© The Author(s), 2020. Published by Cambridge University Press for the British Institute of International and Comparative Law

IMPLEMENTING HUMAN RIGHTS DUE DILIGENCE THROUGH CORPORATE CIVIL LIABILITY

NICOLAS BUENO AND CLAIRE BRIGHT*

Abstract Since the adoption of the UN Guiding Principles on Business and Human Rights the relationship between human rights due diligence (HRDD) and corporate liability has been a source of legal uncertainty. In order to clarify this relationship, this article compares and contrasts civil liability provisions aiming at implementing HRDD. It explains the legal liability mechanisms in the draft Treaty on Business and Human Rights and in domestic mandatory HRDD legislation and initiatives such as the French Duty of Vigilance Law and the Swiss Responsible Business Initiative. It compares these developments with the emerging case law on parent company and supply chain liability for human rights abuses. It explores the potentially perverse effects that certain civil liability provisions and court decisions might have on companies' practices. Finally, it makes recommendations for the design of effective liability mechanisms to implement HRDD.

Keywords: human rights, business and human rights, human rights due diligence, legal liability, mandatory due diligence legislation, parent company liability, supply chain liability, treaty on business and human rights, UN Guiding Principles on Business and Human Rights.

I. INTRODUCTION

Since the adoption of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) the relationship between human rights due diligence (HRDD) and corporate liability has given rise to a number of questions. In particular, to what extent does failure to exercise

* Senior Lecturer and Swiss National Science Foundation (SNSF) Ambizione Postdoctoral Researcher, Faculty of Law of the University of Zurich, nicolas.bueno@uzh.ch; Assistant Professor, Nova School of Law, Lisbon, claire.bright@novalaw.unl.pt. This paper has been presented at the Justice for Transnational Human Rights Violations Conference at the Bonavero Institute of Human Rights (University of Oxford), at the 5th Annual Conference of the Global Business and Human Rights Scholars Association (University of Essex) and at the Research Workshop on Business and Human Rights (University of Geneva). The authors would like to thank the colleagues who organised these events and all participants for the enriching discussions. We are also grateful to the reviewers and to Professor Robert McCorquodale and Professor Sarah Dadush for their invaluable comments on earlier drafts.

[*ICLQ* vol 69, October 2020 pp 789–818] doi:10.1017/S0020589320000305

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

HRDD lead to liability?[1] The UN Guiding Principles provide that the appropriate action that must be taken by a company upon the findings of actual or potential human rights impacts varies according to whether the company causes, contributes to or is directly linked to that human rights impact. The question arises as to whether this trichotomy of involvements is or should be reflected in legal liability regimes, and, if so, how this should be done. Finally, to what extent can or should due diligence be used as a defence to allow companies to escape liability? A due diligence defence mechanism is usually discussed in relation to strict liability regimes. However, the question arises as to whether such a due diligence defence can lead companies to approach their due diligence obligations as a mere tick-box exercise.

This article aims to clarify these questions by comparing and contrasting recent liability mechanisms at the international and domestic level that seek to implement HRDD. It is structured as follows. Section II briefly introduces the concept of HRDD and outlines the few references to legal liability in the UN Guiding Principles. Section III compares two legal liability mechanisms at the international level. It first examines the Draft Treaties on Business and Human Rights,[2] which set out separate HRDD obligations and corporate liability provisions, before looking at the parent company liability provision of the Draft Principles on the Protection of the Environment in Relation to Armed Conflicts.[3]

Section IV then compares the ways in which emerging mandatory HRDD legislation and legislative proposals at the domestic level seek to implement HRDD through legal liability mechanisms. In particular, it analyses the French Duty of Vigilance Law[4] and the Swiss Responsible Business Initiative[5]. Finally, in section V the article delves into the recent domestic case law developments on parent company and supply chain liability. It

[1] A Ramasastry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 JHR 248; N Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2017) 8–9; J Bonnitcha and R McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) EJIL 899; J Ruggie and J Sherman, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28(3) EJIL 921; B Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' (2017) 2 BHRJ 225.

[2] Open-Ended Intergovernmental Working Group (OEIWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Second Revised Draft (6 August 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>.

[3] International Law Commission, Protection of the Environment in Relation to Armed Conflicts, UN Doc A/CN.4/L.937 (6 June 2019).

[4] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,

[5] Chancellerie fédérale, Initiative populaire fédérale 'Entreprises responsables – pour protéger l'être humain et l'environnement' <www.bk.admin.ch/ch/f/pore/vi/vis462t.html>.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

concludes by offering suggestions for possible options for implementing HRDD requirements in legal liability regimes, highlighting specific challenges.

II. DUE DILIGENCE AND LEGAL LIABILITY IN THE UN GUIDING PRINCIPLES

A. Human Rights Due Diligence and the Degrees of Involvement

The concept of human rights due diligence is defined in the UN Guiding Principles 17–21 and included in various chapters of the OECD Guidelines for Multinational Enterprises and paragraph 10 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The concept of human rights due diligence is the object of extensive literature[6] and several pieces of general[7] and sectoral[8] international guidance.

HRDD is traditionally defined as a process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse human rights impacts.[9] The UN Guiding Principles and the OECD Guidelines for Multinational Enterprises specify what is expected from business enterprises for each step of this process. First, business enterprises should identify and assess the actual and potential adverse human rights impacts. Second, they should act upon these findings by taking appropriate action to prevent potential adverse human rights impacts or to end actual ones. In this regard, the appropriate action varies according to whether the business enterprise causes or contributes to the adverse impact or is involved solely because the impact is directly linked to its operations, products or services by a business relationship.[10] Third, business enterprises should account for how they address their actual and potential adverse impacts. Finally, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for remediation.[11]

[6] O Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last' (2014) 32 NQHR 55–7; Bonnitcha and McCorquodale (n 1); Ruggie and Sherman (n 1); Bernaz (n 1) 193–9; Fasterling (n 1) 225 or K Salcito and M Wielga, 'What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?' (2018) 3 BHRJ 113.

[7] United Nations Office of the High Commissioner for Human Rights (OHCHR), The Corporate Responsibility to Respect Human Rights: An Interpretative Guide (2012) (OHCHR Interpretative Guide); OECD, Due Diligence Guidance for Responsible Business Conduct (2018).

[8] eg OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2018); OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (3rd edn, 2016) or ILO-IOE International Child Labour Guidance for Business (2015).

[9] UN Guiding Principles, Principle 17; OECD Guidelines for Multinational Enterprises, Ch II, commentary, para 14 and Ch IV, commentary, para 15.

[10] UN Guiding Principles, Principle 22 and commentary.

[11] N Bueno, 'Multinational Enterprises and Labour Rights: Concepts and Implementation' in J Bellace and B ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Elgar Edward 2019) 423–5; Martin-Ortega (n 6) 55–7, for these steps.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

The second step, the taking of appropriate action, has been much discussed.[12] Appropriate action depends on the degree of involvement in the adverse human rights impact. In short, when a business enterprise causes an adverse impact on human rights, it should take the necessary steps to cease the impact.[13] When a business enterprise contributes to an adverse impact on human rights, it should take the necessary steps to cease its contribution, and also use its leverage to mitigate, to the greatest extent possible, any remaining impact.[14] Finally, the last scenario is when the company does not contribute to the adverse human rights impact through its own activities, but the adverse impact is directly linked to the company's operations, products or services and is caused by a business relationship. This is the case, for example, when a company's supplier uses child or bonded labour to manufacture a product for this company contrary to the terms of its contract and without any intentional or unintentional pressure from the enterprise to do so.[15] Appropriate action in this third scenario also depends on the degree of leverage that the company has over its business relationship: if the company has leverage to mitigate the adverse impact, it should exercise it, as would be required in the event that the company had contributed to the impact. If it lacks leverage, it should try to increase it. Finally, if increasing its leverage is impossible, it should consider terminating the relationship.[16]

The author of the UN Guiding Principles, John Ruggie, explained that the distinction between the three types of involvement have sometimes been overemphasised and expressed as an 'either or' question, whereas a variety of factors can play a determining role. These factors include the extent to which the business enabled, encouraged, or facilitated human rights harm by another and the extent to which it could or should have known about such harm.[17] Although this trichotomy of involvements relates to the type of actions that must be taken by business enterprises to address adverse human rights impacts, rather than to issues of corporate liability, it raises the question of whether it should be reflected in legal liability regimes. As argued in the following section, the UN Guiding Principles are not entirely clear on this question.

[12] Compare eg O De Schutter 'Corporations and Economic, Social, and Cultural Rights' in E Riedel, G Giacca and C Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 212–16; C Kaufmann *et al.*, *Extraterritorialität im Bereich Wirtschaft und Menschenrechte* (Swiss Center of Expertise in Human Rights 2016) 16–18.

[13] UN Guiding Principles, Principle 19, commentary.

[14] OHCHR Interpretative Guide (n 7) 19.

[15] ibid 49 and 17, for further examples of each scenario; see also C Kaufmann, 'Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?' (2016) Swiss Review of Business and Financial Market Law 51 and N Bueno, 'La responsabilité des entreprises de respecter les droits de l'homme: État de la pratique suisse' (2017) Aktuelle Juristische Praxis 1016.

[16] For the detail and steps to be taken before termination, UN Guiding Principles, Principle 19, commentary; OECD Guidelines for Multinational Enterprises, Ch II, commentary, para 22.

[17] J Ruggie, Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 and 17 in a Corporate and Investment Banking Context (February 2017) <https://www.business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

B. Legal Liability in the UN Guiding Principles

Under the UN Guiding Principles, States are 'expected to adopt a mix of measures – voluntary and mandatory, national and international – to foster business respect for human rights in practice'.[18] However, the UN Guiding Principles do not go as far as defining or prescribing extraterritorial human rights obligations and the extent to which the States are required to regulate the extraterritorial activities of companies domiciled in their jurisdiction is still debated.[19] The UN Guiding Principles nevertheless recognise that some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. In the context of economic, social, and cultural rights, for example, the Committee on Economic, Social and Cultural Rights has subsequently specified that the extraterritorial obligation on States to protect against economic social, and cultural rights abuses by business enterprises extends to any business entities over which States Parties may exercise control.[20] As a result, States should require companies domiciled in their territory or within their jurisdiction to act with due diligence to identify, prevent and address abuses to Covenant rights, wherever those abuses may be located.[21]

However, the hardening of the soft-law expectations to a legally binding corporate duty to exercise HRDD raises a number of questions, at the core of which is the question of the legal liability.[22] In this respect, the UN Guiding Principles make it clear that 'the responsibility of business enterprises to respect human rights is distinct from issues of legal liability, which remain defined largely by national law provisions in relevant jurisdictions'.[23] The limited references to legal liability in the UN Guiding Principles is a part of what is sometimes called the accountability gap in business and human rights.[24]

[18] UN Guiding Principles, Principle 3 and Commentary; J Ruggie, Letter of response to a public letter by Swiss business associations regarding their position on the Swiss Responsible Business Initiative (19 September 2019) <https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf>.

[19] S Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (2020) 9(1) ESIL Reflections; see also E Schmid, 'The Identification and Role of International Legislative Duties in a Contested Area: Must Switzerland Legislate in Relation to "Business and Human Rights"' (2015) SRIEL 577–8.

[20] Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc E/C.12/GC/24 (23 June 2017) para 10.

[21] ibid, para 33.

[22] Martin-Ortega (n 6) 55–7; B Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 ICLQ 961–2: C Macchi and C Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in M Buscemi *et al.* (eds), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Brill Nijhoff 2020) 218–47.

[23] UN Guiding Principles, Principle 12, commentary.

[24] Ramasastry (n 1) 248; Bernaz (n 1) 8–9 or Schmid (n 19) 577–8.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

The UN Guiding Principles nonetheless address the relationship between HRDD and legal liability in the commentary to Principle 17 on due diligence. The commentary states that 'conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them'.[25] In this regard, commentators have expressed concern that due diligence may be interpreted as narrow compliance-orientated processes, allowing businesses to claim that they are compliant with the UN Guiding Principles by adopting a box-ticking approach.[26] However, the commentary to Principle 17 emphasises that 'business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses'.[27] In other words, HRDD is not merely a formal process but also a standard of expected conduct in order to prevent adverse human rights impacts.[28] From this, it follows that the appropriateness of the HRDD that is conducted should be taken into account in considerations of liability.[29]

For the rest, the UN Guiding Principles leave a certain amount of uncertainty regarding the interplay between liability and the three degrees of involvement presented above. For example, the commentary to Principle 17 on HRDD compares the non-legal notion of 'contribution' to the legal concept of 'complicity' in criminal law. It states that 'questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties', leaving aside the third scenario in which an adverse human rights impact is directly linked to the operations, products or services of a business enterprise. This suggests that such a scenario is of no concern for legal liability. Even though HRDD should be conducted regardless of whether a company causes, contributes or is directly linked to an adverse impact, with varying actions depending on the type of involvement of the company with the impact, only causing or contributing to adverse human rights impacts would give rise to liability under the UN Guiding Principles. In the absence of clear criteria to distinguish between the various degrees of involvement, the distinction creates some uncertainty.[30]

C. Clarifications Issued by the OHCHR on Due Diligence and Legal Liability

In the light of this legal uncertainty, the OHCHR released guidance on improving corporate accountability and access to judicial remedies for

[25] UN Guiding Principles, Principle 17, commentary.

[26] Bonnitcha and McCorquodale (n 1) 910; B Fasterling and G Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116 JBE 805–6.

[27] UN Guiding Principles, Principle 17, commentary.

[28] L Smit *et al.*, *Study on Due Diligence Requirements through the Supply Chain: Final Report* (European Commission 2020) 260

[29] ibid 264.

[30] See also Bonnitcha and McCorquodale (n 1) 910, for a discussion.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

business-related human rights abuse[31] (Guidance on corporate accountability), accompanied by explanatory notes.[32] The Guidance provides policy objectives for States when they are designing civil and criminal corporate liability mechanisms for human rights abuses. Objective 14 clearly states that corporate civil liability should be properly aligned with the responsibility of companies to exercise HRDD. In particular, domestic civil liability regimes should take appropriate account of effective measures taken by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.[33]

The Guidance on corporate accountability does not recommend the adoption of specific liability mechanisms by States. However, it introduces a new distinction between liability within corporate groups and supply chain liability. With regard to corporate groups, the Guidance clarifies that civil liability regimes should be clear on the expected standards for the management and supervision of different entities within the group with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from the group's operations.[34] In other words, it recommends precision about the type and degree of control and supervision that will give rise to parent company liability in domestic regimes. The same holds true in relation to supply chain liability. Here, however, the Guidance makes express reference to the causation, contribution and linkage trichotomy by specifying that the relevant adverse impacts are those that 'a business enterprise may cause or contribute to as a result of its policies, practices or operations'.[35] Accordingly, it can be deduced that only the first two degrees of involvement (causation and contribution) should give rise to liability when it comes to the harm caused by an entity in the supply chain. Although this interpretation seems in line with the commentary to Principle 17 of the UN Guiding Principles, it is questionable whether this distinction is necessary and even desirable in domestic liability regimes in so far as it risks having the effect in practice of focusing litigation strategies around these distinctions, thereby turning attention away from the crucial question which is whether adequate due diligence was conducted in the factual circumstances of the case.

In June 2018, the OHCHR released another report describing three particular ways in which the non-observance of HRDD can trigger legal liability in

[31] OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, UN Doc A/HRC/32/19, Annexe: Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse (10 May 2016).

[32] OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance, UN Doc A/HRC/32/19/Add.1 (10 May 2016).

[33] OHCHR (n 31) Policy objective 14.1.

[34] ibid, Policy objective 12.3.

[35] ibid, Policy objective 12.4.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

domestic regulatory regimes.[36] First, the non-observance of mandatory HRDD can raise the prospect of legal liability, regardless of whether, or the extent to which, damage flows from that non-compliance. In other words, the mere fact of not complying with a due diligence process may be subject to sanction. Second, HRDD and the question of whether it was exercised may also be among the threshold factual issues, for instance in the context of assessing the potential breach of a duty of care in a tort claim.[37] In that case, the question is whether compliance with the due diligence obligation would have prevented the damage from occurring, as in the case of the French Duty of Vigilance Law presented below.[38]

Finally, HRDD can be integrated into strict liability mechanisms, in which case it will not have a bearing on whether the company is prima facie liable, but may raise the possibility of a legal defence by the company.[39] The adequate procedures defence in the UK Bribery Act 2010[40] and the Italian Legislative Decree 231/2001[41] contain examples of such mechanisms in relation to corporate criminal and administrative liability. The Swiss Responsible Business Initiative presented below also triggered a debate by drafting a due diligence defence mechanism in tort law.[42] While the main purpose of this due diligence defence in tort law is to shift the burden of proof from the claimant to the company in order to alleviate some of the difficulties that claimants may face in accessing relevant information to substantiate their claims, it also raises the concern that companies will argue that they formally complied with the HRDD process to escape liability, without meaningfully engaging with HRDD.

The next section shows the growing trend towards mandatory HRDD initiatives with associated civil liability regimes at the international level. It compares and contrasts specific examples and highlights some of the challenges resulting from the different approaches taken. It begins with recent examples at the international level such as the various drafts of the Treaty on Business and Human Rights.

[36] OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, UN Doc A/HRC/38/20/Add.2 (1 June 2018).

[37] ibid, para 12.

[38] Section IV.A.

[39] OHCHR (n 36) para 12.

[40] Section 7 of the UK Bribery Act 2010. See G LeBaron and A Rühmkorf, 'Steering CSR Through Home Art Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15; I Pietropaoli *et al.*, A UK Failure to Prevent Mechanism for Corporate Human Rights Harms (BIICL 2019) 48–55.

[41] Decreto Legislativo 8 giugno 2001, n. 231, Disciplina della responsabilità amministrativa delle persone giuridiche, della società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300. See Fédération International pour les droits humains (FIDH) *et al.*, 'Italian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislations?' (November 2019) <https://e6e968f2-1ede-4808-acd7-cc626067cbc4.filesusr.com/ugd/6c779a_d800c52c15444d74a4ee398a3472f64c.pdf>.

[42] Section IV.B.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

III. HUMAN RIGHTS DUE DILIGENCE AND LIABILITY IN INTERNATIONAL INSTRUMENTS

A. Due Diligence and Liability in the various drafts of the Treaty on Business and Human Rights

The process towards the negotiation of a treaty on business and human rights[43] began on 26 June 2014 with the adoption of a resolution by the UN Human Rights Council, which established an open-ended intergovernmental working group (the OEIWG) with a mandate to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[44] The first official draft (Zero Draft) of the Treaty was released on 16 July 2018,[45] a year later, the OEIWG published a revised draft of the Treaty (Revised Draft) and the Second Revised Draft was released on 6 August 2020.[46]

The concept of human rights due diligence is enshrined in Article 6 of the Second Revised Draft, under the heading 'Prevention'. Article 6 provides that State Parties shall regulate the activities of business enterprises through the adoption of legal and policy measures at the domestic level to ensure that all persons conducting business activities within their territory or jurisdiction or otherwise under their control undertake HRDD.[47] It is noteworthy that, unlike the Zero Draft, the first and Second Revised drafts have opted for terminology that is more closely aligned with that of the UN Guiding Principles in relation to HRDD.[48] However, significant differences persist. Like the Zero Draft,[49] the first and Second Revised Drafts do not really make use of the 'causing, contributing and directly linked' trichotomy of the UN Guiding Principles to determine the appropriate action that should be taken to prevent or mitigate adverse human rights impacts.[50] Regarding the scope of HRDD, the Second Revised Draft mandates State Parties to require that persons conducting business activities undertake HRDD in order to identify, assess, prevent and monitor any actual or potential human rights violations or

[43] On this process, see eg D Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 BHRJ 203; O De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 BHRJ 41; L McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 ICLQ 143; Cassel, 'The Third Session of the UN Intergovernmental Working Group on Business and Human Rights Treaty' (2018) 3 BHRJ 227.

[44] Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Resolution 26/9, UN Doc A/HR/RES/26/9 (14 July 2014).

[45] OEIWG, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Zero Draft (16 July 2018), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>. On the Zero Draft, see C Lopez, Towards an International Convention on Business and Human Rights (Part I) and (Part II), OpinioJuris (23 July 2019) <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/>.

[46] OEIWG (n 2).

[47] Art 6(1) and (2) Second Revised Draft.

[48] N Bernaz, Clearer, Stronger, Better? – Unpacking the 2019 Draft Business and Human Rights Treaty (19 July 2019) <http://rightsasusual.com/?p=1339>.

[49] Art 9(2) Zero Draft.

[50] Reference is, however, made in the Preamble.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

abuses that may arise 'from their own business activities, or from their business relationships'.[51] The term 'business relationship' is defined as 'any relationship between natural or legal persons to conduct business activities, including, those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State including activities undertaken by electronic means'.[52] This replaced the notion of 'contractual relationships' in the first Revised Draft, which had attracted much criticism.[53]

Article 8 of the Second Revised Draft focuses on the issue of legal liability. Whilst the Second Revised Draft does not impose any obligation on States to adopt a specific liability regime,[54] under Article 8(1) States are required to ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities.[55] Article 8(7) deals specifically with liability when the harm is caused by a person with whom a company has a business relationship, as defined above. It stipulates that States should provide for the liability of a natural or legal person for its failure to prevent another person with whom it has a business relationship from causing or contributing to human rights abuses to third parties in two cases: when the company legally or factually controls or supervises such person or the relevant activity that causes the human rights abuse or when it should have foreseen the risk of human rights abuses in the conduct of business activities, but failed to put adequate measures to prevent the abuse.[56]

Under Article 8(7), it is therefore the 'failure to prevent' a third party from causing or contributing the harm that may trigger legal liability. This formulation does not allow a company to argue that it had formally complied with its due diligence obligation by simply having a process in place (a tick-box exercise) and so to escape liability as expressly mentioned in Article 8 (8). What would need to be proven is that the damage would have resulted even if the company had exercised the required HRDD. Liability may be triggered for a company, such as a parent company or a lead company, either when it exercises sufficient legal or factual control or supervision over the business partner or the relevant activity, or when it should have foreseen the risk of human rights abuse. The criteria that should be used to establish this

[51] See art 6(2)(a)–(d) Second Revised Draft.

[52] Art 1(4) Second Revised Draft.

[53] C Lopez, Legal Liability for Business Human Rights Abuses under the Revised Draft of a Treaty on Business and Human Rights, BHRJ Blog (11 September 2019) <https://www.cambridge.org/core/blog/2019/09/11/legal-liability-for-business-human-rights-abuses-under-the-revised-draft-of-a-treaty-on-business-and-human-rights/>.

[54] Except for the list of criminal offences listed in art 8(9) of the Second Revised Draft. See also on the Revised Draft D Iglesias Márquez, 'Hacia la adopción de un tratado sobre empresas y derechos humanos: viejos debates, nuevas oportunidades' (2019) 4 Deusto Journal of Human Rights 167, for further comments.

[55] Art 8(1) Second Revised Draft.

[56] Art 8(7) Second Revised Draft.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

control or supervision are not further established, which is also a source of legal uncertainty.

B. Due Diligence and Liability in the Draft Principles on the Protection of the Environment in Relation to Armed Conflict

In June 2019, the International Law Commission released the provisionally adopted text of the Draft Principles on the Protection of the Environment in Relation to Armed Conflict.[57] This document refers both to due diligence based on the UN Guiding Principles[58] and to legal liability of non-State actors.

Draft Principle 10 deals with corporate due diligence. It affirms that States have a duty to take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercise due diligence with respect to the protection of the environment when acting in an area of armed conflict or in a situation after an armed conflict.[59] Although the Draft Principles relate to the protection of the environment and not human rights, the interconnectedness between the two is increasingly acknowledged[60] and the due diligence standard in Draft Principle 10 relies on the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises.[61]

Draft Principle 11 contains recommendations on corporate liability. States are required to take appropriate measures in order to ensure that corporations 'can be held liable for harm caused by them to the environment … Such measures should, as appropriate, include those aimed at ensuring that a corporation … can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control'. In addition to liability for its own conduct, Draft Principle 11 contains therefore a specific reference to liability for harm caused by a de facto controlled subsidiary. In this regard, it is not the business enterprise's failure to prevent the subsidiary from causing the harm that should trigger liability, but the existence of a control relationship over the subsidiary that caused the harm.[62] 'De facto' control, however, is not further explained. It differs from the Second Revised Draft Treaty in that the formulation of Draft Principle 11 focuses exclusively on parent company liability excluding the possibility of a company being liable for harm caused by a business partner, and liability is therefore defined too narrowly.

The next section explores examples of mandatory human rights due diligence laws and associated liability provisions that have recently been adopted or that

[57] International Law Commission (ILC), Protection of the Environment in Relation to Armed Conflicts, UN Doc A/CN.4/L.937 (6 June 2019).

[58] ILC, Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, A/CN.4/728 (27 March 2019) para 68.

[59] ILC (n 57) Draft Principle 10.

[60] Smit *et al.* (n 28) 181.

[61] ILC (n 58) para 67.

[62] Compare with the text of the former draft: 'Parent companies are to be held responsible for ascertaining that their subsidiaries exercise due diligence', ILC (n 58) para 104.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

are currently in discussion at the domestic level. In contrast to the international law texts presented so far, they are intended to be directly applicable in domestic courts to determine liability and their wording therefore tends to be more specific.

IV. DUE DILIGENCE AND LIABILITY IN DOMESTIC MANDATORY DUE DILIGENCE LAWS

Legislations seeking to implement the UN Guiding Principles can be divided into three broad categories.[63] A first category of laws requires that companies disclose information regarding their human rights and environmental impacts generally or relating to specific human rights issues. Examples include the UK Modern Slavery Act,[64] the Australian Modern Slavery Act and the EU Non-Financial Reporting Directive.[65]

A second category requires a more comprehensive exercise of substantive HRDD in relation to a specific sector or issue, without clarifying liability conditions in case harm does occur.[66] Examples include the EU Timber Regulation,[67] the European Union (EU) Conflict Minerals in Supply Chain Regulation[68] and the Dutch Child Labour Due Diligence Act.[69] These examples rely on public authorities for the monitoring and enforcement of due diligence obligations defined in the laws. In the case of the Dutch Act, a company must exercise due diligence by investigating whether supplied goods or services have been produced using child labour. In the event of a reasonable suspicion of child labour, it must adopt and implement a plan of action in observance of the ILO-IOE Child Labour Guidance Tool for Business.[70] The public supervisory authority may impose an administrative

[63] N Bueno, 'Mandatory Human Rights Due Diligence Legislation' in H Ewing *et al.* (eds), *Teaching Business and Human Rights Handbook* (2019) <https://teachbhr.org/resources/teaching-bhr-handbook/mandatory-human-rights-due-diligence/>; N Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability in L Enneking *et al.* (eds), *Accountability, International Business Operations and the Law* (Routledge 2020) 249–50; C Bright, D Lica, A Marx and G Van Calster, *Options for Mandatory Human Rights Due Diligence in Belgium* (Leuven Centre for Global Governance Studies 2020) <https://ghum.kuleuven.be/ggs/publications/research_reports/options-for-mandatory-hr-due-diligence-in.pdf> 18.

[64] UK Modern Slavery Act of 2015.

[65] EU Directive 2014/95 of 22 October 2014 on disclosure of non-financial and diversity information by certain large undertakings [2014] OJ 2014 L 330/1.

[66] Macchi and Bright (n 22) 229.

[67] EU Reg 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23.

[68] EU Reg 2017/821 of 17 May 2017 on supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1; see P Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' (2020) 69 ICLQ 685, for a detailed analysis.

[69] Wet zorgplicht kinderarbeid of 7 February 2017 as adopted by the Senate on 17 May 2019. Unofficial English translation <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>.

[70] Art 5 Dutch Child Labour Due Diligence Act.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

fine in case of failure to comply with these obligations. The Act also provides criminal sanctions in case of continuing non-compliance during five years after an administrative fine was imposed.[71] The purpose of the enforcement mechanisms in this second category of laws is primarily to sanction failure to comply with the due diligence obligations set forth by the law but they leave the issue of access to effective remedy for affected individuals unaddressed.

The third category of legislation and legislative proposals do not only mandate the exercise of HRDD, but also provide for an associated civil liability regime in case of harm. This section IV focuses on the relationship between HRDD and corporate liability in this third category. Even though various initiatives and campaigns for the introduction of mandatory HRDD are currently taking place in a number of European countries,[72] and at the European level,[73] the article focuses on the French Duty of Vigilance Law, which is the only example of overarching mandatory due diligence legislation adopted thus far, and one of the most advanced legislative proposal: the Swiss Responsible Business Initiative, which has triggered intensive parliamentary debates on the question of corporate legal liability for business-related human rights and environmental violations.

A. Due Diligence and Liability in the French Duty of Vigilance Law

The French Duty of Vigilance Law, which was adopted in 2017, imposes a legal duty of vigilance on certain large companies, by requiring them to exercise human rights due diligence. In order to fulfil its vigilance obligations pursuant to Article L.225-102-4(I) of the French Commercial Code, a company must establish, disclose and effectively implement a vigilance plan.[74] The plan should allow for risk identification and the prevention of severe violations of human rights and harm to the environment resulting from three kinds of activities: the activities of the company itself, the activities of companies under its control, and the activities of the subcontractors or suppliers with whom it maintains an established commercial relationship.[75] The concept of control is defined in the French Commercial Code as 'exclusive control', which enables the company to 'have decision-making power, in particular over the financial and operational policies of another

[71] Art 9 Dutch Child Labour Due Diligence Act.

[72] Business and Human Rights Resource Center, National Movements for Mandatory Human Rights Due Diligence in European Countries, <https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries>.

[73] Smit *et al.* (n 28) 170.

[74] S Cossart, J Chaplier and T Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All (2017) 2 BHRJ (2017) 320.

[75] Art L.225-102-4(I) French Commercial Code.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

entity'.[76] The concept can refer to legal control, de facto control or contractual control.[77] The concept covers subsidiaries that are directly and indirectly controlled and therefore includes first-tier subsidiaries and lower tiers of subsidiaries over which a company exercises a decision-making power.[78] The concept of 'established commercial relationships' aims to limit the scope of suppliers and subcontractors that a company must include in its vigilance plan. Under French Law, an established commercial relationship means a 'stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'.[79] It is therefore narrower than the concept of business relationships referred to in the UN Guiding Principles insofar as it excludes ad hoc relationships.[80]

The French Duty of Vigilance Law contains two enforcement mechanisms. First, under Article L.225-102-4 of the French Commercial Code any interested party can seek an injunction from the relevant French court to order the company to comply (after having first sent a formal notice, a *mise en demeure*, to the company), with periodic penalty payments in case of continued non-compliance. The first legal actions have been launched in France on the grounds of this first enforcement mechanism.[81] Although these legal actions are still ongoing, in a first decision concerning the summary proceedings against Total, the Court declared that it did not have jurisdiction to hear the case which should instead be filed before the Commercial Court.[82] An appeal of the decision has been filed.

In addition, Article L.225-102-5 of the French Commercial Code provides for an associated liability regime whereby interested parties can file civil proceedings whenever a company's failure to comply with its vigilance obligations gives rise to damage that could otherwise have been prevented. In French, this liability provision reads as follows: *le manquement aux obligations* [*de vigilance*] *engage la responsabilité de son auteur et l'oblige à réparer le*

[76] S Brabant, C Michon and E Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance' (2001) 50 Revue Internationale de la Compliance et de l'Éthique des Affaires 93.

[77] ibid 2.

[78] S Schiller, 'Exégèse de la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' (2017) 15 JCP Entreprise et affaires 1193.

[79] Cossart, Chaplier and Beau de Lomenie (n 74) 320.

[80] Macchi and Bright (n 22) 234.

[81] See for instance: formal notices sent to Total on 19 and 25 June 2019 respectively for allegedly failing to address its climate-related impacts in its vigilance plan; and for failing to identify and address the risks of adverse human rights impacts to local communities arising out of two oil-related projects in Uganda in its vigilance plan; formal notice sent to Teleperformance on 18 July 2019 in relation to issues concerning workers' rights and freedom of association in its foreign operations, subsidiaries and supply chains; formal notice sent to EDF on 26 September 2019 for failing to address risks of adverse impacts on indigenous communities arising out of a wind farm project in the State of Oaxaca; formal notice sent to XPO Logistics Europe on 1 October 2019 for allegedly failing to meet the requirements of the law in relations to labour issues in its supply chain. See Bright *et al.* (n 63) 34.

[82] Tribunal judiciaire de Nanterre, ord. réf. 30 janvier 2020, n° 19/02833.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

préjudice que l'exécution de ces obligations aurait permis d'éviter.[83] This liability is a fault-based liability, which is determined pursuant to three conditions under French law: a breach, damage and causation between the two.[84] It is not relevant whether the company caused, contributed to or was directly linked to the harm. Rather, what is relevant is whether the damage could have been avoided had the company complied with its obligations of vigilance.

Using general fault liability to implement HRDD raises at least two practical questions that the case law will have to answer. The first question arises in regard to what constitutes a breach of the obligation to *effectively* implement a vigilance plan in practice. Indeed, this is an obligation of means whereby companies are expected to take all the steps in their power to achieve a certain result, rather than to guarantee a specific outcome.[85] In contrast to a regime of strict liability with a due diligence defence mechanism,[86] the plaintiff will have to prove that the company breached that obligation, which can prove difficult in practice when the evidence is detained by the company.

The second question deals with causation. The claimant will have to prove that a failure to establish or effectively implement a vigilance plan (the breach) is what caused the damage.[87] This becomes more complex when a subsidiary or a business partner with whom the company has an established commercial relationship is involved in the human rights impact. In determining this causation, the French courts will have to consider the respective roles played by these entities in the harm. For Brabant and Savourey, the distinction in the UN Guiding Principles between situations in which a company caused, contributed to or was directly linked to the adverse impact could usefully be applied by the French judges in this respect.[88] Such an approach would entail that causation would be established when a company is proven to have caused or contributed to the harm and not when they are merely directly linked to the harm through their operations, products or services. However, this approach would foster legal uncertainty in so far as the three different categories are not legally defined. Nonetheless, a large amount of

[83] See art L.225-102-5 Code du commerce français, which provides that 'the author of any failure to comply with the [vigilance] duties shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid'. English translation provided by Respect International, <http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/>.

[84] S Brabant and E Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies (2017) 50 (supplément) *Revue internationale de la compliance et de l'éthique des affaires* 2; art 1240 and 1241 on fault liability should apply provided that the commercial code will be applicable in a transnational claim, which the law does not clarify, but seems logical from the purpose of such law; Bueno (n 63) 252, for a comment.

[85] Brabant and Savourey (n 84) 2; Cossart, Chaplier and Beau de Lomenie (n 74) 321.

[86] As it is the case in art 101a(2)(c) of the Swiss Constitution as proposed in the Swiss Responsible Initiative, see Section IV.B below.

[87] Cossart, Chaplier and Beau de Lomenie (n 74) 321.

[88] Brabant and Savourey (n 84) 2.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

uncertainty remains. In particular, there are two main theories in French tort law that may be used to determine causation: the theory of the equivalence of conditions, which is based on the idea that each factor contributed to causing the damage, and as a result, that each factor is considered as having caused the damage; and the theory of adequate causality, which seeks to find the most likely determining cause of the damage.[89] The outcomes of cases will inescapably vary greatly depending on which theory the French judge favours in a specific instance. The Swiss Responsible Business Initiative outlined in the following section, has adopted a different approach relying on a strict liability regime for controlling companies associated with a due diligence defence.

B. Due Diligence and Liability in the Swiss Responsible Business Initiative

In 2016, civil society organisations in Switzerland launched a popular constitutional initiative on responsible business (the Responsible Business Initiative).[90] The initiative is drafted as one constitutional provision, Article 101a of the Swiss Constitution, and collected the requisite threshold of 100,000 signatures. Swiss citizens will have to decide whether to include this new provision in the Swiss Constitution in a vote set on 29 November 2020. If adopted, Article 101a of the Swiss Constitution will have to be implemented in a federal law, most likely in the Swiss Code of Obligations.[91] If rejected, the counterproposal adopted by the Parliament will enter into force and modify the Code of Obligations. However, this counterproposal contains certain due diligence obligations but no legal liability provision, as outlined below.

The text of the proposed Article 101a of the Swiss Constitution requires companies to carry out appropriate due diligence based on the UN Guiding Principles. In addition, Article 101a(2)(c) provides for specific liability of a controlling company for the harm caused by a controlled company. Control in this legal provision encompasses both the control that a parent company may exercise over its subsidiaries and the 'economic control' that a lead company may exercise, for example, over a supplier in its supply chain.[92] Whether economic control exists or not depends on the factual circumstances. The explanatory report for the initiative suggests some criteria for establishing the existence of economic control over a supplier, such as the market position of the enterprise vis-à-vis its supplier and the terms of the

[89] ibid 3.

[90] Chancellerie fédérale, Initiative populaire fédérale 'Entreprises responsables – pour protéger l'être humain et l'environnement', <www.bk.admin.ch/ch/f/pore/vi/vis462t.html>, for the official text in French, German and Italian; Swiss Coalition for Corporate Justice, The Initiative Text with Explanations (2016) <https://corporatejustice.ch/about-the-initiative/>, for an unofficial English translation.

[91] Bueno (n 63) 247.

[92] Proposal art 101(2)(a) Swiss Constitution. See G Geisser, 'Die Konzernverantwortungsinitiative: Darstellung, rechtliche Würdigung und mögliche Umsetzung' (2017) PJA 955.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

contract between the two entities.[93] Apart from this, however, the notion of economic control is not further defined,[94] which creates some legal uncertainty.

This strict liability for the harm caused by a controlled company is accompanied by a due diligence defence for the controlling company. The proposed Article 101a(2)(c) of the Swiss Constitution reads as follows: 'companies are also liable for damage caused by companies under their control … They are not liable however if they can prove that they took all due care … to avoid the damage, or that the damage would have occurred even if all due care had been taken.'[95]

Unlike the French law, Article 101a(2)(c) as drafted in the Swiss Responsible Business Initiative formulates a strict liability (rather than a fault-based liability) regime for controlling companies for the harm caused by the companies that they control. On the one hand, the mechanism alleviates the practical difficulties that claimants may face in accessing relevant information to prove that there was negligent conduct by the controlling company. Indeed, combined with the due diligence defence, the liability mechanism effectively reverses the burden of proof so that the burden falls on the company to prove that it exercised appropriate due diligence, rather than on the claimant to prove that the due diligence exercised was inadequate. In addition, claimants are not required to show that the lack of due diligence of the controlling company caused the damage, as it is required in the French law. Furthermore, the OHCHR highlighted that this due diligence defence could incentivise companies to meaningfully engage in human rights due diligence activities. However, it also raised concern about the appropriateness of a HRDD defence in some cases. In particular, it highlighted that such a defence might be inappropriate and unfair if applied in cases of superficial 'check box' approaches to human rights due diligence instead of genuine attempts to identify, mitigate, and address human rights risks as required the UN Guiding Principles. It concluded by emphasising the importance of ensuring that judges are familiar with the content of human rights due diligence so they can distinguish genuine efforts by business enterprises to identify and address risks from superficial efforts, and make their decisions accordingly.[96]

In this respect, the text of the constitutional initiative reduces this risk by clarifying that to escape liability, companies must prove that they conducted due diligence as required and 'in order to prevent such damage'.[97] This formulation makes it clear that carrying out due diligence as a tick-box

[93] Swiss Coalition for Corporate Justice, Rapport explicatif de l'initiative populaire fédérale «Entreprises responsables: pour protéger l'être humain et l'environnement» <https://initiative-multinationales.ch/wp-content/uploads//2018/05/20170912_Erl%C3%A4uterungen-FR.pdf> 43.

[94] C Kaufmann, 'Konzernverantwotungsinitiative: Grenzlose Verantwortlichkeit' (2016) Swiss Review of Financial Market Law 50, for other uncertainties.

[95] Proposal art 101(2)(c) Swiss Constitution.

[96] OHCHR (n 36) para 29.

[97] Proposal art 101(2)(c) Swiss Constitution.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

exercise will not be sufficient to constitute a defence, which is in line with the UN Guiding Principles.[98]

In order to avoid a popular vote on the Responsible Business Initiative, the Swiss National Council, one of the chambers of the Swiss parliament, drafted a first counterproposal law directly modifying the Swiss Code of Obligations.[99] In this first counterproposal, which has been rejected by the Parliament, the mechanism of strict liability for the controlling company with a due diligence defence was maintained, but it would have applied only to certain large parent companies effectively controlling subsidiaries, thereby excluding supply chain liability.[100] As discussed in relation to the Draft Principles on the Protection of the Environment in Relation to Armed Conflict, it is questionable why the same mechanism should not apply to companies that de facto control suppliers or (sub)contractors.

In June 2020 the two chambers of the Parliament nonetheless agreed on the adoption of the other counterproposal drafted by the Council of States.[101] This counterproposal contains a due diligence obligation for certain large companies in only two areas: conflict minerals and child labour. It does not contain any civil liability provision, but a criminal provision in case a company does not report on its due diligence obligations.[102] As it was not considered to be a satisfactory counterproposal by the committee that submitted the Swiss Responsible Initiative, it did not lead to its withdrawal. Instead, this counterproposal will enter into force and modify the Swiss Code of Obligations if the Swiss citizens reject the constitutional initiative.

So far, this article has shown that, despite the lack of clear references to legal liability in the UN Guiding Principles, several mechanisms for civil liability have been adopted or are currently under discussion in order to implement HRDD. It has also shown the complexity of implementing HRDD through civil liability in practice. The next section demonstrates how the case law has been developing in parallel and has moved in a similar direction. In the absence of due diligence legislation, however, domestic courts face new difficulties, particularly in relation to how liability mechanisms can be constructed that do not create perverse incentives for companies. We will explore this challenge and possible solutions in the next sections.

[98] See (n 27).

[99] Parlement suisse, Conseil national, 16.077 Droit de la société anonyme, dépliant Session d'été 2018, 204–13, <www.parlament.ch/centers/eparl/curia/2016/20160077/N11%20F.pdf>.

[100] N Bueno, 'Diligence en matière de droits de l'homme et responsabilité de l'entreprise: Le point en droit suisse' (2019) 29 (3) SRIEL 360–2; F Werro, 'The Swiss Responsible Business Initiative and the Counter-Proposal' (2019) 10(2) JETL 166–82; N Bueno, The Swiss Responsible Business Initiative and Its Counter-Proposal: Texts and Current Developments, BHRJ Blog (7 December 2018) <https://www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/>.

[101] Swiss Parliament, National Council and Council of States, 16.077 CO. Droit de la société anonyme, Session d'été 2020 <https://www.parlament.ch/centers/eparl/curia/2016/20160077/NS2-9%20F.pdf>.

[102] Proposed art 365ter of the Swiss Criminal Code.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

V. HUMAN RIGHTS DUE DILIGENCE AND CIVIL LIABILITY IN DOMESTIC COURTS

Civil litigation for business-related human rights abuses expanded from the 1990s onwards in the United States further to the revival of the Alien Tort State (ATS)[103] and some of the focus turned to the relevant standard for aiding and abetting as a determinant factor to establish a company's contribution to human rights harms.[104] However, the expansion of case law on the basis of the ATS was curbed in 2013 when the US Supreme Court applied the presumption against extraterritoriality in the *Kiobel* case,[105] restricting the possibility of using the ATS to cases which 'touch and concern' the territory of the United States 'with sufficient force to displace the presumption against extraterritorial application'.[106] It was further restricted in 2018 when the US Supreme Court affirmed in the *Jesner* case[107] that 'foreign corporations may not be defendants in suits brought under the ATS', thus restricting the possible use of the ATS to cases filed against companies based in the US.[108]

Whilst this door shut, civil litigation against parent and lead companies based on domestic tort law has been burgeoning both in the EU and elsewhere. As part of this latest trend, international standards on HRDD are increasingly relevant in determining the degree of supervision that a parent or lead company should exercise over its subsidiary or business partner, which is central to considerations of liability in negligence. However, as the following section explores, it has also been argued that certain decisions may have the effect of creating perverse incentives for parent and lead companies not to exercise HRDD.

A. Due Diligence and Parent Company Liability

In most jurisdictions, the company law principle of separate legal personality applies, meaning that each (separately incorporated) company within a corporate group is regarded as a distinct legal entity having a separate existence from its owners and managers.[109] Consequently, a parent company will not automatically be held liable for the harmful acts or omissions of its

[103] S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004).

[104] D Cassell, 'Corporate Aiding and Abetting of Human Rights Violation: Confusion in the Courts' (2008) 6(2) Northwestern Journal of International Human Rights 304.

[105] C Bright, 'The Implications of the Kiobel v. Royal Dutch Petroleum Case for the Exercise of Extraterritorial Jurisdiction' in A Di Stefano, C Salamone and A Coci (eds), *A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law* (Giappichelli 2015) 165.

[106] *Kiobel v Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).

[107] *Jesner v Arab Bank, Plc, No 16-499*, 584 U.S. (2018).

[108] W Dodge, 'Corporate Liability Under the US Alien Tort Statute: A Comment on Jesner v Arab Bank' (2019) 4 BHRJ 131.

[109] SJ Turner, 'Business Practices, Human Rights and the Environment' in JR May and E Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Elgar Edward 2019) 377.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

subsidiary on the basis merely of the shareholding. It is only in exceptional circumstances that the corporate veil may be lifted so that a parent company can be vicariously liable for the wrongful acts of its subsidiaries.[110]

However, over the last few decades, the idea that a parent company may be directly liable for its own acts or omissions in relation to the harms resulting from the activities of its subsidiaries has started to gain traction.

Leader distinguishes two approaches developed in UK case law in this respect: the traditional one and a new one. In the traditional approach, the liability of the parent company for the harm caused to a third party by a subsidiary depends on the degree of control exercised by the parent company over the decisions of the subsidiary.[111] In other words, where a parent company exercises, in practice, a high degree of control and supervision over the subsidiary's relevant conduct that caused the harm, then it might be liable for that harm.[112]

An illustration of this approach can be found in the case of *Okpabi v Royal Dutch Shell Plc* (2018), in which the English Court of Appeal ruled that the claims against the UK parent company could not proceed, on the basis that the claimants could not demonstrate a properly arguable case that the parent company owed them a duty of care 'on the basis either of an assumed responsibility for devising a material policy the adequacy of which is the subject of the claim, or on the basis that it controlled or shared control of the operations which are the subject of the claim'.[113] Lord Justice Simon noted, in particular, that: 'The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.'[114]

In the new approach, on the other hand, it is the existence of a 'special relationship' between the parent company and its subsidiary that creates the expectation that control *should* be exercised by the former over the activities of the latter.[115] The circumstances in which such a special relationship might exist were defined in the case of *Chandler v Cape Plc*,[116] which was brought by a former employee of the parent company's (domestic) subsidiary who had contracted asbestosis as a result of exposure to asbestos dust during the

[110] *Adam v Cape Industries Plc* [1990] BCLC 479.

[111] S Leader, 'Parent Company Liability and Social Accountability: Innovation from the United Kingdom' in A Ghenim *et al.* (eds), *Groupes de Sociétés et Droit du Travail: Nouvelles Articulations, Nouveaux Défis* (Dalloz 2019) 113.

[112] ibid 114.

[113] *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 para 132. On this case, see K Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14 Utrecht Law Review 6; C Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands' in A Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018) 212.

[114] *Okpabi* (n 113) para 89.

[115] ibid 115.

[116] *Chandler v Cape* [2012] EWCA Civ 525.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

course of his employment.[117] Lady Justice Arden enunciated four indicia indicating the existence of a duty of care owed by the parent company to the employees of its subsidiary: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[118]

The existence of a 'special relationship' between the parent company and its subsidiary has also played an important role in employment law cases in France prior to the French Duty of Vigilance Law. In such cases, the approach taken to determine whether a parent company can be liable for the harm caused to the employees of its subsidiary has consisted in determining the situations in which a parent company can be considered as a co-employer, together with its subsidiary, of the employees working for the latter. For instance, the case of *Venel v Areva*[119] was filed against parent company Areva by an employee of its subsidiary, Cominak (a uranium processing factory in Niger) on the basis of the work-related illness (lung cancer) that he had contracted as a result of exposure to aluminium dust. The claimant sought compensation from the parent company, as his co-employer, on the basis that Areva had a duty to ensure the health and safety of Cominak's employees. At first instance, the Tribunal des Affaires de Sécurité Sociale de Melun came to the conclusion that Areva was effectively a co-employer, and was therefore liable, on the grounds of the following elements: it held shares in Cominak and was the concession holder of the mine exploited by Cominak; Cominak had a postal address in France at Areva's headquarters; Areva and Cominak conducted identical activities and exploited the same mining site; Areva, as an expert in the nuclear industry, could not ignore the risks to which the

[117] On this case, see C Kaufmann, 'Holding Multinational Corporations Accountable for Human Rights Violations: Litigation Outside the United States' in D Baumann-Pauly and J Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 260; N Bueno, 'Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations' (2017) 21(5) International Journal of Human Rights 575–7; McConnell (n 43) 171; R McCorquodale *et al.*, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises (2017) 2(2) BHRJ 203. In the subsequent case of *Thompson v The Renwick Group Plc* (2014) EWCA Civ 635, the court found that there was no evidence that the parent company 'at any time carried on any business at all apart from that of holding shares in other companies' and there was no basis upon which it could be asserted that the parent company 'did have or should have had any knowledge of that risk superior to that which the subsidiaries could be expected to have' (at para 38). See Bueno (n 11) 428.

[118] *Chandler* (n 116) para 80.

[119] *Venel v Areva*, Tribunal des Affaires de Sécurité Sociale de Melun, 11 mai 2012, n° 10/00924, 6. On this case see for instance Bueno (n 117) 579; Bueno (n 11) 429.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

employees were exposed; and, finally, Areva had established a local observatory for the health of workers in uranium mines.[120]

However, the judgement was reversed on appeal, as the Court of Appeal of Paris found that, in order for the parent company to be considered as a co-employer, there must be an intermingling of activities, interests and management between the parent company and the contractual employer. This intermingling was lacking in this case because Cominak was not technically a controlled subsidiary of Areva, which held only 34 per cent of its shares, and Areva did not hold the majority of seats on the board of directors of Cominak, which remained autonomous in its management.[121]

In the case law of various jurisdictions, public representations and statements made by parent companies also played a key role in both establishing the existence of a special relationship between parent companies and their subsidiaries and creating certain expectations with regard to the degree of supervision that the former should exercise over the activities of the latter. The Canadian case of *Choc v Hudbay Minerals Inc*. of 2013[122] illustrates this. The claimants, members of a Guatemalan indigenous community, were asking for compensation for alleged human rights violations (including a shooting, a killing and gang rapes) committed by security personnel working for the wholly controlled subsidiaries of a Canadian company (Hudbay). They argued, *inter alia*, that the parent company owed them a duty of care and should be liable in negligence for its own acts and omissions in failing to prevent the harms committed by the security personnel. In a ruling upon preliminary issues of law, Justice Brown noted, in particular, that 'the public statements made by the parent company are one factor among others to be considered and are indicative of a relationship of proximity between the defendants and plaintiffs'.[123] The court further added that the parent company 'made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs'.[124]

The old and the new approaches are not necessarily mutually exclusive. For example, in a case brought against Shell in the Netherlands, the Court of Appeal of The Hague reached a diametrically opposite conclusion to that of the English Court of Appeal in *Okpabi* despite being based on similar facts.[125] Indeed, the Hague Court of Appeal allowed the claim to proceed to trial in the Netherlands on the grounds that 'considering the foreseeable serious consequences of oil spills to the local environment from a potential spill source, it cannot be ruled

[120] *Venel* (n 119) 6 and 7.
[121] *Venel v Areva*, Cour d'Appel de Paris, 24 Oct. 2013, no. 12/05650.
[122] *Choc v Hudbay Minerals Inc*., 2013 ONSC 1414.
[123] ibid, para 68.
[124] ibid, para 69.
[125] *Eric Barizaa Dooh of Goi v. Royal Dutch Shell Plc*, Court of Appeal of The Hague (18 December 2015). See C Bright, 'Quelques réflexions à propos de l'affaire Shell aux Pays-Bas' in L Dubin *et al.*, *L'entreprise multinationale et le droit international* (Pedone 2016) 127.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

out from the outset that the parent company may be expected to take an interest in preventing spills'.[126] In reaching its decision, the Dutch Court of Appeal therefore adopted a hybrid approach, relying both on the high degree of supervision exercised de facto by the parent company over the operations of its subsidiary and the degree of supervision that should have been exercised on the basis of the relationship of proximity between the entities, as evidenced, *inter alia*, by group-wide policies adopted by the parent company. The tests set out by the court suggest that there is a high level of supervision expected from a parent company in terms of monitoring compliance with the human rights and environmental standards within its group.[127]

Finally, in the recent decision in the *Lungowe v Vedanta* case,[128] the UK Supreme Court also adopted an hybrid approach, looking not only at the degree of supervision exercised de facto by the parent company but also at the degree of control that should have been exercised, not on the basis of a special relationship between the parties, but on the basis of the legitimate expectations arising out of its group-wide policies. The case was brought by 1,826 Zambian citizens against a UK parent company and its Zambian subsidiary for the damage the plaintiffs claimed to have suffered as a result of the discharge of toxic emissions into local waterways over many years from the Nchanga copper mine operated by the subsidiary. The UK Supreme Court found that there was a real issue to be tried against Vedanta and that it was 'well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the mine may be demonstrable at trial'.[129]

The UK Supreme Court notably identified three possibilities through which group-wide policies could give rise to a parent company duty of care: (1) devising defective or ineffective group-wide policies;[130] (2) 'taking active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries';[131] and (3) holding itself out as exercising a certain degree of supervision and control of its subsidiaries, even if it does not in fact do so.[132] As a result, a parent company may notably incur a duty of care to third parties, such as local communities affected by the operations of its subsidiary, if, as part of its group-wide policies, it exercises a certain degree of supervision and control over the activities of its subsidiary, but also if it holds itself out to exercising it in published materials, even if it does not actually do so in practice. Applying this approach, Lord Briggs stated:

[126] *Barizaa Dooh of Goi v Royal Dutch Shell* (n 125) para 3.2.
[127] Bright (n 113) 221.
[128] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.
[129] ibid 61. See also L Green and D Hamer, 'Corporate Responsibility for Human Rights Violations: UK Supreme Court Allows Zambian Communities to Pursue Civil Suit Against UK Domiciled Parent Company' EJIL: *Talk!* (24 April 2019); D Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' BHRJ 1, 8.
[130] M Croser *et al.*, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 BHRJ (2020) 130, 133.
[131] *Lungowe v Vedanta* (n 128) 53.
[132] ibid, para 53.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

> I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial.

It follows from this decision that both the positive steps undertaken by a parent company through group-wide corporate policies and the failure to take action in accordance with a parent company's public commitments can give rise to a duty of care.[133] The court also specified that the indicia set out in the *Chandler* case were not required to find a duty of care but merely constituted 'particular examples of circumstances in which a duty of care may affect a parent'.[134]

Scholars have warned against the potentially perverse effect of approaches, in which the adoption and implementation of group-wide corporate policies or commitments can generate parent company liability, as it might be a disincentive to companies to devise such policies or commitments, for fear of exposing themselves to legal liability.[135] However, this would be a risky strategy for companies,[136] especially given the growing expectations for companies to undertake HRDD. One way to counteract this risk would be through the adoption of mandatory HRDD legislation with an associated liability regime that would capture the parent company–subsidiary relationship. This would allow discussions to shift from the *existence* of such a duty to the substantive question of the *breach* of a statutory duty. This argument is further developed in the following section on the liability of lead companies beyond the corporate group.

B. Due Diligence and Liability of Lead Companies

Although there has not yet been any decision on the merits, similar discussions are taking place about the liability of lead companies, such as purchasing companies in the supply chain or in relation to other business partners. Indeed, a growing number of cases have sought to go beyond the corporate group to establish liability based on the degree of control, influence or leverage exercised by a lead company over the relevant activities of its business partners that gave rise to the harm.[137] For example, the Canadian courts have examined both the degree of supervision exercised in practice

[133] R McCorquodale, 'Parent Company Can Have a Duty of Care for Environmental and Human Rights Impacts: Vedanta v Lungowe' BHRJ Blog (11 April 2019) <https://www.cambridge.org/core/blog/2019/04/11/parent-companies-can-have-a-duty-of-care-for-environmental-and-human-rights-impacts-vedanta-v-lungowe/>.

[134] *Lungowe v Vedanta* (n 128) 56.

[135] McCorquodale (n 133).

[136] Macchi and Bright (n 66).

[137] C Terwindt *et al.*, 'Value Chain Liability: Pushing the Boundaries of the Common Law?' (2017) 8(3) JETL 261.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

and the degree of supervision that should have been exercised on the basis of a special relationship between a Canadian retailer (Loblaws) and its sub-supplier, in order to decide on the potential liability of the former for harms caused to the employees of the latter.[138] The claimants argued that Loblaws owed them a duty of care because it had control of their workplace, a factory situated in the Rana Plaza building, because of its substantial purchasing power and the corporate social responsibility standards that it promulgated, and because of its knowledge that the workplace was hazardous.[139] However, the court found that the claimants' action could not be certified as a class action as they had no viable cause of action. It found, in particular, that the relationship between a purchaser of goods and the employees of the manufacturer of those goods was not sufficiently close to give rise to a duty of care: 'the association between the foreign garment workers … is not so close that Loblaws may reasonably be said to owe the foreign workers a duty to protect them from injury caused by third parties'.[140]

The court noted, in particular, the contradiction that would result from using the voluntary standards promulgated by the company to recognise the existence of a duty of care, when such a duty would not be recognised in relation to other purchasing companies that had not adopted any such commitment.[141] Indeed it stated, 'it hardly seems fair that Loblaws, who did something by promulgating CSR standards, should be liable for, to quote the Plaintiffs' factum, 'failing to mandate a broader audit to include an electrical, fire, and a building (structural integrity) assessment'. The contradiction that derives from using group-wide policies and public representations to determine the existence of a duty of care owed by the purchasing company echoes the disincentive, noted above in relation to the case law on parent company liability, for companies to conduct HRDD.

In Germany, in the case of *Jabir and Others v KiK*, the claimants similarly attempted to establish a duty of care by a purchasing company in relation to its supply chain.[142] The claim was filed against the German retailer KiK by four Pakistani victims, and relatives of victims, of a fire that occurred in the textile factory of a supplier of KiK in Pakistan, which resulted in the death of 262 workers and left dozens more injured. As the purchaser of 75 per cent of the factory's output, KiK was therefore its main buyer.[143] The claimants argued, *inter alia*, that KiK owed them a direct duty of care to ensure a healthy and safe working environment,[144] on the basis that 'it had controlled factory

[138] *Das v George Weston Limited*, 2017 ONSC 4129. [139] ibid, para 3.
[140] ibid, para 529. [141] ibid, para 533. [142] Terwindt *et al.* (n 137) 276.
[143] F Wesche and M Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*' (2016) 16 HRLR 373; European Center for Constitutional and Human Rights (ECCHR), 'Kik: Paying the Price for Clothing Production in South Asia' <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/>.
[144] Terwindt *et al.* (n 137) 277.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

conditions and assumed responsibility for safety management',[145] and that it had breached that duty of care by failing to do its share to prevent the harm suffered by the factory workers, in breach of its legal obligation to ensure compliance with health and safety standards at the factory. Unfortunately, the German court did not have the opportunity to rule on the merits of the case; it was rejected on the basis that the claims were time-barred under Pakistani law (the law applicable to the dispute).

In Sweden, the Arica Victims KB association, representing 707 Chilean residents, filed a lawsuit against the Swedish mining company Boliden[146] on the basis of the alleged (health-related) harm that the Chileans had suffered as a result of the dumping of 20,000 tons of mining waste in Chile by Promel, a company contracted by Boliden. The claimants argued, in particular, that Boliden owed them a duty of care and that it had breached that duty by failing to ensure that the sludge was appropriately processed by the Chilean contractor.[147] Although the county court of Skellefteå dismissed the claim for lack of causation between the company's actions and the injury suffered by the claimants, the court nonetheless 'found it remarkable and negligent of Boliden to have continued the contractual relationship with Promel after realising any exported waste would end up in an uncovered pile in close proximity to already populated areas, despite knowing such storage conditions would not be accepted at their plant in Sweden',[148] suggesting that Boliden should have exercised its leverage over its contractor or, if was not able to do so, should have considered ending the relationship.[149] On appeal, these issues were not considered, as the claim was rejected for being time-barred.

More recently, a number of home States courts have displayed a certain willingness to hear claims against both parent and lead companies on the basis of alleged business-related human rights and environmental harms. An illustration of this can be found in the Canadian Supreme Court case of *Nevsun Resources Ltd. v Araya*.[150] This case concerned the claims filed by three Eritrean workers against the Canadian company Nevsun Resources Ltd on the basis of alleged breaches of domestic torts and customary international law (including prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity) at a mine in Eritrea owned by Nevsun. The mine was operated by Nevsun's subsidiary who hired a contractor for the construction of the mine. The contractor entered into subcontracts with two companies respectively owned by the Eritrean military and by Eritrea's only political party. By affirming that the claim could proceed to trial in Canadian courts, the Supreme Court acknowledged that a

[145] Wesche and Saage-Maaß (n 143) 373.
[146] A Marx, C Bright and J Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study requested by the European Parliament (March 2019) at 63.
[147] RK Larsen, 'Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?' (2014) 83 NJIL 405.
[148] Marx, Bright and Wouters (n 146) 49.
[149] ibid 22.
[150] *Nevsun Resources Ltd. v Araya,* 220 SCC 5 (CanLII).

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

Canadian company may be held civilly liable for its own acts and omissions in relation to human rights violations committed by the subcontractor of a foreign subsidiary.

However, the willingness from certain home States courts to hear this type of cases is not without limits, as illustrated by the recent case of *Kadie Kalma. v African Minerals Ltd*.[151] In this case, the UK Court of Appeal found, *inter alia*, that the UK company African Minerals did not owe a duty of care to local communities in relation to the harms that they had allegedly suffered at the hands of the Sierra Leonean police during two incidents of unrest connected to the iron ore mine owned and operated by the respondents. Applying the three-stage test set out in the case of *Caparo v Dickman*[152]—foreseeability, proximity and whether such a duty was fair, just and reasonable—the court found that, although the damage was foreseeable, the relationship between the parties was not a close one in so far as the police forces were operationally independent and not 'under the command and control' of the company,[153] and that it would not be fair, just or reasonable to impose 'this potentially wide duty upon the respondents in order to protect a large group of inhabitants of Sierra Leone from their own police force'.[154]

The absence of decisions on the merits of a case to clarify the conditions of liability of lead companies in its supply chain for the harm caused by a contractor creates a great deal of legal uncertainty, which is detrimental both to companies and to victims of corporate human rights abuses.[155] Nevertheless, these cases highlight that lead companies can also exercise a certain degree of control and supervision over their suppliers or (sub) contractors that is not dissimilar to the control exercised by parent companies over their subsidiaries. Recent developments referred to in this article, at both the domestic and the international levels and, in particular, the two Draft Treaties on Business and Human Rights, the French Duty of Vigilance Law and the Swiss Responsible Business Initiative also suggest that the progressive defragmentation of the liability of parent companies is likely to be extended beyond the corporate group.[156]

Cassel has argued that the time was ripe for a judicial recognition of a common law duty of care for companies to exercise due diligence with respect to the business-related human rights impacts of the entities over

[151] *Kadie Kalma v African Minerals Ltd* [2020] EWCA Civ 144.
[152] *Caparo Industries plc v Dickman* [1990] UKHL 2.
[153] *Kadie Kalma* (n 151) 144.
[154] ibid 147.
[155] J Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' report prepared for the Office of the UN High Commissioner for Human Rights (2014) 7.
[156] A Yilmaz Vastardis, 'Vedanta v. Lungowe Symposium: Potential Implications of the UKSC's Decision for Supply Chains Relationships' Opinio Juris Blog (23 April 2019) <http://opiniojuris.org/2019/04/23/vedanta-v-lungowe-symposium-potential-implications-of-the-ukscs-decision-for-supply-chain-relationships/>.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

which they have effective control or leverage.[157] The problem is that the heterogeneity of the criteria that a domestic court could use and the lack of decisions on the merits give rise to legal uncertainty. We argue that the imposition of a statutory duty on lead companies to exercise HRDD may solve these issues. However, such a liability regime should take into account the warnings voiced by Ruggie, who stated that: 'If parent or lead companies fear that they may be held legally liable for any human rights harm anywhere within their value chains, irrespective of the circumstances of their involvement, it would create the perverse incentive to distance themselves from such entities.'[158] In order to address this risk, it is suggested to design a legal duty for lead companies to exercise HRDD based on international standards. In order for such a legal duty to be effective, it would need to be accompanied by legal liability. Civil liability could then be established based on the existence of control by the company over the entity causing the harm. In other words, like in the case of the Swiss Responsible Business Initiative, there could be a presumption that parent and lead companies are liable for the damage caused by entities under their control. In this situation where lead companies exercise control over a supplier or a (sub)contractor, there is no reason to establish a different liability regime from that for parent companies. Objective criteria, such as the market position vis-à-vis the entity causing the harm or the terms of a contract, should therefore be developed to help identifying the existence of such control between companies outside a corporate group. This presumption could be rebutted where lead companies can prove that they could not have prevented the harm caused by a controlled entity despite having conducted the required HRDD. Alternatively, where no control exists, liability would not be presumed and the claimant would need to prove the usual elements required by domestic tort law to show that the company acted negligently.

VI. CONCLUSION

In order to meet their responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights, businesses should exercise human rights due diligence. However, the UN Guiding Principles do not elaborate on the issue of legal liability for failure to meet such responsibility, which causes considerable legal uncertainty. Despite the limited references to legal liability in the UN Guiding Principles, an increasing number of laws and legislative initiatives at the domestic and international levels are attempting to clarify the conditions for the implementation of HRDD through

[157] D Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 BHRJ 179.

[158] Keynote Address by John Ruggie at the Conference 'Business & Human Rights: Towards a Common Agenda for Action' (December 2019) <https://shiftproject.org/resource/john-ruggie-keynote-finland2019/>.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

civil liability mechanisms. This article compares and contrasts some key examples.

A first general finding is that HRDD legislation does not usually refer to the trichotomy of involvements (cause, contribution and direct link) used in the UN Guiding Principle for the determination of liability. While this distinction is important to determine the appropriate action that a company should take to prevent or mitigate adverse human rights impacts, we argue that the distinction between contributing to and being directly linked to an adverse human rights impact is not sufficiently legally defined to draw consequences for the determination of legal liability. When another entity is involved in the harm, the international law texts and domestic legislation presented in this article refer instead to the notion of control as one condition of liability for parent or lead companies. However, this article also shows a lack of coherence in how this notion is used. Some liability mechanisms, such as that in the Second Revised Draft Treaty, refer to legal or factual control over a person or an activity, whereas other mechanisms, such as the French Duty of Vigilance Law, refer to exclusive control over an entity, in the sense of having decision-making power, in particular over the financial and operational policies of said entity. Still others, like the Swiss Responsible Business Initiative, refer to the notion of *economic* control. In this regard, there is a need for harmonisation in the terminology.

A second general remark is that the adoption of mandatory human rights due diligence legislation would alleviate the risk of discouraging companies from conducting HRDD. Domestic case law on parent company liability is gradually crystallising the idea that the non-observance of HRDD requirements may give rise to liability. However, different approaches exist in this respect. Some cases look at the degree of control exercised by the parent company over the decisions of a subsidiary, whilst others focus on the degree of control that should have been exercised, either on the basis of the relationship of proximity between the parties, or on the basis of the legitimate expectations arising out of group-wide policies. These approaches are also increasingly relied on in relation to the case law on liability of lead companies. In this regard, scholars have warned against the potentially perverse effects of approaches that consist in scrutinising the existence of HRDD policies adopted by companies in order to determine the existence of a duty of care, in so far as it may discourage companies from devising such policies or commitments, for fear of exposing themselves to the risk of legal liability. We argue that the adoption of mandatory HRDD legislation, which introduces a legal obligation to exercise HRDD, with an associated civil liability regime would alleviate this risk.

Furthermore, international law instruments and domestic legislation aiming at implementing HRDD through legal liability should not exclude the possibility of establishing liability for the harm caused by the activity of a controlled supplier or (sub)contractor. In this regard, specific liability

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press

provisions that focus exclusively on parent company liability, such as the Swiss counterproposal adopted by the Swiss National Council or Draft Principle 11 of the Draft Principles on the Protection of the Environment in Relation to Armed Conflict, are too narrow. They fail to explain why a company that de facto controls a supplier or a subcontractor should not be held liable on the same grounds. What is missing in this regard are objective criteria, such as the market position of the enterprise vis-à-vis its supplier or the terms of a contract, to establish when a company's control over a business relationship should trigger its liability.

Ultimately, there are several options for designing a liability provision aiming at implementing HRDD. A strict liability for controlled companies with a due diligence defence, as discussed in Switzerland, or a fault-based liability, as in France, may be used and complement each other. We argue that a strict liability for controlling companies with a due diligence defence, provided the notion of control is well defined for both parent and lead companies, should be encouraged. It alleviates the practical difficulties that claimants may face in proving that there was negligent conduct by the company. Any regulation that links HRDD and legal liability, in particular through a due diligence defence, should nonetheless make it clear that conducting due diligence as a tick-box exercise will not be sufficient to avoid liability in the event of harm. This risk may exist if a narrow compliance-orientated understanding of HRDD is adopted. Regulators could overcome this risk by clarifying, in line with the UN Guiding Principles, that a company will not automatically be able to escape liability simply by demonstrating that it formally exercised HRDD. In that sense, HRDD is more than a mere process, and refers to a standard of expected conduct to prevent a human rights impact.

https://doi.org/10.1017/S0020589320000305 Published online by Cambridge University Press