. **Absolute immunity** shields a variety of state actors from any liability for conduct undertaken in the scope of their official duties.¹¹⁶ Absolute immunity applies to actors functioning in [legislative](#), [prosecutorial](#), or [judicial](#) capacities.¹¹⁷ An actor shielded by absolute immunity is shielded from potential civil claims and courts will not inquire into '[considerations of intent and motive](#)'.¹¹⁸

110 See generally Seth Davis and Christopher A Whytock, '[State Remedies for Human Rights](#)' (2018) *Boston University Law Review* 98 (2).

111 See generally Paul Hoffman and Beth Stephens, 'International Human Rights Cases under State Law and in State Courts' (2013) 3(1) *UC Irvine Law Review* 9.

112 *Alyeska Pipeline Service Co v Wilderness Society*, 421 U.S. 240, 270 (1975) (SC).

113 18 U.S. Code § 1595 (TCPA Fees); 28 U.S. Code § 2412 (FTCA Fees); 29 U.S. Code § 216 (FLSA Fees); 42 U.S. Code § 1988 (Civil Rights Fees).

114 See Independent Federation of [Flight Attendants v Zipes](#), 491 U.S. 754, 760–62 (1989) (SC); [Newman v Piggie Park Enterprises, Inc.](#), 390 U.S. 400, 402 (1968) (SC).

115 [James v City of Boise](#), 577 U.S. 306, 306–07 (2016) (SC); [Hughes v Rowe](#), 449 U.S. 5, 14 (1980) (SC).

116 [Burns v Reed](#), 500 U.S. 478, 486–87 (1991) (SC).

117 [Bogan v Scott-Harris](#), 523 U.S. 44, 49–53 (1998) (SC) (Legislative Immunity); [Van de Kamp v Goldstein](#), 555 U.S. 335, 343 (2009) (SC) (Prosecutorial Immunity); [Stump v Sparkman](#), 435 U.S. 349, 364 (1978) (SC) (Judicial Immunity).

118 *ibid*, [Bogan](#) at 55.

62. The most confronted immunity in civil rights litigation is **qualified immunity**. Qualified immunity extends to state actors who do not violate a clearly established right.
63. When confronting assertions of [qualified immunity](#),¹¹⁹ advocates must prove that (a) plaintiff's rights were violated; and (b) that the right was [clearly established](#)¹²⁰ at the time of the violation.
64. Unfortunately, courts do not consider rights 'clearly established' simply because they are enumerated in the Constitution or by statute. Instead, courts consider 'whether it would be clear [to a reasonable officer](#) that his conduct was unlawful in the situation he confronted'.¹²¹ Further, a clearly established right must be defined with an appropriate level of specificity, particularised to the context of the case.¹²² The level of specificity has led to seemingly absurd results.¹²³ The analysis essentially requires plaintiffs to identify a prior case which is both legally and material similar.
65. While Section 1983 liability may extend to private actors, it is less settled whether private actors may assert qualified immunity. Courts evaluating the issue often look towards the [history, principles and justifications](#) of qualified immunity to determine whether the extension of such immunity is warranted.¹²⁴ Courts may also consider the [profit motive](#) of companies as well as the nature of the private actors' [relationships with the government](#).¹²⁵ These considerations have thus far led to varied results that [lack clarity or consistency](#).¹²⁶

Access to justice

66. While the fee-shifting statutes outlined in [58]-[59] above create some potential financing for litigation, America's legal system suffers from acute access-to-justice issues. In the United States, legal services are often treated like a commodity available only to those who can afford the fees. As a result, low-income people must often confront a legal system [without adequate representation](#).¹²⁷ While American law demands representation for individuals [facing criminal charges](#),¹²⁸ no such requirement exists for [civil representation](#).¹²⁹ Some states, however, provide for a [right to counsel in civil cases](#).¹³⁰ In addition to the lack of recognised rights, legal service corporations, once a vibrant source of representation, have seen funding curtailed over the years.

119 [Harlow & Butterfield v Fitzgerald](#), 457 U.S. 800, 818 (1982); See '[Qualified Immunity](#)', Equal Justice Initiative.

120 [Ashcroft](#) (n 16) 735; [Harlow](#) (n 119).

121 [Saucier v Katz](#), 533 U.S. 194, 202 (2001) (SC).

122 [Ashcroft](#) (n 16) 742.

123 [Schwartz](#) (n 16) 2.

124 [Eilarsky v Delia](#), 566 U.S. 377, 383 (2012) (SC); [Richardson v McKnight](#), 521 U.S. 399, 404 (1997) (SC).

125 *ibid* [Richardson](#) at 413.

126 GS Buchanan, '[State Action and the Public/Private Distinction](#)' (2010) 123(5) *Harvard Law Review* 1248, 1270–76.

127 [2017 Justice Gap Report](#) (Legal Services Corporation).

128 [Gideon v Wainwright](#), 372 U.S. 335, 342–43 (1963) (SC).

129 [Turner v Rogers](#), 546 U.S. 431, 448 (2011) (SC).

130 Laura K Abel and Max Rettig, '[State Statutes Providing for a Right to Counsel in Civil Cases](#)' (2006) *Clearinghouse Review Journal of Poverty Law and Policy* 245.



Can civil claims be brought against foreign defendants and if so, what are the rules for that?

67. Civil claims can be brought against foreign defendants so long as a US court has jurisdiction over the defendant. Recent Supreme Court decisions have, however, curbed the exercise of jurisdiction over foreign defendants generally.¹³¹

Personal jurisdiction

68. Plaintiffs bringing a civil claim against a foreign defendant must first demonstrate that a US court has personal jurisdiction over the defendant. There are two forms of personal jurisdiction: general jurisdiction over a defendant for all claims, and specific jurisdiction over conduct-linked claims. Recent Supreme Court cases have imposed heightened barriers to establishing jurisdiction.

69. In *Daimler v AG Bauman*, human rights plaintiffs brought a civil claim against Daimler for the conduct of their Argentine subsidiary during the ‘Dirty War’ in Argentina. The Supreme Court rejected the plaintiffs’ reliance on the ubiquitous [presence of Daimler](#)¹³² and its products in the US market, holding that general jurisdiction could not be established because the claims did not relate to Daimler’s conduct within the US. The Supreme Court similarly curbed the [exercise of specific jurisdiction](#).¹³³ This trend of limiting the [exercise of jurisdiction](#)¹³⁴ of foreign defendants highlights a trend to restrict access to US courts. This trend has resulted in the dismissal of civil claims against foreign defendants.¹³⁵

Liability of corporations under the ATS and TVPA

70. While ATS and TVPA civil claims may be brought against foreign individual defendants, they may not be brought against foreign corporate defendants. In *Jesner v Arab Bank, plc*, the Supreme Court held that foreign corporations were [not liable under the ATS](#).¹³⁶ The Supreme Court similarly held, in *Mohamad v Palestinian Authority*, that corporations were [not subject to liability under the TVPA](#).¹³⁷

Presumption against extraterritoriality

71. Perhaps the most difficult hurdle to clear in bringing claims against foreign corporations for foreign conduct is the presumption of extra-territoriality.¹³⁸ Beginning with *Kiobel v Royal Dutch Petroleum Co*, the Supreme Court held that the presumption against extraterritoriality must be rebutted to bring a civil claim based on foreign conduct. The *Kiobel* Court, however, left open the possibility that some ATS claims remained viable where they ‘touch and concern’ the

131 See eg *Daimler AG v Bauman*, 571 U.S. 117 (2014) (SC); see generally Carolina Nuche, ‘Piercing the Jurisdictional Veil: Holding Corporations Accountable for Human Rights Violations after *Kiobel* and *Daimler*’, (2017) 4 *St Thomas Journal Of Complex Litigation* 1.

132 ‘*Daimler AG v Bauman*’, 128 *Harvard Law Review* 311, 313–15 (2014).

133 *Bristol-Myers Squibb Co v Superior Ct of California, San Francisco Cnty*, 137 S. Ct. 1773, 1781–87 (2017) (SC).

134 Nuche (n 131) 2–7.

135 *Krishanti v Rajaratnam*, 2014 WL 1669873, at *7 (DNJ 2014) (US District Court, District of New Jersey); Gwynne Skinner, ‘*Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*’ (2014) 46 *Columbia Human Rights Law Review* 158, 192.

136 *Jesner v Arab Bank, plc*, 138 S.Ct. 1386, 1403 (2018) (SC).

137 *Mohamad v Palestinian Authority*, 566 US 449, 451–52 (2012) (SC); Lyle Denniston, ‘*Anti-torture law given narrow scope*’ (2012) SCOTUS blog.

138 Common law claims such as tort claims do not need to rebut the presumption against extraterritoriality.

United States with sufficient force to overcome the presumption. The scope of the ‘touch and concern’ test has yet to be determined, though the domestic conduct alleged must include more than allegations of [‘general corporate activity’](#).¹³⁹ The presumption is not impenetrable. A line of cases has recognised that foreign corporations may be held liable for conduct committed within the US which aids and abets a violation cognisable under the ATS.¹⁴⁰

Other limitations

72. Beyond the presumption against extraterritoriality, statutory and common law civil claims against foreign defendants may still be dismissed on the basis of comity, forum *non conveniens*, the act of state doctrine, or other doctrines meant to curb the application of US law to foreign defendants engaged in foreign conduct.
73. Under the amorphous doctrine of [international comity](#), a court may decline to exercise jurisdiction in deference to the legislative, judicial, or executive acts of another country.¹⁴¹ The doctrine is ill defined and varies across the country. However, the rise of a doctrine of [‘international comity abstention’](#) in cases such as *Mujica v Airscan* could provide courts with another means of declining to exercise jurisdiction over both foreign and domestic defendants.¹⁴²
74. The **act of state doctrine** permits a court to decline to exercise jurisdiction over a claim against a foreign corporation in deference to the sovereign acts of a foreign government concerning conduct within their own territory. The [factors considered](#) include the impact of the issue on US foreign relations, the degree of codification or consensus regarding the area of international law at issue, and the continuing existence of the government which perpetrated the act.¹⁴³
75. Finally, under the doctrine of **forum non conveniens**, a defendant may seek to a dismiss a case where it is more ‘convenient’ to litigate the case in the country where the conduct occurred, even if US courts have jurisdiction.¹⁴⁴ Courts consider the utility of domestic litigation to both parties, the availability of an alternative forum, the burden on the defendants, and other public and private factors.¹⁴⁵

139 [Nestlé USA, Inc v Doe](#), 141 S.Ct. 1931, 1937 (2021) (SC).

140 *Mastafa v Chevron Corp*, 770 F.3d 170, 181 (2d Cir. 2014) (US Court of Appeals, Second Circuit).

141 William S Dodge, [‘International Comity in American Law’](#) (2015) 115(8) *Columbia Law Review* 2071.

142 *Mujica v AirScan, Inc*, 771 F.3d 580, 597 (9th Cir. 2014) (US Court of Appeals, Ninth Circuit); See Maggie Gardner, [‘Abstention at the Border’](#) (2019) 105(1) *Virginia Law Review* 63.

143 *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398, 427–28 (1964) (SC); See *WS Kirkpatrick & Co Inc v Environmental Tectonics Corporation, International*, 493 U.S. 400, 408–10 (1990) (SC).

144 [Gulf Oil Corp v Gilbert](#), 330 U.S. 501, 507 (1947) (SC).

145 [Wiwa v Royal Dutch Petroleum Co](#), 226 F.3d 88, 101 (2d Cir. 2000) (US Court of Appeal, Second Circuit); [In re Chiquita Brands Int’l, Inc](#), 190 F.Supp.3d 1100, 1116 (S.D. Fla. 2016) (US District Court, Southern District of California) (finding Colombia was not an adequate alternative forum where plaintiffs faced threats).



Can you recommend resources for further research and consultation to anyone interested in learning more about liability for human rights violations in your jurisdiction?

Articles

- Joanna C Schwartz, '[How Qualified Immunity Fails](#)', 127 Yale L.J 2 (2017).
- Laura K Abel and Max Rettig, '[State Statutes Providing for a Right to Counsel in Civil Cases](#)' (2006) Clearinghouse Review Journal of Poverty Law and Policy 245.

Books and book chapters

- Michael Avery et al, *Police Misconduct: Law and Litigation* (3d edn, Thomson/West, November 2021).
- Sheldon H Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (2021-2022 edn, West Group).

Databases

- [FindLaw](#)
- [Legal Information Institute – Cornell Law School](#)
- [Justia](#)
- [US Protest Law Tracker](#)

Relevant organisations

- [ACLU](#)
- [Center for Constitutional Rights](#)
- [EarthRights International](#)



Case Scenarios

1

Case Scenario

A wave of peaceful anti-government protests in the capital city of X Country denounced controversial legislation reforming electoral law. X Country's police responded to the peaceful protests with violence and brutality. The protesters were beaten and tear gassed. Some were detained for several days without charge or access to the lawyers. Human rights activists reported alleged torture and other ill-treatment in detention.

The protesters gathered in the market square where many shops and office buildings are located. Security Co is a private company providing security to the premises and personnel of the shops and offices. There is no evidence that personnel of the Security Co were involved in the violence that injured protesters. There is, however, evidence that on several occasions personnel of Security Co provided X Country's police with vehicles, equipment, and water. [READ MORE](#)

2

Case Scenario

X Group is a group of extractive companies. Parent Co is the parent company of X Group which is responsible for the overall management of X Group's business. X Group's extractive operations are carried out by its subsidiaries. Every subsidiary is incorporated as a separate legal entity and is responsible for an individual project. Subsidiary Co is a licence holder and operator of a major extractive project. Parent Co is the sole shareholder of Subsidiary Co.

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists

and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations. [READ MORE](#)

3

Case Scenario

Factory Co owns a garment factory that supplies many large international clothing retailers. The working conditions in Factory Co's factory have generally been poor and exploitative and have included physical abuse for non-compliance with production targets, sexual harassment of female workers by male supervisors, and compulsory unpaid overtime. Local trade unions have regularly accused Factory Co of poor factory workplace safety, including a lack of emergency procedures, ineffective fire safety equipment and few emergencies medical supplies. Two months ago, during a fire at Factory Co's garment factory, seventy-six workers died and fifty-eight were injured, many seriously. Preliminary investigations suggest that employees suffocated or were burned alive because windows were barred, emergency exits closed, smoke alarms did not work, and supervisors did not implement safety protocols and fire evacuation procedures.

Brand Co is the major purchaser of clothes produced by Factory Co's garment workers. It has been an enthusiastic and very public advocate for human rights standards and expressed its commitment to responsible business practices. Several civil society organisations wrote an open letter to the CEO of Brand Co calling on Brand Co to demonstrate leadership in preventing, addressing, and remedying adverse human rights impacts in its supply chain. [READ MORE](#)



CaseScenario 1

Q1

Could injured or unlawfully arrested protesters bring civil claims against the police and/or Security Co (and/or its personnel) in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

76. Civil claims could be brought against both the police and Security Co. In both instances, the protesters may have Section 1983 claims as well as common law negligence claims against state actors, and *Bivens* and FTCA claims against federal police.
77. Typically, the protesters would bring Section 1983 claims (or *Bivens* claims in the case of federal law enforcement) against the police officers responsible for their injuries or unlawful arrest.¹⁴⁶ The protesters could also bring conventional tort claims of assault, battery, and false imprisonment against state police officers, and FTCA claims for the actions of federal police officers.¹⁴⁷ Should the protesters hope to pursue claims in a state court, many states have remedies for injuries or unlawful arrests perpetrated by the police.¹⁴⁸
78. Protesters alleging a [Section 1983](#) claim must prove by a preponderance of evidence that: (a) the police deprived the plaintiff of a federal right; and (b) the police were acting under the colour of law.¹⁴⁹
79. Protesters may allege that their First Amendment rights, which include the right to free speech and association, were violated by the unlawful suppression of their protest.¹⁵⁰ Protesters may also allege Fourth Amendment violations due to their unlawful detention without charge¹⁵¹ and the use of excessive force.¹⁵² Protesters, as pretrial detainees (held without charge), may also allege violations of the Due Process Clause of the [Fourteenth Amendment](#) due to [torture](#) or other [deplorable prison conditions](#).¹⁵³

¹⁴⁶ Abel and Rettig (n 130) 271-72.

¹⁴⁷ For elements of tort claims, see the response to Question 2 above (paras [22]-[38]).

¹⁴⁸ Some states have adopted [anti-protest statutes](#).

¹⁴⁹ *Gomez* (n 65).

¹⁵⁰ *Don't Shoot Portland v City of Portland*, 465 F.Supp.3d 1150, 1155-56 (D. Or. 2020) (US District Court, District of Oregon) (a First Amendment claim that police chilled protected political speech). See the [Don't Shoot Portland complaint](#).

¹⁵¹ *Fogarty v Gallegos*, 523 F.3d 1147, 1155-58 (10th Cir. 2008) (US Court of Appeals, Tenth Circuit).

¹⁵² *Shamir v City of New York*, 804 F.3d 553, 557 (2d Cir. 2015) (US Court of Appeals, Second Circuit) (recognising an excessive force claim against a police officer); *Don't Shoot Portland* (n 150) 1155 (a Fourth Amendment claim of excessive force involving tear gas).

¹⁵³ See *Richko v Wayne County, Mich.*, 819 F.3d 907, 915 (6th Cir. 2015) (US Court of Appeals, Sixth Circuit).

80. Depending on the tort claims plaintiffs bring, they must establish the elements of the specified tort as outlined above in [30]-[38]. For example, a protester bringing a tort claim of battery must prove that (a) the police officers acted with intent to cause harmful or offensive contact with the victim; and (b) the police officers' conduct caused harmful contact with the plaintiff's person directly or indirectly.¹⁵⁴
81. A protester could also bring a so-called *Monell* claim against the police department or the municipal government. To establish departmental or municipality liability under *Monell* the protesters must prove that the conduct of the police officers was the result of policies and regulations of the police department or municipal body.¹⁵⁵
82. A claim may also be brought against Security Co depending on its role in the actual injuries of the protesters and its relationship with the police. For example, a Section 1983 civil claim may be brought against Security Co if the protesters can show that Security Co was acting as an agent of the state.¹⁵⁶
83. Alternatively, Security Co may be directly liable for torts committed by its employees. Injured protestors could bring traditional tort claims such as battery, assault, and false imprisonment for injuries resulting from the conduct of Security Co employees acting within the scope of their employment.

Q2

If civil claims would not be the preferred route for holding perpetrators in Case Scenario 1 to account, please indicate any other legal avenues available to the protesters.

84. Civil claims would likely be the preferred route.

Q3

Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 1?

85. Protesters successfully sought injunctions against the use of tear gas and other police methods during the anti-police violence protests in 2020.¹⁵⁷ Successful claims were also brought against the City of Seattle for constitutional violations against those [protesting against the World Trade Organization in 1999](#).¹⁵⁸



¹⁵⁴ Restatement (Second) of Torts (n 28) § 13.

¹⁵⁵ *Monell* (n 18).

¹⁵⁶ For a discussion of the relationships that may subject private actors to Section 1983 liability, see the discussion of 42 U.S. Code § 1983 in response to Question 2 at paras [22]-[24].

¹⁵⁷ *Black Lives Matter Seattle-King Cnty v City of Seattle*, 466 F.Supp.3d 1206 (W.D. Wash. 2020) (US District Court, Western District of Washington at Seattle); *Don't Shoot Portland* (n 150) 1155-56.

¹⁵⁸ *Hankin v City of Seattle*, Public Justice.

CaseScenario 2

Q1

Could the local community, or its representatives, or someone acting on their behalf, bring civil claims against Parent Co and Subsidiary Co in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.

86. Individuals harmed by the oil spill could bring civil claims against both Parent Co and Subsidiary Co. Due to the specifics of the case scenario, most claims would be brought under the [Oil Pollution Act \(OPA\)](#).¹⁵⁹
87. The OPA [imposes liability](#) on a 'responsible party for a ... vessel or a facility from which oil is discharged ... into or upon navigable waters or adjoining lines'.¹⁶⁰ Following a spill the government shall, where appropriate, designate the '[Responsible Party](#)'.¹⁶¹ Responsible Parties are liable for removal costs incurred by both the government and private individuals so long as those actions are consistent with the National Contingency Plan.¹⁶²
88. Damages are also [available for individuals](#) who suffer injury to real or personal property, loss of subsistence use of natural resources, and economic losses due to injury or the loss or destruction of property.¹⁶³
89. Generally, the OPA [limits the financial liability](#) of Responsible Parties.¹⁶⁴ However, this limited liability is unavailable in cases of gross negligence, wilful misconduct, or the violation of an applicable law or regulation.
90. Under the OPA, liability would likely be limited to Subsidiary Co as the designated 'Responsible Party', though that is a determination that would be made by the federal government. In the case of the BP Oil Spill highlighted after paragraph [94] below, the tanker that caused the spill was owned by Transocean but operated by BP. The Coast Guard designated both Transocean and BP as 'Responsible Parties'.
91. If the government only designated Subsidiary Co as the responsible party, then only Subsidiary Co would be liable under the OPA. However, injured parties could seek to impose liability on Parent Co through theories of agency or piercing the corporate veil, as discussed in [44]-[45] above.¹⁶⁵ The fact that Parent Co is the sole shareholder of Subsidiary Co, alone, is insufficient to impose liability on Parent Co.

159 [Oil Pollution Act](#) of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990), codified as amended 33 U.S. Code §§ 2701-2761 (1994 & Supp. III 1997).

160 Elements of Liability, [33 U.S. Code § 2702\(a\)](#).

161 Designation of Source and Advertisement, [33 U.S. Code § 2714](#).

162 Elements of Liability, [33 U.S. Code § 2702\(b\)\(1\)](#).

163 *ibid* § 2702(b)(2).

164 Limits on Liability, [33 U.S. Code § 2704](#).

165 *ibid* 11-12.

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 2 to account, please indicate any other legal avenues available to the local population.

92. The OPA contains sections which mandate the creation of **claims funds** following oil spills. These funds are typically funded by both the responsible party and the government. Claimants can seek funds through the claims process and forgo litigation. Claims funds are typically supervised by appointed Special Masters who manage the fund and the claims processing apparatus. A client injured by Subsidiary Co's oil spill must review the availability of a claims fund, its processes, and any limitations before deciding to engage in litigation that may prove costly.
93. Additionally, political pressure on local and federal politicians can lead to a more fully funded compensation fund as well as better clean-up and rehabilitation initiatives. As a socially conscious company, Parent Co, like BP before it, is susceptible to public pressure and will seek to preserve its reputation. Collective action and community pressure should be applied on both government officials and Parent Co itself.

Q3

Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

94. On 24 March 1989, the [Exxon Valdez oil tanker](#) ran aground in Prince George Sound, Alaska, spilling an estimated 11 million gallons of oil into the sound and affecting more than 1,300 miles of the shoreline, impacting the environment, local industries, and communities.¹⁶⁶ The jury returned a verdict against Exxon for USD 507.5 million in compensatory damages and USD 5 billion in punitive damages.¹⁶⁷ Following an appeals process, the punitive damages award was lowered to USD 507.5 million.¹⁶⁸

SPOTLIGHT: CASE STUDY

The most prominent post-OPA litigation arose following the BP oil spill in the Gulf of Mexico in 2010.¹⁶⁹ On 20 April 2010, the Deepwater Horizon oil rig, located 44 miles off the coast of Louisiana, exploded before sinking into the sea. Following the explosion, [an estimated 130 million gallons](#) of oil flowed into the Gulf of Mexico. The spill caused unprecedented harm to the environment as well as to individuals whose livelihoods, homes, and health suffered as a result. The damages caused by the oil spill led to numerous suits against BP and other responsible corporations. Under the OPA, the Gulf Coast Claims Facility was established to process more than [USD 6 billion](#) allocated to over 600,000 businesses and individuals. In March 2012, a final settlement was reached which replaced the GCCF, resulting in an [estimated USD 7.8 billion fund](#) to settle the remaining private claims.

¹⁶⁶ [‘Exxon Valdez’](#), NOAA Damage, Remediation and Restoration Program.

¹⁶⁷ [In re Exxon Valdez](#), 236 F.Supp.2d 1043, 1050 (D. Alaska 2002) (US District Court, District of Alaska).

¹⁶⁸ [Exxon Shipping Co v Baker](#), 554 U.S. 471, 515 (2008) (SC).

¹⁶⁹ *ibid*; [In re Exxon Valdez](#) (n 167) 1050.

CaseScenario 3

Q1

Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.

Claims against Factory Co

95. The individuals working in Factory Co have a variety of cognisable tort claims depending on the injury suffered.¹⁷⁰ Workers subjected to physical abuse or sexual harassment may also have claims of assault, battery, or intentional infliction of emotional distress. All of those injured in the fire or due to other inadequate safety measures may also bring claims of negligence. Finally, survivors of the workers who died in the fire may bring wrongful death claims.
96. Beyond the general tort claims, various statutory claims are available depending on the specific injury suffered. First, workers subjected to compulsory labour, overtime or otherwise, may have viable [claims under the TVPRA](#).
97. The [key elements](#) of such a claim are: (a) Factory Co knowingly provided or obtained the labour of the workers; and (b) Factory Co coerced the workers to perform said labour through: (i) force, physical restraint, or threats of force or physical restraints; (ii) serious harm or threats of serious harm; (iii) abuse or threatened abused of law or legal process; (iv) any scheme, plan or pattern intended to cause the plaintiff to believe that, if the plaintiff did not perform such labour, the plaintiff or another person would suffer serious harm or physical restraint.
98. Second, female workers subjected to sexual harassment may bring [hostile work environment claims](#).¹⁷¹ The key elements to a hostile work environment claim are: (a) the female workers were discriminated against because of their gender; and (b) the discrimination was '[sufficiently severe or pervasive](#) to alter the conditions of the victim's employment and create an abusive working environment'.¹⁷²
99. Finally, employees at the factory may [bring claims](#)¹⁷³ for their unpaid overtime wages under the FLSA. The key elements in a [FLSA unpaid overtime claim](#) are: (a) the workers were in an employment relationship with Factory Co; (b) Factory Co was engaged in interstate commerce; and (c) the workers worked over 40 hours per week but were not paid overtime wages.

¹⁷⁰ For a discussion of the different key elements of various tort claims, see the response to Question 2 (paras [22]-[38] above).

¹⁷¹ Unlawful employment practices, [42 U.S. Code § 2000e-2\(a\)\(1\)](#).

¹⁷² [Meritor Savings Bank, FSB v Vinson](#), 477 US 57, 67 (1986) (SC).

¹⁷³ Penalties, [29 U.S. Code § 216\(b\)](#).

Claims against Brand Co

100. Insofar as Factory Co coerced labour through force or other means, workers may have a beneficiary claim against Brand Co under the TVPRA. The key elements are: (a) Brand Co knowingly benefited financially or by receiving anything of value; (b) from participation in a venture with Factory Co; and (c) Brand Co [knew or recklessly disregarded](#) the fact that its venture with Factory Co engaged in forced labour.¹⁷⁴
101. The workers, or the community more generally, may also bring a consumer fraud case against Brand Co. Under various [state consumer fraud statutes](#),¹⁷⁵ Brand Co may be liable for material misstatements about its support for human rights while benefiting from inhumane labour practices.¹⁷⁶

Q2

If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 3 to account, please indicate any other available legal avenues available to the victims and/or their families?

102. Various laws in the United States regulate the conditions of labour in areas ranging from workplace safety to compensation. In the period preceding the fire at Factory Co, for instance, employees may have brought complaints under the [Occupational Health and Safety Act](#).¹⁷⁷ In response to such a complaint, the government may take steps to investigate the claim and inspect the workplace to ensure compliance with safe workplace conditions.

Q3

Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 3?

103. There are numerous cases raising these issues in the United States. **ATS** and **TVPRA** claims, though not all successful, have been brought against Nestlé and other companies benefitting from forced labour and other human rights violations.¹⁷⁸ In *John Doe v Apple*, TVPRA claims have been brought on behalf of the guardians of 14 children who were killed in a tunnel collapse while mining cobalt in the Democratic Republic of Congo.¹⁷⁹ Consumer claims have also been brought against Starbucks and other companies benefitting from the conditions in the chocolate

¹⁷⁴ See provisions on forced labour in [18 U.S. Code §§ 1589](#), 1595; also *Ricchio v McLean*, 853 F.3d 553, 556–58 (1st Cir. 2017) (US Court of Appeals, First Circuit).

¹⁷⁵ [Consumer Protection in the States: A 50-State Evaluation of Unfair And Deceptive Practices Laws](#), (2018) National Consumer Law Center.

¹⁷⁶ *Myers v Starbucks Corp*, 536 F.Supp.3d 657, 665–667 (C.D. Cal. 2021) (US District Court, Central District of California); *Sud v Costco Wholesale Corp*, 229 F.Supp.3d 1075 (N.D. Cal. 2017) (US District Court, Northern District of California). See [a sample complaint from Myers](#).

¹⁷⁷ 29 C.F.R. § 1903.11(a).

¹⁷⁸ In *Doe v Unocal Corp*, 110 F.Supp. 2d 1294 (C.D. Cal. 2000) (US District Court, Central District of California) plaintiffs brought ATS claims for human rights violations including forced labour. Though the case was at first dismissed, the case was eventually settled. For other claims that are still ongoing, see eg *Keo Ratha v Phathana Seafood Co Ltd*, CV 16-4271-JFW (ASx), 2017 WL8293174, *4 (C.D. Cal. 21 Dec 2017) (US District Court, Central District of California, Western Division); *Nestlé USA, Inc v John Doe I, Cargill, Inc v John Doe I*, Nos 19-416, 19-453, 2020 WL 2749081 (2021) (SC).

¹⁷⁹ *Doe 1 et al v Apple Inc*, No 1:19-cv-03737 (D.D.C. filed 15 Dec 2019) (US District Court, District of Columbia). As of publication the litigation is ongoing and unresolved.

industry, for fraudulently presenting their products as ethically sourced.¹⁸⁰ Claims alleging hostile work environments or unsafe working conditions for domestic employees are also common, with a Northern California jury returning a multi-million-dollar verdict in a hostile work environment case brought against [Tesla](#).



