

BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT IN EUROPE

CONNECTING THE DOTS



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About the compendium: The webinar series upon which this compendium is based was convened by Dr Claire Bright, Director of the NOVA Centre on Business, Human Rights and the Environment (NOVA BHRE) and the compendium was edited by Dussu Djabula, Research Assistant at the NOVA BHRE.

About the NOVA BHRE: The NOVA BHRE is an academic centre within the NOVA School of Law which seeks to contribute to fostering responsible business conduct that upholds respect for human rights, decent work and environmental standards throughout their global value chains, thereby also advancing the UN Sustainable Development Goals.

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INTRODUCTORY NOTE



The field of Business and Human Rights has attracted growing attention in recent years as many cases have illustrated that companies can be involved in human rights and environmental harms in their own operations or throughout their global value chains. From issues of child labour, forced labour, poor and unsafe working conditions, to environmental damage and the climate-related impact of corporate activities, all sectors are concerned and all internationally recognised human rights can be affected. Recently, the COVID-19 pandemic has shone the light on the difficulties resulting from unregulated global supply chains and raised questions in terms of the human rights compatibility of business responses to the crisis.

10 years ago, the UN Guiding Principles on Business and Human Rights (UNGPs), developed by Harvard Professor and former UN Special Representative on the issue of human rights and transnational corporations, Professor John Ruggie, following years of extensive consultations, were unanimously adopted by the UN Human Rights Council. One of the major achievements of the UNGPs was to clarify that companies have a responsibility to respect human rights requiring them to take positive steps in order not to infringe on the human rights of others. In particular, the UNGPs set out the policies and processes that companies are expected to adopt in order to know and show that they respect human rights, namely: (1) a policy commitment to meet their responsibility to respect human rights; (2) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (3) processes to enable the remediation of any adverse human rights impacts that they cause or to which they contribute.

Since the adoption of the UNGPs, a growing number of leading companies have started to put in place human rights due diligence processes which are becoming more and more robust. However, studies have shown that, overall, the levels of compliance with human rights due diligence expectations remain low. For example, in the recent study for the European Commission on Due diligence requirements through the supply chain, just over one-third of business respondents indicated that their companies undertake due diligence which takes into account all human rights and environmental impacts, and for the majority of these, the due diligence exercise was limited to first-tier suppliers. In Germany, following the 2020 monitoring process, only 13-17% of the 455 companies surveyed could show that they adequately met their due diligence obligations as contained in the German National Action Plan for Business and Human Rights. In Portugal the first National Enquiry on Responsible Business Conduct revealed that less than one in five companies have due diligence processes in place.

Against this backdrop highlighting the limitations of soft law approaches, important legislative developments towards the hardening of the soft law human rights due diligence expectations are taking place at the international, European and domestic level. In Europe and elsewhere, a growing number of jurisdictions are seeking to mandate companies to take steps in order to ensure human rights, decent work and environmental standards are upheld in their operations and in global value chains, thereby also advancing the UN Sustainable Development Goals. At the EU level, various instruments imposing certain due diligence obligations to companies in relation to their adverse human rights and environmental impacts already exist. In addition, in April 2020, the European Commissioner for Justice, Didier Reynders, announced the future introduction of a legislative initiative on mandatory human rights and environmental due diligence at the EU level.

In light of these legislative developments at the European level, and with the support of the Portuguese Presidency of the Council of the European Union which was held between the 1st of January and the 30th of June 2021, the NOVA Centre on Business, Human Rights and the Environment (NOVA BHRE) organized a series of webinars gathering experts from different fields and representing various groups of stakeholders to discuss key issues on Business, Human Rights and the Environment in Europe.

INTRODUCTORY NOTE

The webinar series was organised in partnership with the [Portuguese Ombudsman](#) (Provedor de Justiça), the [British Institute of International and Comparative Law](#), the [Teaching Business and Human Rights Forum](#), and [NOVA 4 The Globe](#) and was composed of 6 episodes which aimed to 'connect the dots' between corporate due diligence and issues such as civil liability, private international law, contract and company law, the green deal, sustainable finance, and gender equality, in light of the legislative developments at the European level.

The keynote speech was delivered by John Ruggie, introductory speeches were delivered by the Secretary of State for Internationalization of the Portuguese Ministry of Foreign Affairs, Eurico Brilhante Dias, as well as the Secretary of State for Trade, Services and Consumer Protection, João Torres. The various panels featured speakers from 6 continents including members of the UN Working Group on Business and Human Rights, EU policy makers, established scholars, as well as lawyers, business organisations, practitioners, trade-unions, NGOs and asset managers.

The recordings of the webinars are available on the [YouTube channel of the NOVA BHRE](#). The blogs featured in this blog compendium are based on the interventions of the various speakers in the webinar series.

**The Director of the NOVA Centre on Business, Human Rights and the Environment,
Claire Bright**

CORPORATE DUE DILIGENCE AND CIVIL LIABILITY



CORPORATE DUE DILIGENCE AND CIVIL LIABILITY

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TRANSCRIPT OF THE OPENING SPEECH OF THE SECRETARY OF STATE FOR INTERNATIONALISATION, EURICO BRILHANTE DIAS



EURICO BRILHANTE DIAS

About the author: Eurico Brilhante Dias is the Secretary of State for Internationalisation of the Portuguese Ministry of Foreign Affairs. His full biography can be found [here](#).

Professor Mariana França Gouveia,

Professor John Ruggie,

Distinguished Panellists,

Dear participants,

Please allow me to thank you for this opportunity to present some opening remarks on this Webinar Series organized by the Nova Centre on Business, Human Rights and the Environment, in partnership with the Portuguese Ombudsman, the British Institute of International and Comparative Law, the Teaching Business and Human Rights Forum and Nova 4 The Globe.

In the forthcoming months, participants will have the opportunity to engage with experts and exchange views on key issues pertaining to Business, Human Rights and the Environment, and the role of due diligence procedures in the upholding and promotion of adequate standards in these areas.

I would not dwell on the issue of measuring to what extent failure to exercise due diligence leads to liability or to what extent should States provide for a legally binding framework. I am confident this is a topic that will lead to a very substantial debate during this Webinar Series.

Suffice to say that companies play a central role in assessing the potential human rights' impacts of their actions and in conforming their action with these findings, by taking appropriate action to prevent potential adverse human rights impacts or end actual ones.

Companies' due diligence complements States' action as they are usually in the best position to identify, mitigate and account for human rights abuses and environmental damage throughout their global value chains. As member of the Government responsible for trade promotion and investment, I see this as a growing concern of both Portuguese exporting companies and international companies investing in our country. Corporate social responsibility is nowadays perceived as a positive differentiating factor in international markets.

TRANSCRIPT OF THE OPENING SPEECH OF THE SECRETARY OF STATE FOR INTERNATIONALISATION, EURICO BRILHANTE DIAS

But the role of the States and International Organizations such as the UN, OECD or ILO on a more regulatory level cannot be overlooked. It is important to develop common global standards in this area; to provide for coherent approaches; to avoid free-riding or economic competition based on lower human rights standards and thus to levelling the playing field. Ultimately, to ensure adequate human rights', cultural and environmental protection norms enforceability.

The United Nations Guiding Principles on Business and Human Rights are the main reference for our efforts, and I cannot thank enough Professor Ruggie for leading this discussion back in 2011, which culminated in the unanimous adoption of the Guidelines in the Council for Human Rights.

The trio of Presidencies comprising Germany, Portugal and Slovenia is committed to drive forward efforts to achieve an EU-wide coherent implementation of the UNGPs. We have called for the development of a new communication on "Corporate Social Responsibility" which should include an EU action plan on responsible business conduct.

At the same time, we'll seek to actively promote and support, in line with the EU Action Plan for Human Rights and Democracy and the Council Conclusions on Human Rights and decent work on global supply chains, the global efforts to implement the UNGPs. At the national level, work on an Action Plan on the implementation is also underway and should be finalized soon.

This is, indeed, a timely subject. The reinforcement of the protection of Human Rights, including within and by the business sector, remains of the utmost importance to the fulfilment of the goals that the Portuguese Presidency has set out for these six months.

The response to the global pandemic crisis provides us with both a challenge and an opportunity like none before. Now it is time to focus on climate action leadership. To focus on the promotion and the strengthening of the European social model. To promote a rules-based approach to international trade based on fair and sustainable business practices. To generate inclusive economic growth and create opportunities for all. This is why this debate is so important.

I seize this opportunity to thank, once again, the organizers for this timely initiative which will surely provide us with interesting insights on a very important topic for our future.

TRANSCRIPT OF THE KEYNOTE SPEECH DELIVERED BY PROFESSOR JOHN RUGGIE



JOHN RUGGIE

About the author: John Ruggie was a Professor at Harvard Kennedy School of Government. He was also a former UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, as well as the author of the UN Guiding Principles on Business and Human Rights.

Thank you, State Secretary, and thanks to all the sponsors and participants of this seminar series. I have been in this field for a while and I am so pleased by the fact that we are having discussions at levels of detail and possibilities that would have been hard to imagine just 10 years ago, when the Guiding Principles were adopted. I know we have a lot further to go, but every once in a while, I like to remind myself that we have already come a fair way that we can build on.

I want to congratulate Portugal for taking on the EU Presidency at this difficult but also extraordinary promising time. Your delegation has its hands full with the routine business of the EU Presidency, but when you add in the Green Deal, non-financial reporting standards, ESG standards, some of the other things that you mentioned, plus then the subject that I have been asked to address today – mandatory corporate human rights due diligence and liability. I hope you have a big vigorous and young delegation that can take the long hours you will be spending on the challenges that Portugal will have to deal with. I am pleased that you have worked closely with the German Presidency, which I did as well. And I don't know if it would be helpful, but if you want to tell the Slovenians that my grandmother was Slovenian, maybe that will take us somewhere, so feel free to do that!

We have mentioned a whole series of subjects and the interesting thing is that they are so closely related. There is a track in the EU on updating the non-financial reporting standards and then there is the due diligence. They are on separate tracks, but if you're going to have a due diligence system, the reporting system and what you report ought to be very closely related to the due diligence system. So far, they do not seem to be. I very much hope that the Portuguese presidency will endeavour to help realize this potential for a truly transformative moment.

I am supposed to talk about due diligence and liability, and I am sure by now everyone has committed the due diligence principles of the UN Guiding Principles to heart. I will not say very much about them.

I think you know that human rights due diligence is a central concept in the UN Guiding Principles, intended to enable businesses to identify, prevent, mitigate, and account for potential and actual human rights harms that may result not only from their own activities but also through their business relationships. Quite deliberately, we adapted the term 'due diligence' from the world of business because it is a concept that business is familiar with. But we insisted that even though business may be familiar with the concept, there are critical distinctions that have to be borne in mind regarding human rights due diligence.

TRANSCRIPT OF THE KEYNOTE SPEECH DELIVERED BY PROFESSOR JOHN RUGGIE

First of all, human rights due diligence is not a transactional process. You are not looking to buy a piece of property and you want to make sure that there is a title to it. You are undertaking a long-term relationship with people so the focus needs to be on those people, whose lives, activities, and opportunities you can affect. That means that stakeholder engagement is absolutely critical to human rights due diligence. It is one of its distinctive features, differentiating it from conventional due diligence processes.

It is also different from the way many people are thinking about stakeholder capitalism. It is not an attempt to identify ex ante general classes of stakeholders like employees, communities or consumers, whose interests should be taken into account. The Guiding Principles are exactly the opposite. They focus on the people whose human rights a business may affect in a specific context. The idea is to engage and learn from those people how a business may affect their lives. Acting on risks is the key difference between the transactional due diligence practice by business and human rights due diligence.

My third point is that human rights due diligence can be included within a broader enterprise risk management system, as long as these differences are respected and taken into account. As long as the company is not simply looking for financially material risks to themselves, but rather looking for salient risks to people they are impacting, which a traditional risk management system might not catch early enough.

A little sidebar before I get on to liability. If you make a due diligence system mandatory the way in which it is being discussed in Brussels, and if the requirement exists for a serious due diligence process including reporting and the possibility for penalties for non-compliance, it becomes a legal responsibility for the company, and it requires the company, which in turn has implications for the governance of the company. The management has to collect and aggregate the data of risks, failures and successes and report it to the board. And so, through a human rights' due diligence system, you actually affect corporate governance in a much larger sense. You do not have to rewrite directors' duties. Directors ipso facto have an expanded new job. Human rights due diligence properly constructed has that potential.

Not let me turn to liability. The first thing I want to say is that it is obvious that everyone who has been in this field for a long time gets very excited when they hear 'liability' because finally we have something that is concrete and that is legal. But let me begin by saying that legal liability is only a subset of a broader set of accountability mechanisms. Most or many human rights harms will not fall into a liability bucket and will require other ways of treating human rights harm. That may include administrative penalties such as fines, loss of permits or concessions. It can include incentives such as preferential access to state financing or procurement contracts. These should all be part of the accountability part of human rights due diligence and, as I say, many human rights harms that we deal with would be dealt with through such measures. However, we have not really thought very much about them in the discussion of what's going on in Brussels.

The liability that is being discussed in the Brussels initiative involves a standard of conduct not result. That is to say, an actor (a business) is judged by whether a certain standard of conduct has been followed and what the consequences were, but the initial emphasis is on the standard of conduct.

The 27 EU different jurisdictions are going to require guidance on this front. Otherwise, you are not going to have a level playing field because they are all going to figure out their own way to do it. The next thing you know is that corporations are going to go jurisdiction shopping because they are going to be treated better by Hungary than in the Czech Republic or whatever the case may be. This too requires extensive consultations, and, to my knowledge, that has not yet taken place.

TRANSCRIPT OF THE KEYNOTE SPEECH DELIVERED BY PROFESSOR JOHN RUGGIE

What should the guidance include? It should include things like: are human rights governed at the highest level of the company? In other words, is there board oversight of management practices in the area of human rights? There should be, that is point number one. Does the due diligence process include meaningful engagement with stakeholders or their legitimate representatives? Are risks identified and acted on effectively and in a timely manner? Is progress achieved in the standard of conduct recorded and reported and is the company providing an enabling remedy? I bet that in the 27 countries you will not find more than a small handful who have practices that are alike in all these respects. They are going to have to become more alike. Similarly, it may be necessary to provide guidance on where different human rights abuses fall within the various instrumentalities that Member States already employ to impose penalties on corporations. In Common Law systems we have different types of liability ranging from strict to intentional and to negligence. That too has to be considered as part of the provision of penalties.

My next point relates to the question that everybody is asking: for how many levels down does a company have to go? The answer from companies is “we are willing to do tier one”. The answer from others is “we want to include all layers in the supply chain”. To me, that is the wrong question. This is not a simple issue. Unilever has more than a half a million suppliers. Nestlé deals with 560 thousand farmers alone. The degree of oversight required if you have to do it on a layer-by-layer basis in companies of this size may be beyond anyone’s capacity. My sense is that the answer should not be defined by layers in the supply chain. It should be driven by wherever a company’s due diligence identifies salient human rights risks, no matter where. If your human rights due diligence process turns up a risk, whether it is in the 12th layer or the 2nd layer, that is where you go. This should include, in my view, an analysis of – companies do not like to hear this – how lead companies may be contributing to human rights harms through their own business models and practices (by changing orders at the last minute, by changing designs at the last minute, by delaying payments, etc). That should all be part of the due diligence system and the standard of care that we are talking about.

Finally given that we are dealing with a standard of conduct, there should be, in my view, a due diligence defence, but not an automatic safe harbour. The commentary to Guiding Principle 17 notes, and I am quoting, “conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse”. The words “every reasonable step” refer to two things: the quality of the due diligence process and the quality of a company’s response to what it found. Just checking the box is not going to do the trick here, it is a different kind of due diligence system.

As I said at the outset, we still have a long way to go but my goodness we are talking about designing a legal regime that will initially cover 27 countries. And if the decision is made that non-EU companies that have a major business presence in the EU are included, then the EU becomes a surrogate global regulator in this field.

What you are doing is critically important, and I hope you can all make a contribution to getting this right, because we do not get many opportunities like this. Thank you.

THE IMPORTANCE OF CIVIL LIABILITY FOR A CORPORATE HUMAN RIGHTS DUTY



LISE SMIT

About the author: Lise Smit is a Senior Research Fellow at the British Institute of International and Comparative Law and has also worked as a practicing lawyer in South Africa. She also led the study for the European Commission on regulatory options for mandatory human rights and environmental due diligence which formed the basis for the currently ongoing legislative initiative at the EU level.

What is the role of civil liability in the context of the introduction of mandatory human rights and environmental due diligence?

The starting point is the basic principle that where there is a right there is a remedy. So that having a remedy for victims is at the core of anything that calls itself a human rights law.

And because we are talking about remedies for victims against companies – that are private actors – civil liability is the equivalent of remedy in this context, because civil liability relates to the duties between private parties. It is the recognition by society that under certain circumstances private parties have a duty not to cause harm to others, even if there is no contract or consent to this duty.

This duty of care not to cause harm to another person is common to both civil and common law systems, even though it is formulated differently. In principle, it has existed for thousands of years, even since Roman times.

However, despite the duty already existing in law – in broad terms and in certain circumstances – victims particularly in transnational cases have to date been prevented from accessing remedies. This is due to a range of barriers, not only in terms of substantive law failing to expressly define such a duty for these kind of circumstances, but also due to other barriers, including relating to territorial jurisdiction, separate corporate personality, the rules of evidence, and financial and practical hurdles related to human rights and cross-border litigation.

For this reason, in the study which we led for the European Commission on regulatory options for mandatory due diligence as a duty of care, the stakeholders across the board recognised the need for access to remedy as one of the main reasons for the introduction of an EU level law.

Importantly, civil liability is not just about financial compensation. Civil remedy can take different forms. Depending on the legal instrument and the legal framework in the jurisdiction, a range of remedies could be made available once a liability is recognised: Victims facing future or imminent harm could potentially seek preventative orders such as injunctions or interdicts, they could ask the court to stop the company from continuing with ongoing harms, they could ask for remedial orders such as clean-up orders, restitution of land. Some legal systems even allow for supervisory orders, where a court asks the company to do something – and report back in a few months on what it has done.

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We should also remember that victims in question often do not have access to healthcare, social grants or any form of income. It does not help them at all if we say to them: you cannot get any form of remedy from the company, but great news: the company might be required to report on you as a statistic in their next annual report, or great news: consumers might be persuaded not to buy the relevant product, or great news: directors might be facing a fine or even prison sentence. None of this helps the victims at all. They might not even find out about any of it. For them, civil liability is essential. It is the ability to realise their rights in a concrete form.

What would be the anticipated impacts for a mHRDD law that introduces access to civil remedy?

The central feature of the duty of care enquiry is that it is context-specific, and facts-based, determined by what is reasonable or expected in the circumstances, taking into account the specific facts. The specific circumstances under which the private-to-private duty arises can – and should be – defined in law, but the enquiry as to how it applies to the specific facts of each case is – and should be – left to the court.

For example, in Roman law, it was considered that if you burned waste in your back garden on a sunny wind free day, it may be perfectly reasonable, but if you do it on a windy day and the fire jumps to your neighbour's garden, you might be liable. So it all depends on the circumstances and what kind of diligence is due under those circumstances. This is why it lends itself so well to a general duty imposed on business: because it is not prescriptive or tick-box based, and it can apply to the wide range of situations that arise in business on a daily basis. It allows a judge to decide normatively, on the given facts, whether the conduct met the standard that was expected, or not.

Therefore it is never going to be possible – or wise – for a legislator to try to pre-emptively guess or list every single example of what is expected or not expected. Any attempt at delineating the duty too much will only limit the judge's power to decide the reasonableness on the facts. This is a good thing. It allows companies to confidently and effectively prioritise the risks that they know are really out there, rather than those are listed by the legislator. It incentivises them to really prevent these risks, using the resources at their disposal, knowing that they are thereby also meeting the legal duty.

Therefore, if the duty is defined right – and this is a big if – civil liability allows for the company and the rights-holders' objectives to be perfectly aligned: the rights-holders want the company to do absolutely everything in its power to avoid human rights harms, and the company knows that it will effectively need to show that it has done this, if it was challenged in court. In terms of impact, the most important aspect of a legal duty is its equalising power. Poor victims can win against large companies if they have the law on their side.

There are some who argue that civil liability will not have the desired impact because there will only ever be a small handful of these cases brought. However, this is only the tip of the iceberg. As we have seen time and time again in other areas of law: for every one test case against one company, other companies make thousands of hours of phone calls, take advice, implement policies and allocate resources – which could even include budget increases and staff appointments – to avoid making the same mistakes that others made.

Test cases are called test cases for a reason: whether successful or unsuccessful, they test the boundaries of the legal duty and show everyone what was acceptable or not acceptable on those particular facts. Over time, case law can build up clarity and anticipation.

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Civil liability also incentivises genuine stakeholder engagement. As a litigator you know that issuing summons is not the first step in the process, it is actually the beginning of the end. No-one really wants to go to court. Court cases are preceded by months – or often years – of correspondence, complaints, demands and attempts at agreement, and if there is a possible lawsuit waiting at the end, these letters are taken much more seriously than if they are placed in the PR folder. This means that you do not have to end up really suing someone, the mere threat of it usually helps fix the problem.

In terms of the more traditional understanding of regulatory impacts, I should also mention that in the European Commission study there was a preliminary assessment of impacts carried out by LSE Consulting. It found that the enforcement of a duty of care through judicial mechanisms is likely to have a significantly less burdensome impact on costs for States, than a state-based regulatory oversight body, because the courts are already there, and we never expect there to be a floodgate of human rights civil claims, because the practical, financial and other hurdles applicable to these cases will still be there.

The UK Joint Committee has suggested a duty to prevent model based on the UK Bribery Act. In very simple terms, how would this work?

The UK Joint Committee on Human Rights suggested in 2017 that a possible mechanism could be modelled on section 7 of the UK Bribery Act, which creates a duty to prevent bribery coupled with a defence of adequate procedures. We undertook a study which examined what this could look like in the context of business and human rights harms, and presented a draft model provision which is based on a duty to prevent human rights harms, coupled with a due diligence defence.

Unlike the Bribery Act, which creates criminal offences, we focused on the creation of a statutory duty which would lead to civil liability – in other words the ability of victims to sue companies that they allege have failed to meet this duty, and for the company to show that it has carried out the human rights due diligence reasonable in the circumstances. The study also contained a survey of companies regarding their experiences with the UK Bribery Act, which has now been in place for over 10 years. So if anyone is interested I would encourage them to have a look at the study, which is available [here](#).

THE RELATIONSHIP BETWEEN DUE DILIGENCE AND CIVIL LIABILITY IN LEGISLATION



NICOLAS BUENO

About the author: Nicolas Bueno is a Professor of International and European Law at UniDistance Suisse.

If we look at examples of existing legislation or legislative proposals on mandatory human rights and environmental due diligence, how have they connected civil liability to due diligence?

I would like to discuss four examples of legal liability provisions that have been discussed with regard to human rights due diligence. All four examples have in common that they allow affected people to take an active part into accessing their rights. That distinguishes them from other types of legislation that we see such as disclosure or narrower due diligence legislations. I think it is very important to present and contrast examples in these discussions on civil liability to guide policy makers. At the moment, at the EU, none of them is perfect, but I think that through discussion and comparison we might really come to the best option for a civil liability provision.

The first example discussed in an international framework is the second revised Draft Business and Human Rights Treaty in 2020. This revised draft has a very long provision on legal liability in article eight. According to article eight, paragraph one States should introduce – this is only a draft, we all agree on this – the legal liability for human rights abuses that may arise from the activities of business enterprises as well as from their business relationships. Something that is clear is that is not only about the harm caused by the own companies in a corporate group now.

There is another provision that describes a little more into detail how we could establish this legal liability for the harm caused by these business relationships in particular. This provision is in article 8 paragraph 7 of the second revised draft. It says that States should adopt a liability provision or regime for the failure to prevent a business relationship from causing or contributing – this is the vocabulary of the Guiding Principles, “from causing to contributing to” – human rights abuses. Business relationship here is very broadly defined. In article 1 paragraph/5 it is described as including subsidiaries, suppliers, subcontractors, etc. There are some conditions that try to narrow the scope of this liability that should exist with regard to these business relationships. There should be a legal control, factual control or supervision over the person that caused the harm (the business relationship), over the activity that causes the harm or when the companies should have foreseen risks for human rights. It is a very large possibility of establishing liability.

On the other hand, we have a second example at the international level. I just would like to contrast it with you. The International Law Commission looked at this very specific context. We are not exactly in the business and human rights context, but we are in another very specific context of the protection of the environment in relation to armed conflict. The Principles that have been adopted included in the Draft Principle number 10, with regard to corporate due diligence, and Draft Principle number 11 with regard to corporate liability. You see this is much more narrow and shorter. These Draft Principles establish that there should be some liability for companies that caused harm to the environment in the context of an armed conflict through their own activities as well as by a subsidiary acting under de facto control. Here, de facto control is not really defined.

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Regarding other two examples that have been discussed, we have the French Loi de Vigilance. It was the first law that has been adopted that contains a civil liability provision: “a breach of [the vigilance duties] triggers the liability of the offender and its obligation to compensate any damage that the performance of those duties would have prevented.” The goal of the law, or what is interesting about this law, is that it defines the duties of the company in order to be able to establish what is a breach of these duties and whether there is causation with the damage.

The fourth example is the Swiss Responsible Business Initiative that aimed at including a provision in the Constitution that included a due diligence obligation for companies and a liability provision establishing that companies should be not only liable for their own acts and omissions but as well for the damage caused by companies under their control, unless they can prove that they acted with due diligence. This is the idea of due diligence defence that Professor John Ruggie mentioned. I just wanted to provide an overview of discussions that have been taken place so far. I am sure that his discussion will now as well take place at the level of the EU.

Speaking of the Swiss Responsible Business Initiative, the latter was rejected in the vote on the 29th of November 2021 despite obtaining a majority of the popular vote, which in itself is quite significant. Could you give us more details on the content of the text and the vote of the 29th of November 2020?

There was a vote on the 29th of November on this article 101 of the Swiss Constitution and more than 50 percent of the population did accept. It was rejected because it needed a double majority with the cantons and the popular vote in Switzerland. It is remarkable to see that the majority of the population could be in favour of a legal liability that was quite broad and voted on the inclusion of a due diligence duty that was based on the United Nations Guiding Principles on Business and Human Rights. This legal liability provision includes a specific liability for the harm caused by controlled companies. It designed a due diligence defence, meaning that a company that controls another company is liable unless it can prove that it conducted due diligence or that the damage would have occurred even if all due care had been taken. This was the logic of the constitutional provision.

One of the discussions was “what does it mean to control the company?” In this article 101, the notion of control was not very clearly defined as it included not only legal control of the parent company over a subsidiary but also factual or economic control over another company as well. That triggered some discussion at the Parliament, which led to a counter proposal that aimed to narrow a bit the scope of this liability provision by accepting that there should be liability for controlled companies, but only for the damage caused by subsidiaries, with the due diligence defence as well.

Is that really fair to only have this kind of legal liability for the harm that is caused by a controlled subsidiary but not by a controlled supplier, to some extent? This is a discussion that we will have probably as well at the EU level. Finally, another counter proposal has entered into force. This new due diligence law that we will have in Switzerland introduces only due diligence obligations without any legal liability for two areas: child labour and conflict minerals. The due diligence is linked to the United Nations Guiding Principles on Business and Human Rights to some extent. A question that we will have to answer in the future is what we can do with this kind of due diligence laws that introduce very specific standards of conduct for companies without any legal liability provision. Could we use this standard of conduct in a civil liability case? How will that work in practice? The question is not only if we want to have a legal liability provision, but what happens if we do not design a legal liability provision in this kind of legislation?

A RIGHTS-HOLDERS PERSPECTIVE



FREYA DINSHAW

About the author: Freya Dinshaw is a Senior Lawyer at the Human Rights Law Centre where she specialises in business and human rights. She has also worked in private practice both in Australia and in the UK.

You have been calling for a mandatory human rights and environmental due diligence law in Australia. From your perspective, why is civil liability needed in this context, not just in Australia but also elsewhere? What is the experience from existing laws which do not connect civil liability to reporting requirements?

Civil liability is an essential aspect of an mHREDD regime, and is the key feature that makes the regime meaningful for the people whose rights have been abused and for whom there is no easy path to justice.

In my work, I've spoken with people who have lost a loved one or had their community destroyed. When you hear what people have gone through, it's kind of unbelievable that someone's world has fallen apart and yet the company involved can carry on business as usual. But in Australia and elsewhere, our existing laws are not currently designed to give people anywhere to turn when these kind of events happen.

My experience in Australia is that it can be quite difficult in practice to file cases in court for corporate human rights matters. For example, we have fairly strong laws around directors' duties in Australia, coupled with civil and criminal penalties for serious breaches, including jail time. And it is possible that an argument could be made that failing to respect human rights is a breach of the director's duty to act with due care and diligence. However, I have looked quite carefully at this, and even when considering what I thought was a fairly open and shut case which should have reasonable chances of success, what I realized is there are real practical and legal hurdles in bringing this kind of claim to court.

This might be obvious, but what I realised is that our directors' duties laws are not purpose built with human rights matters in mind. They are designed to ensure financial wellbeing, not the wellbeing of people that impacted by companies. So bringing this kind of case is like trying to fit a shoe on someone's hand or a glove onto someone's foot -it could work but it isn't necessarily designed to work like that. And this isn't good enough when you consider the trauma and hardship that people face day to day.

In Australia, we also recently enacted an MSA, which is modelled on the UK and requires companies to report on the steps they are taking to prevent and address modern slavery in their operations and supply chains, specifically including due diligence and remediation. It's very new, and the first round of statements have only just started to be published. However, in terms of legal options, the MSA does not help a worker that is forced to work in slave-like conditions in the supply chain of an Australian company. There is no ability under the MSA to bring action on behalf of overseas workers. The Government agency administering the MSA can't take action on their behalf, or fine companies that do not comply with their obligations. The only hard enforcement mechanism relates to criminal prosecution which predated the MSA- however, to date no Australian companies have been prosecuted in respect of slavery-like practices overseas.

A RIGHTS-HOLDERS PERSPECTIVE

The Australia's law reform commission has recently come out and said that reporting and transparency, without more, may –'be effective at raising awareness among the business sector, these measures are not sufficient to generate meaningful behaviour change in the long run.' With the mHREDD movement, we now have an opportunity to design a law that gives people somewhere to go when their rights are abused, that is purpose built and can drive positive change. Currently people don't have anywhere to go, and that's not really good enough.

How do you envision that the connection between civil liability and due diligence would to be provided for in the Australian framework? Would there be a duty to prevent, as we have seen in the UK legal framework?

In Australia we are very much looking to the experiences of overseas models to see what could work. Traditionally we look to the UK, which is why we've have gone down the MSA path, and this path will be reviewed next year by the Government as part of its 3 year review at which point mHRDD and other reforms should all be on the table. We are also currently looking to the UK to reform our anti-bribery laws, along the duty to prevent lines. We are currently in trade negotiations with the EU, so the direction that the EU takes on mHRDD will be very influential in any model that would be followed here.

From a civil society perspective, of course we are looking to achieve real change in the way business deals with human rights matters. And is the case everywhere, we are keen to avoid a 'tick box' approach to due diligence. For example, the fact that Australian mining giant Rio Tinto could blow up a 46,000 year Aboriginal sacred site in Western Australia against the wishes of Traditional Owners despite being one of the highest ranking mining companies on the Corporate Human Rights Benchmark demonstrates to us that we need to be fairly careful in how standards of due diligence are set and met for the purposes of civil liability.

What would civil liability mean for advising rights-holders? How would it impact on their ability to engage and be taken seriously by companies even before any pleadings are issued? How would it change the landscape and role for civil society pre- and post-civil remedy?

At the heart of business and human rights issues lies a serious power imbalance between companies, and the workers, communities and individuals impacted by them. This is the fundamental problem that civil liability can begin to address. When I speak to people who have suffered harm or injustice that could have been prevented, it is disheartening to have to give advice on how legal options are limited, about the challenges each step brings, about the financial and procedural hurdles involved, and how the whole process may take years.

It's also a huge burden for people to fight these uphill battles. You have to remember that they have already gone through so much before getting to the point of bringing a case. In addition, by speaking out, people can risk danger to themselves and their communities. They need to re-traumatize themselves again and again by speaking to lawyer after lawyer, expert after expert, and having to constantly relive the events. Money can be an issue. There's also a huge personal toll that can accompany these cases, in terms of all the time, energy, emotional stress and the weight of community expectations. For many people, all of this may outweigh the benefits of seeking to hold a company accountable for what they have done when the chances of success are not really in their favour.

So, while this situation remains, to some extent these kind of disputes will always be unfair and uneven. That's why many civil society organisations need to look outside the law to pressure companies into doing the right thing.

A RIGHTS-HOLDERS PERSPECTIVE

Having a clear route to litigation wouldn't solve all these challenges, but it would go a long way towards improving access to justice. It would potentially bring companies to the table when grievances are raised by communities or civil society organizations. In fact, it incentivises companies to meaningfully and sensitively engage on human rights issues even if in order to avoid the drama of going to the courtroom. And it ultimately tells people that their human rights do matter, and there's somewhere they can go when things fall apart.

So allowing people the basic right to go to court when they've suffered a wrong is what will start to slowly shift this situation that we have right now, and I really think it will make a difference.

SOME PRACTICAL INSIGHTS FROM THE FRENCH EXPERIENCE



SOLÈNE SFOGGIA



CHRISTIAN DARGHAM

About the authors:

Christian Dargham is a business ethics and dispute resolution lawyer. He is the head of the disputes department at Norton Rose Fulbright in Paris.

Solène Sfoggia is an Associate at Norton Rose Fulbright where she works as a dispute resolution and business ethics lawyer.

How is the French Law on the duty of vigilance working in terms of connecting due diligence to corporate liability?

(Christian Dargham) First of all, we now have a kind of accountability Professor Ruggie was referring to at the beginning of the session and we have some concrete actions. Indeed, the French Duty of Vigilance Law is a law enacted in March 2017 that makes it mandatory for French companies that have either more than 5000 employees in France or 10 000 employees globally to identify and prevent severe impacts on human rights and fundamental freedoms, health, safety and environment resulting from their activities, as well as from their controlled companies, subcontractors and suppliers' activities. It is very concrete.

The law provides for five monitoring measures to be put in place. The first one is a risk mapping in terms of human rights; the second, a process for regular assessment of the situation of the subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in light of the risks that have been identified in the risk mapping; the third, tailored actions to mitigate risks or prevent severe impacts; the fourth, an alert process (whistleblowing); and fifth, a system for monitoring the implementation of these measures and evaluating their effectiveness. There is a kind of concrete guidelines to what is expected. How is it linked to civil liability? In two ways. First of all, a company that fails to design and to put in place this Vigilance Plan could be put under notice for a three-month period by any stakeholder that has an interest (NGOs, Trade Unions, Public authorities, etc.) to regularize the situation and to put in place the Vigilance Plan. Otherwise, the stakeholder can go to court and ask the company to do so under penalty. The second way is a more classical tort liability: when a company has not put in place the Vigilance Plan and this Plan could have avoided or prevented the damage that happened, the company can be liable. This requires the existence of a link between the lack of putting in place that plan and the damage.

There are very concrete aspects here. I would say perhaps at this stage the most important one is the reputation one. Each time there has been either a dispute or notice that was delivered, it became public. Many French companies are now under pressure in this respect and let me say two words about this. Accountability is absolutely key, but it needs to come with two things. First of all, concrete guidance. I will give you a quick example. In France we had, at the same time than this Vigilance Law, the Law on Anti-corruption. There is a specific dedicated authority in France (the French Anti-corruption Agency) that came with very specific guidelines and recommendations. In this area that is still new to a lot of companies, there is a real need for things that are concrete, for example, how to conduct the risk mapping, which is an exercise that is not easy. The second thing that is absolutely key as well is a kind of fairness in terms of competition. A lot of French companies now say that they have an economic burden (not all of them are approaching this negatively, just to be fair) and their competitors do not. To convince companies to go beyond cosmetic things they also need to feel that everyone is treated the same.

SOME PRACTICAL INSIGHTS FROM THE FRENCH EXPERIENCE

In your practical experience, how could a civil liability enforcement mechanism be valuable for companies, as well in terms of aligning with their responsibilities under the United Nations Guiding Principles on Business and Human Rights?

(Christian Dargham) First of all, there is a need for accountability. Secondly, awareness. This is a new area and when you go into the companies and discuss with people, for example, when conducting a risk assessment, you see that they are not all aware of what human rights are really. For them, human rights are about politics and something very abstract. By raising awareness, you work with them and help them identify their concrete human rights issues and how they could have a remedy to them. The more they discover, the more – in their vast majority – they want to prevent bad things from happening, although sometimes there are some people who are aware and still do not want to make the effort to allocate resources.

The last two points are the carrot and the stick. The carrot is that more people (the stakeholders, the clients, the employees, etc.) wants to work in clean companies, so it is used as a competitive differentiator. There are 4 or 5 French companies that are really active in this area and leaders of the markets. They are aware that things need to be 'clean'. The stick is, of course, the risk of prosecution and having a negative media coverage. I think PWC conducted a study two years ago that showed that CEOs had to leave their position in the vast majority of cases not because they have not met the financial targets, or been inconsistent with the policy of the shareholders, but for ethical issues. This is something that people listen to more carefully than three, four or five years ago.

What does it mean in terms of advising companies and in particular has the kind of advice you give companies changed since the introduction of the French Duty of Vigilance Law?

(Solène Sfoggia) We saw a real change compared to our practice even just three years ago where this topic was often considered as accessory. As Christian said, this Law closely follows the Law on Anticorruption in France that requires companies to have an anti-corruption plan. In light of these two laws, in three years, it is quite striking to see how companies now invest more time and resources to this challenge. They really structure their way to address these issues, meaning that they now have compliance officers, compliance teams, follow-up committees, policies, due diligences processes, etc.

In terms of advice, we see that companies now request our help on a daily basis (to help them on their risk identifications, processes, trainings, follow-ups committees, etc.) but also on specific projects and strategic decisions in terms of human rights impacts, which is an important aspect as well.

In this respect, it is interesting to note that this law did not only impact large companies (the companies subject to this law), but also many small and medium companies. In fact, these small companies and suppliers sometimes cannot work with instructing companies anymore if they do not meet their standards and compliance requirements. As such, even the small companies who are not subject to this law can ask us to help them improving their compliance and human rights policies to be able to continue working with these instructing companies.

In a French case one year and a half ago, the French Court confirmed that an instructing company could terminate its relationships with a supplier that did not meet the compliance standards that was required, without being liable for the sudden termination of established relationships. The Law had very concrete impacts on a large scope of companies, and we can hope that this virtuous circle will keep growing.

CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS VIS-À-VIS LEGAL DUTY OF CARE



FILIP GREGOR

About the author: Filip Gregor is the Head of the Responsible Companies at Frank Bold, a purpose driven law firm, and a member of the Czech OECD National Contact Point. He represents Frank Bold in the Steering Group of the European Coalition for Corporate Justice, which works to develop European framework for human rights and environmental due diligence. Filip co-founded the Purpose of the Corporation Project, a strategic open-source platform for a debate on the role of the corporation in society and the future of corporate governance.

What is the role of civil liability in the context of the introduction of mandatory human rights and environmental due diligence?

Any human rights and environmental due diligence legal obligation will have implications for corporate civil liability, unless such implications are explicitly ruled out. Thus excluding civil liability from a human rights and environmental due diligence legislation would have to be done deliberately and intentionally. Denying civil liability by establishing such artificial barriers would go against the purpose of the United Nations Guiding Principles for Business and Human Rights, which make it very clear that victims must have access to judicial remedy and that it is a duty of the States to redress abuse of human rights through effective policies, legislation, regulations and adjudications, including by removal of barriers to access to remedy.

The importance of civil liability in the context of due diligence legislation is spelled out clearly in the (draft) report of the European Parliament on human rights and environmental due diligence, which states that a main objective is to facilitate access to judicial remedy for harm occurring in global value chains. To this end the report assumes civil liability for contribution to harm across value chain. Victims must have recourse to judicial remedy, and civil liability and tort specifically, is the most appropriate and flexible instruments that is best suited to the business and human rights context. Alternatives such as criminal and administrative liability have their place, but they are too inflexible and rely too much on public authorities to ensure access to remedy for affected people.

How does liability actually work in the context of tort law?

There are different forms of civil liability that vary in terms of the strictness of the liability. The twin concept of corporate responsibility to respect human rights and perform human rights due diligence bear similarity to the duty of care in tort law, which requires a person that is found liable of having acted with negligence thereby causing harm to another, to compensate the victim of such harm. A breach of the corporate responsibility to respect human rights can, therefore, amount to a breach of the duty of care. A corporation (or indeed any person) is liable if several conditions are met, including in particular that it failed to act with a reasonable care, that the harm was foreseeable, and that there was a causation between acts and omissions linked to the human rights due diligence and harm. In this regard, human rights due diligence requirements can help to determine if the corporation has acted with reasonable care, taking into account company's leverage and other aspects elaborated in the UN Guiding Principles.

CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS VIS-À-VIS LEGAL DUTY OF CARE

The corporate due diligence legislation, however, needs to clarify how the requirement of 'causation' should be applied in the context of business relationships.

First, in case a company is able to control another entity, whether by ownership, contractual means or decisive economic influence, the liability of the controlling entity for the harm caused by the controlled one should be of a strict character, as recommended by the European Parliament's (draft) report on human rights and environmental due diligence.

Second, a more nuanced approach is needed where a company tolerates, facilitates, or otherwise contributes to the abuse of human rights or environmental standards by its business partners. This may take a form of not taking appropriate action regarding the well-known or severe impacts by a supplier, thus not following through the human rights due diligence, or proactively contributing to the problem, for example by implementing a purchasing policy and practices that take advantage of insufficient labour rights protection. In these cases, a contribution by failing to carry out human rights due diligence offers a more appropriate test for liability, subject to further criteria.

COMMENTS FROM MULTI-STAKEHOLDERS



LUCIE CHATELAIN

About the author: Lucie Chatelain is an advocacy and litigation officer – Globalization and Human Rights – at Sherpa. Prior to joining Sherpa in 2019, Lucie was an associate in the international arbitration team of a law firm in Paris. She also worked for the United Nations Special Rapporteur on the situation of human rights defenders, while volunteering with several organisations involved in the defence of migrants’ rights.



To react to the panellists’ interventions, I would like to make two points with respect to the French law on the duty of vigilance, this time from the perspective of victims with whom Sherpa has been working: first, with respect to how the corporate duty is linked to civil liability and, second, with respect to the limitations in practice.

The first point has to do with the definition of the corporate duty, and its impact on civil liability.

The French law does not restate the definition of HRDD in the UNGPs. It relies on the notion of “vigilance”, which is a pre-existing concept of French civil liability law. In French law, the violation of a duty of vigilance amounts to negligence and can trigger civil liability.

The 2017 law on the duty of vigilance of parent and instructing companies provides for a specific duty of vigilance for certain companies regarding the activities of their subsidiaries, subcontractors and suppliers. It is partly informed by the notion of HRDD, but the wording is different: it creates an obligation to adopt and effectively implement adequate measures to identify risks and prevent violations. These terms (“effective”; “adequate”) are key to transform soft law into hard law and to give effect to civil liability.

Indeed, if human rights due diligence is just an obligation to adopt internal risk-management processes, then civil liability is pretty much useless. Unfortunately, the duty of vigilance has been interpreted as such by many companies, which consider that they cannot be held liable if they have “made efforts” and published a plan. If we want due diligence to work in hard law, it must be clearly defined as the obligation to take all necessary, adequate and effective measures to ensure that human rights violations and environmental harms do not occur in the company’s value chain.

Second, the fact that the French law on the duty of vigilance merely refers to existing civil liability rules is limiting for victims’ access to remedy.

It is up to the claimant to prove the traditional conditions of civil liability under French law: (1) the lack of vigilance of the company, (2) the harm suffered as a consequence and, (3) how respect for its duty of vigilance could have prevented the harm (causation).

COMMENTS FROM MULTI-STAKEHOLDERS

This liability regime may appear ill-adapted to most violations along the supply chain. In particular, in a lot of cases, it can be very difficult to establish that the damage would not have happened if the company had respected its duty of vigilance. The company will argue that it is not the only responsible, that even if it had respected its duty of vigilance perhaps it would not have used the supplier involved in the violation, but that would not have prevented the damage from occurring.

That is why it seems crucial that the upcoming European legislation provides for a specific liability regime that is adapted to those realities.

In particular, there should be a reversal of the burden of proof, as well as a more nuanced and adequate approach to causation. A company shall be liable, unless it can prove that it took all necessary, adequate and effective measures to ensure that no such violation occurs in its value chain. In addition, this defence shall not be available in case of control over the entity that caused the harm because victims should not bear the consequences of internal corporate structure decisions.

COMMENTS FROM MULTI-STAKEHOLDERS



CHRISTIAN EWERT

About the author: Christian Ewert is the President of Amfori, the leading global business association for open and sustainable trade, bringing together over 2,400 retailers, importers, brands and associations from more than 44 countries. amfori's membership contains organisations of all sizes and all sectors with a combined turnover of more than one trillion euros. Amfori's mission is to enable each of its members to enhance human prosperity, use natural resources responsibly and drive open trade globally.

It is a pleasure to join today's webinar series on due diligence hosted by NOVA with the support of the Portuguese Presidency of the Council of the EU. I am honoured to share our viewpoint with so many experts from across the globe to discuss Human Rights Due Diligence, business responsibility and accountability.

I am here today on behalf of amfori, the leading business association for open and sustainable trade. We represent over 2.400 retailers, importers and brands. Our members come from all corners of the world - from all industries, all sectors and in all sizes. 70% of our members are SMEs. Supporting our members in their journey towards advancing supply chain due diligence is part of amfori's DNA. We do so by providing tools and services for continuous improvement anchored to international normative frameworks like the UNGPs. When it comes to human rights due diligence, our member companies have significantly shaped the principle of voluntary self-commitment over the past 20 years.

Initiatives like the one proposed by the EU for the adoption of a harmonised due diligence legislation have the potential to bring cohesion to scattered efforts and a much needed level-playing field. amfori is very supportive of this process. We have actually been the first business association to openly support action at EU level for the adoption of a comprehensive approach to due diligence, including legislation.

What are the key ingredients to make this legislation both effective and workable?

To be effective, conducting human rights due diligence should become the licence to operate in the EU. That is, all companies operating in the EU should act diligently by identifying risks in their supply chain. This can be achieved by preventing, mitigating, and tracking these risks. Subsequently, companies should then communicate about them and take measures to remediate where appropriate. For that to happen successfully, also a proper enforcement mechanism is essential since it would ensure that all companies play by the same rules.

But how do we make this legislation workable?

Back in April 2020, Commissioner Reynders clearly stated that this regulation will come with liability provisions, hoping that this would ensure effective implementation and set a real level-playing field. What cannot be stressed enough is that the liability dimension should not be seen as a silver bullet.

COMMENTS FROM MULTI-STAKEHOLDERS

What 20 years of experience has taught us is that due diligence is a journey, and not a short or simple one. We believe the EU should design its system in a pragmatic way that encourages businesses to learn continuously from their experience as well as best practice. Most importantly, legislation should create the conditions for business partners to work together. If used properly, amfori's tools and services can help companies demonstrate that they are doing their best to conduct due diligence properly and that they are managing their supply chains in a fair and sustainable manner. This also means that companies that did all that was reasonably expected should be exempted from liability.

Giving companies enough time to implement future legal requirements remains essential. Companies will not be able to implement HRDD overnight, let alone to do so in a perfect fashion. amfori supports a phased approach to implementation, though in a time-bound fashion with clear deadlines in place. The principle of proportionality is enshrined in the UNGPs. This principle should also apply to the degree of responsibility and potential liability in EU legislation. It could then be nuanced depending on whether a business caused, contributed to or was directly linked to adverse human rights impacts. Although it is essential to discuss corporate accountability, we should also acknowledge corporate efforts to respect human rights even in situations where States fail to protect human rights.

Under the 1st pillar of the UNGPs, States would have the obligation to protect human rights, but we know that the situation differs from State to State. If national provisions and internationally recognized standards diverge, companies should be allowed to find a solution. This solution should strike a balance between legal compliance and sustainability concerns.

Last but not least, I cannot stress enough that introducing due diligence obligations and sanctions will not suffice to ensure that supply chains are transformed for the better. What is needed is a smart mix of policy measures, including capacity building, changes in public procurement, cohesive trade policies and incentives for companies that go the extra mile in terms of sustainability. With this range of measures, only then will there be a behavioural change.

Similarly, voluntary commitments should keep on being promoted and incentivised. Businesses initiatives are what has driven sustainability over the past years. The mix of legal provisions and voluntary commitments is what we need to advance sustainability globally, achieve the SDGs and make our people and the planet prosper.

Thank you very much for your attention. It is a pleasure to speak to all of you today.

COMMENTS FROM MULTI-STAKEHOLDERS



CHRISTOPHER PATZ

About the author: Christopher Patz is a Policy Officer at the European Coalition for Corporate Justice (ECCJ), which works to develop a European framework for human rights and environmental due diligence whilst enhancing accessing judicial remedy for victims. Previously he worked on judicial and non-judicial cases against European brands and private auditors for their involvement in factory fires and collapses in South Asia, which he documented in the film *Discount Workers*. He holds an LLB and Graduate Diploma in Legal Practice from the Australian National University.

With the long-awaited passage of the European Parliament's Corporate Due Diligence & Corporate Accountability legislative report the EU co-legislator has, for the second time in six months, officially called on the European Commission to bring forth EU Due Diligence legislation with improvements on access to judicial remedy for victims; specifically civil liability rules for harm occurring in the value chains of EU companies.

The Corporate Due Diligence legislative report duly acknowledges that the right to effective remedy is an internationally recognized human right; that remediation for harm is part of the corporate duty to respect human rights; and that States have an obligation under Pillar III of the UNGPs to enhance access to judicial remedy for victims of corporate abuse (Recital 55). It clearly states an object of the legislation is to provide for a value chain civil liability regime in order to ensure victims' access to remedies (rt 1.3).

It provides for a civil liability regime (Art 19.2) whereby a European company is liable for any harm arising from adverse impacts to human rights, the environment or good governance (e.g. through bribery or corruption) that it; or a company that it controls; has caused or contributed to; by acts or omissions.

In devising this civil liability regime, the report imports definition from the OECD Due Diligence Guidance and EU Competition law, namely the notion of 'contribute to' (Article 3(10)) and "control" (Article 3(9)) respectively. These are not definitions currently commonly used in Member State courts in civil liability cases. By intentionally introducing these specialized terms in the context of civil liability together with their definitions, the parliament is giving a clear indication of what harm scenarios it expects to see covered by future civil liability provisions of the forthcoming EU due diligence directive.

Liability Scenario 1: A company's own causation of harm

The report affirms the status quo in all EU jurisdictions that a company is liable for any harm that it itself has caused.

Liability Scenario 2: A company's own contribution to harm

The report provides that a company is liable for any harm that it has contributed to in its value chain.

COMMENT FROM MULTI-STAKEHOLDERS

The notion of contribution to harm originally derives from the UNGPs which distinguishes it from causing harm. The parliamentary report uses the OECD definition, which covers activities of a company that, together with those of another entity, cause harm; or activities of a company that facilitate or incentivize another entity to cause harm. The report therefore foresees a company will be liable for harm caused by any other entities in the value chain that it itself has facilitated or incentivized. The mere existence of a business relationship, or activities which create the general conditions in which harm is made possible, is not enough for 'contribution' to harm. Rather the act or omission in question should "substantially increase" the risk of harm by another entity. Factors to be taken into account include (i) the degree to which the company's activity increased the risk of the harm occurring; (ii) the foreseeability of the harm; (iii) degree to which the company actually mitigated the harm by the other entity.

A company's predatory purchasing policies that put severe pressure on supplier factories are acts that substantially increase the risk of harm to workers by a factory's management; such policies facilitate and incentivize harm to workers in the form of gross (often unpaid) overtime and resulting workplace accidents (a foreseeable and well-documented result of said purchasing practices), and can thus amount to contribution. An OHCHR report finds that changing product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices can push suppliers to breach labour standards in order to deliver.

Likewise, an omission to adequately monitor a supplier factory for proper fire safety measures would substantially increase the risk of harm to workers; facilitating and incentivizing lax workplace fire preparation by the factory management. That fire would result as a result of the omission is, in various sectors in many countries, sadly and totally foreseeable.

Liability Scenario 3: Liability for harmed caused by a controlled entity

The following two scenarios may be conceived of as a vicarious liability regime, whereby one entity is deemed responsible for the harm of another, similar to that of an employer/employee relationship in law.

"Control" is defined as the possibility of one company to exercise decisive influence over another, in particular by ownership of the latter's assets; or contracts or other means that confer decisive influence on the latter's decision-making bodies and processes, with regard to all factual circumstances. The definition derives from EU competition law and would easily cover wholly or majority-owned subsidiaries; whereas for minority-owned subsidiaries this would depend more heavily on the facts. Noteworthy perhaps in light of recent judicial developments is that Royal Dutch Shell owned only 30% of its Nigerian subsidiary; and that in emerging UK jurisprudence 'control' is not understood as strictly as a determining factor in establishing a duty of care.

The parliament's report provides that prima facie evidence of 'control' by victim claimants will shift the evidentiary burden onto the company in order for it to then produce evidence in its own possession to the contrary (recital 53). By virtue of the report's provisions, a European oil company which either controls or has the possibility to control a foreign subsidiary could be liable for harm the result of oil spills caused by the foreign subsidiaries' operations.

COMMENT FROM MULTI-STAKEHOLDERS

Liability Scenario 4: Liability for a controlled company's contribution to harm in the value chain

A company will also be liable for the harm that has been contributed to by a company that it controls or has the possibility to control. That is to say, an EU company will be liable for any harm by a third party that its foreign subsidiary either facilitated or incentivized, by way of act or omission. As above, the controlled company's acts (e.g. purchasing practices) or omissions (failure to adequately or regularly guarantee factory fire safety measures) must substantially increase the risk of the harm by the third entity; said harm ought also be foreseeable.

According to the report's provisions, a European mining company could therefore be liable for the harm perpetrated by a local security company employed by its foreign subsidiary. The foreign subsidiary's omission/failure to take adequate measures to ensure that the security force does not commit acts of (sexualized-)violence, substantially increased the risk of the harm to local indigenous communities by the latter. Again, sadly and unfortunately such harm is foreseeable in various countries all over the world.

Each of these case scenarios has been argued before courts by victims and each has failed due to well-know barriers to justice. In fact of roughly 35 cases brought in the last decade against EU companies in EU courts for human rights harms in third countries, just one civil liability case has succeeded on the merits. It is the reason we have pillar III of the UNGPs and it is the reason these provisions have been drafted by the JURI committee and adopted by the European Parliament; in order to correct this dramatic State failure. On the basis of the report's provisions, all of these case scenarios are intended to be covered. The Commission's proposal must of course ensure that to be the case.

In response to the above cases, the report makes clear that having a due diligence strategy in place and conducting due diligence will not per se automatically absolve companies from liability (Art. 19.1; Recital 52). It nonetheless provides companies the opportunity to defend themselves from liability if they can prove all due care to prevent the harm was taken, or that the harm would have occurred despite them having taken all due care (Art. 19.4). Obviously each case would be highly fact sensitive and require various determination by judges.

Finally, it also provides that these provisions should apply in cases brought by foreign claimants by virtue of an overriding mandatory provision, regardless of the applicable law (i.e. the law of where the harm occurred). Given that the stated objective of the legislation is to enhance access to remedies for victims (Art 1.3) it would be contrary to the objective of the report if the effect was to displace the application of foreign law where in fact that would provide a better remedy for victims. This question implies that future amendments to Rome II Regulation on applicable law will be necessary. The report also requires that statutes of limitations do not represent a barrier to bringing transnational corporate abuse claims (Art ; recital 54); as has tragically been the case in numerous recent cases.

CONCLUDING REMARKS



SARA PACHECO

About the author: Sara Pacheco graduated from NOVA School of Law. She is a Research Assistant at the Nova Centre for Business, Human Rights and the Environment and also integrates the Green Lab's team that is cooperating with the Portuguese Environment Agency in the context of the Portuguese Presidency of the European Union Council. Her main areas of interest are Human Rights and Sustainability.

The webinar series on Business, Human Rights and the Environment in Europe, organized by the Nova Centre for Business, Human Rights and the Environment in collaboration with the Portuguese Presidency of the Council of the European Union, kicked off on the 28th of January of 2021. In the first episode, the spotlight was on the topic of Corporate Due Diligence and Civil Liability.

The opening address was delivered by the Secretary of State for Internationalisation, Eurico Brilhante Dias, who stated that Corporate Social Responsibility is nowadays perceived as a positive differentiating factor in international markets and that due diligence processes are a growing concern of both Portuguese exporting companies and international companies investing in Portugal, who desire to have sustainable business practices when trading and investing abroad.

The Secretary of State also emphasized that the response to the global pandemic provides both a challenge and an opportunity like none before, and that the trio of presidencies comprising Germany, Portugal and Slovenia is committed to drive forward efforts to achieve an EU wide current implementation of the United Nations Guiding Principles on Business and Human Rights (hereinafter the UNGPs) and an Action Plan on Responsible Business Conduct. On the national level, he mentioned that the Portuguese Action Plan is also underway, and it should be finalized soon.

The keynote speech was delivered by the former UN Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises and author of the UNGPs, John Ruggie. He noted that, although we have come a fair way since the adoption of the UNGPs, there is still a long way to go, and highlighted the differences between human rights due diligence and the concept of 'due diligence' that businesses have been traditionally familiar with. Moreover, he reinforced, inter alia, that the central feature of the UNGPs - the human rights due diligence process - should not be focused on the financially material risks, but on the environment and the people whose human rights a business may affect. He also pointed out that a mandatory due diligence system would have implications for companies' governance without having to 'rewrite directors' duties'.

CONCLUDING REMARKS

Turning to the issue of civil liability, John Ruggie stressed that the liability being discussed at the European level involves a standard of care against which a company will be judged, and underlined the need for common guidance in this respect to ensure uniformity across the 27 Member States. He also discussed the question relating to how far down the value chain does a company have to go and emphasized that this was actually the wrong question to ask. He explained that legal liability should not be defined by layers of the supply chain, but should focus instead on salient human rights risks that require action, regardless of which layer of the supply chain they have been identified in. He also expressed the need for a due diligence difference as opposed to an automatic safe harbour. Finally, he stated that if the upcoming EU-level regulation was to cover non-EU companies having a major business presence in the EU, the EU would become a 'surrogate global regulator in this field'.

Lise Smit, Senior Research Fellow at the British Institute of International and Comparative Law, reminded the basic principle of 'where there is a right there is a remedy', which calls for civil liability in the context of corporate human rights harms. She highlighted the roman roots of the duty of care not to cause harm to others and the fact that it has always been highly context-specific and facts-based, requiring the duty to be analysed in light of what was reasonable to expect in the specific circumstances. As such, she affirmed that it would not be wise for the legislator to delineate the corporate duty of care too much by trying to pre-emptively list every example of what is expected.

Filip Gregor, Head of the Responsible Companies at Frank Bold, emphasized the importance of civil liability in the context of the introduction of mandatory human rights and environmental due diligence to ensure access to remedy in line with the UNGPs. He explained that, in the context of tort law, human rights due diligence 'can help determine if a company has acted with reasonable care'. However, he underlined that the upcoming European legislation will need to clarify how the requirement of 'causation' should be applied in the framework of business relationships.

Nicolas Bueno, Postdoctoral Researcher in International Human Rights Law, presented four examples of civil liability provisions in existing legislation or legislative proposals on mandatory human rights and environmental due diligence that allow the victims to really take an active part into accessing their rights: (i) the Second revised Draft Business and Human Rights Treaty, (ii) the International Law Commission's Draft Principles on the Protection of the Environment in Relation to Armed Conflict, (iii) the French Duty of Vigilance Law, and (iv) the Swiss Responsible Business Initiative, which was rejected in the vote of November 2020 in spite of obtaining a popular majority. In this respect, he affirmed that it was 'remarkable to see that the majority of the population could be in favour of a legal liability that was quite broad'.

Freya Dinshaw, Senior Lawyer at the Human Rights Law Centre, noted that civil liability is a crucial aspect of a mandatory human rights due diligence regime and is essential for those whose human rights have been harmed by corporate activity. She emphasized, from a practical perspective, the serious power imbalance between companies, on the one hand, and the rights-holders (workers, individuals and communities), on the other, and affirmed that a clear route to litigation 'would go a long way towards improving access to justice.' She also highlighted the shortcomings of the Australian Modern Slavery Act in terms of access to remedy for the victims.

CONCLUDING REMARKS

Building up on his practical experience with the French Duty of Vigilance Law, Christian Dargham, Head of the Disputes Department at Norton Rose Fulbright in Paris, explained that a civil liability mechanism is very valuable for companies to address their responsibilities under the UNGPs and to become aware that human rights issues call for concrete action. He underlined that the civil liability arising from the breach of the corporate responsibility to respect human rights (that can amount to a breach of the duty of care) is the most appropriate way for the rights-holders to realize their rights in a concrete form, in the business and human rights context.

Solène Sfoggia, Associate at Norton Rose Fulbright, pointed out that a real change has taken place after the introduction of the French Duty of Vigilance Law whereby companies started to invest more time and resources on business and human rights. She noted that the law impacted not only large companies (the companies who are subjected to the law), but also many smaller companies and suppliers that had to meet certain standards in order to keep their business relationships with the instructing companies.

Based on the lessons learnt from the experience with the French Duty of Vigilance Law, Lucie Chatelain, Advocacy and Litigation officer at Sherpa, suggested that there should be a reversal of the burden of proof: a company should be considered liable in case of business-related human rights harms, unless it can prove that it took all the necessary, adequate, and effective measures to ensure that no such violation occurred in its value chain.

Christian Ewert, President of Amfori, a leading global business association for open and sustainable trade, affirmed that conducting human rights due diligence should become the licence to operate in the EU. He reinforced the importance of an adequate enforcement mechanism to ensure that 'all companies play by the same rules'. Nevertheless, he stressed that legal liability should not be seen as a silver bullet and highlighted the importance of a smart mix of measures, including capacity building, changes in trade policies and incentives, as well as in public procurement.

Christopher Patz, Policy Officer at the European Coalition for Corporate Justice, emphasized that with the adoption of the European Parliament's Corporate Due Diligence & Corporate Accountability legislative report, the European Commission has officially been called to put forward a mandatory human rights and environmental due diligence legislation at the EU level that contains improvements on access to judicial remedy for victims through civil liability provisions for harms occurring in the value chains of EU companies.

Isabelle Schömann, Confederate Secretary at the European Trade Union Confederation, pointed out that there is clear evidence that the mandatory initiative from the Commission arose because voluntary actions and reporting have not incentivized companies to act proactively enough.

CORPORATE DUE DILIGENCE AND PRIVATE INTERNATIONAL LAW



CORPORATE DUE DILIGENCE AND PRIVATE INTERNATIONAL LAW

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SOME CONSIDERATIONS FROM AN ACCESS TO REMEDY PERSPECTIVE



CLAIRE BRIGHT

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Under international law, every breach gives rise to an obligation to provide remedy. The notion of ‘rights’ itself is meaningless without a mechanism to ensure access to effective remedy when breaches have occurred. The UN Guiding Principles on Business and Human Rights (UNGPs) – which were unanimously endorsed by the UN Human Rights Council in 2011, and represent a globally recognized and authoritative framework in the field – highlight that the duty to provide access to remedy is part of the State’s duty to protect human rights.

More specifically, States are required to ensure that when business-related human rights abuses ‘occur within their territory and/or jurisdiction those affected have access to effective remedy’(1). Guiding Principle 26 clarifies that:

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. Yet numerous studies have documented the many obstacles to accessing remedy faced by individuals whose human rights have been adversely affected by business-related activities.

A 2019 study for the European Parliament on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries co-authored by the author of this blog post mapped out relevant legal proceedings brought in Europe against EU-based companies accused of human rights harms in third countries over the past decade(2). The study analysed 35 cases in total, out of which:

- 13 cases were dismissed;
- 4 cases were settled out-of-court;
- 17 were still ongoing;
- Only 1 led to a positive judicial outcome on the merits for the claimants.

The latter was a case on corporate criminal liability which involved the supply of weapons by a CEO of a company to the Charles Taylors’ government in Liberia in exchange for timber concessions(3). Since the study was published, there has now been the first positive judicial outcome for the claimants on the merits in a civil liability case against a corporation in the ruling against Shell discussed below.

SOME CONSIDERATIONS FROM A ACCESS TO REMEDY PERSPECTIVE

Numerous hurdles to accessing legal remedy faced by claimants were identified in the study which grouped them into 2 categories: the practical and procedural obstacles and the legal obstacles. Amongst the recurrent legal barriers identified, several were linked to the private international law rules (jurisdictional issues and applicable law issues), which in their current form, are ill-adapted to the specificities of crossborder civil claims arising out of alleged corporate-related human rights harms. These will be analysed in turn.

1. Jurisdictional issues

Two cases in particular will be referred to here to illustrate the jurisdictional issues that arise out of Brussels I Recast Regulation: the Shell case and the Vedanta case.

The Vedanta case involved civil proceedings brought in the UK by 1,826 Zambian citizens against both the UK parent company Vedanta and its Zambian subsidiary. They were claiming reparation for the damage that they allegedly suffered as a result of the toxic emissions from the Copper Mine in Zambia which was owned and operated by the Zambian subsidiary. In this case, the English court asserted its jurisdiction over the parent company on the basis of Article 4.1 of the Brussels I Recast, combined with Article 63 Regulation since Vedanta is domiciled in the UK.

Article 4.1 provides in this respect that: Subject to this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

And Article 63.1 specifies that: For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat (b) Central administration; or (c) Principal place of business.

However, the application of the Brussels I Recast Regulation is generally limited to EU-domiciled defendants, meaning that it is the domestic law of the forum which determines residual jurisdiction over non-EU entities. More concretely, this entails that, as against the Zambian subsidiary, the claimants had to rely on English domestic rules, and in particular Paragraph 3.1(3) of Practice Direction 6B which reads as follows:

Service out of the jurisdiction where permission is required

3.1. The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where -
[...]

3) A claim is made against a person ("the defendant" on whom the claim form has been or will be served (otherwise than in reliance of this paragraph) and -

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) The claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

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The judgment was very significant in several respects, which have been discussed elsewhere, but it is worth pointing out that it took 4 years just to reach a decision on the jurisdictional issues. In the Supreme Court, Lord Briggs commented on the disproportionate way in which the jurisdictional issues have been litigated, the voluminous pleadings, and the need to avoid a mini trial at such an early stage of the legal proceedings, before the normal processes of discovery and interrogatories have been completed. Lord Briggs quoted Lord Neuberger of Abbotsbury who stated in the case of *VTB Capital plc v. Nutritek International Corp* (4): It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

This warning is particularly relevant in the field of business-related corporate human rights claims which are often characterised by significant imbalances of powers between the parties, as acknowledged by Commentary to Guiding Principle 26 of the UNGPs. Similar jurisdictional challenges were also faced by the claimants in the Shell cases. In this respect, proceedings were filed both in the UK and in the Netherlands in relation to oil spills from pipelines which resulted in environmental damage and affected the lives and livelihoods of communities in the Niger Delta. In the Netherlands, four separate proceedings were filed by 4 Nigerian farmers against the parent company Royal Dutch Shell (headquartered in the Netherlands) and its Nigerian subsidiary which was operating the pipelines. In parallel, claims were filed on behalf of two different Nigerian communities (Ogali and Bille) in the UK where Shell has its registered office. Even though the respective fora eventually allowed the claims to proceed on the jurisdictional grounds, the discussions on whether the jurisdiction of the English and the Dutch courts respectively should extend to cover the connected claims against the foreign subsidiaries were lengthy, created unnecessary delays and added to legal costs.

Against this backdrop, regulatory reform is needed in order to shorten and simplify proceedings and ensure effective access to remedy. In our above-mentioned study for the European Parliament (which was referred to in the report of the JURI committee with recommendations to the Commission on corporate due diligence and corporate accountability published on the 11th of February 2021) we had made a number of recommendations to the European institutions to strengthen the jurisdiction of Member States courts over extraterritorial cases, and in particular suggested that (5):

- The European Commission should adopt a proposal to revise the Brussels I Recast Regulation and include in particular:
 - a provision extending the jurisdiction of the courts of the EU Member State where the EU parent company is domiciled to the claims over its foreign subsidiary or business partners when the claims are so closely connected that it is expedient to hear and determine them together.
 - a provision establishing a forum necessitatis on the basis of which a courts of an EU Member State may, on an exceptional basis, hear a case brought before it when the right to a fair trial or access to justice so requires, and the dispute has sufficient connection with the EU Member State of the court seized.

Although the report of the JURI committee include the proposition to revise the Brussels I Recast Regulation in order to insert a forum necessitatis (6), it regrettably did not provide for a revision of the Regulation to allow for connected claims to be heard before the same forum which us a missed opportunity from an access to remedy perspective.

SOME CONSIDERATIONS FROM A ACCESS TO REMEDY PERSPECTIVE

2. Applicable law issues

Several cases have shown that the applicable law can also constitute a significant barrier to accessing legal remedies for victims of human rights abuses allegedly carried out by EU companies in third countries. Under Article 4.1 of the Rome II Regulation, the law applicable to tort claims is the law of the place where the damage occurred (*lex loci delicti*). The article reads that: Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

In a case like the Shell case mentioned above, the conflict of law rules under the Rome I Regulation would therefore point to Nigerian law as the applicable law. In first instance, the District Court of The Hague had originally dismissed the claims against the parent company on the grounds that under the applicable law – Nigerian law – there was no general duty of care of parent companies to prevent their subsidiaries from inflicting damage on others through their business operations **(7)**. This difficulty was circumvented in that particular case by the Court of Appeal of The Hague which considered that English common law cases have persuasive authority in Nigerian law, as a common law system. However, the case highlights the limitations of the Rome II approach, which points to the host State law (as the law of the country in which the damage occurs) since the effect of applying such law is often to deprive the victims of access to substantive justice and legal remedies. At the moment, the possibility for the forum to apply its own law is confined to two mechanisms of exception under the Rome I Regulation – the overriding mandatory provisions and the public policy exception – which have not been used so far in practice in this type of claims.

Against this backdrop, in our study for the European Parliament, we had also made a number of recommendations to the European institutions to strengthen access to Member State law as the applicable law in this type of cases, and in particular suggested that **(8)**:

- The Council should encourage EU Member States to make use of the overriding mandatory provisions and the public policy exception in the context of business-related human rights claims, in particular when the law of the host state is not protective enough of the human rights of the victims.
- The European Commission should adopt a proposal to revise the Rome II Regulation and include in particular a choice-of-law provision specific to business-related human rights claims against EU companies that would allow the claimant a choice between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled, as the applicable law.

The latest proposal to include a specific choice of law provision in favour of the claimant for business-related human rights claims was included in the report of the JURI committee **(9)**. From an access to remedy perspective, this provision would be particularly important in order to ensure access to substantive justice for the claimants. Indeed, the fact that the Rome I Regulation does not expressly provide for the possibility for the home State law to be applicable in this sort of cases is particularly problematic given that very few countries in the world have actually adopted legislation requiring companies to have processes in place in order to fulfil their responsibility to respect human rights. France was the first one to do so with the introduction of the French Duty of Vigilance Law in 2017, the Netherlands followed suit in 2019, but only in relation to issues of child labour. At the EU level, if the EU adopts a legislation on mandatory human rights and environmental due diligence, it will be a pioneer and it will be necessary to ensure that those higher standards are upheld not only in relation to the harms which occur in Europe but also in relation to the business-related harms of EU companies outside of Europe.

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Footnotes:

1. UNGPs, Guiding Principle 25.
2. 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, February 2019, <[www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>.
3. *Ibid.*, p. 28.
4. *VTB Capital plc v. Nutritek International Corp* [2013] 2 AC 337.
5. 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 DROI committee of the European Parliament, February 2019, p.110, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)
6. In particular, it proposed to insert a new Article 26a according to which 'Regarding business-related civil claims on human rights violations within the value chain of a company domiciled in the Union or operating in the Union within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised.'
7. District Court of The Hague, *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050 / HA ZA 09-1580, January 30, 2013, para. 4.26.
8. A. Marx, C. Bright and J. Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', *op. cit.*, p.112.
9. It proposed to insert a new Article 6a entitled 'Business and Human Rights Claims' in the Rome I Regulation according to which: 'In the context of business-related civil claims for human rights violations within the value chain of an undertaking domiciled in a Member State of the Union or operating in the Union within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.'

CHANGE FOR CHANGE'S SAKE? A SUCCINCT PRIMER ON THE EUROPEAN PARLIAMENT'S PROPOSAL TO AMEND BRUSSELS IA WITH A VIEW TO BOOSTING CORPORATE DUE DILIGENCE



GEERT VAN CALSTER

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My fellow commentators' have excellently reviewed recent cases involving corporate due diligence litigation in the Member States. They show an often frustrating, and always long and extensive discussion in national courts about the very jurisdictional basis on which one may take corporations in the EU to court on the basis of human rights violations and general due diligence violations across the value chain globally. This includes the extent to which one could pull the subsidiaries and/or other parties of the value chain into the courts of the Member States.

What the proposed amendments to the Brussels IA Regulation – the jurisdictional basis on which we are focusing for this issue – suggest is that we effectively do two things: prima facie at least expand the jurisdictional basis in Article 8 of the Brussels Ia Regulation; and introduce what is called a forum necessitatis in Article 6 of the Brussels Ia Regulation. I have copied the relevant proposals at the bottom of this post.

As a practitioner who is involved in some of these cases, in the Courts of England and Wales, and in the Courts of the low countries as well, I tend to look at these proposed changes not only from a scholarly point of view, but also from the point of view as to whether they will change anything in practise or indeed confuse. A general point of attention in my analysis on these issues, is that, in my experience, one has to be cautious in introducing – however well-intended they may be – new rules into either jurisdictional basis or applicable law. One has to be sure that it is very clear what the conditions of application are. Otherwise one simply inserts an extra layer of complexity, in an area in which there is already very long-winded jurisdictional battles, as has been pointed out in the Netherlands, but also in England and Wales.

If one looks with this view at the proposal of the report of the JURI committee to introduce a new paragraph 5 of Article 8 in the Brussels I Recast Regulation, it suggests that an undertaking domiciled in a Member-State, presumably over and above its place of domicile – the place of domicile is something which Article 4 of the Regulation would already guarantee as a place where one could be sued – could also be sued in the Member-State where it 'operates', but only when the damage caused in a third country can be 'imputed' to its subsidiary. That is the link that is being made between the newly proposed Directive on corporate due diligence and the Brussels IA Article 8(5) "anchor jurisdiction", as it is often called.

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Perhaps I do not see clearly what the idea is here, but I cannot see what this actually adds to what we already have at the moment. At the moment, as suggested, one can sue any undertaking in the EU on the basis of Article 4 of Brussels Ia for claims that relate to almost anything. At the jurisdictional level it is in principle really straightforward to sue an EU-based corporation at its place of domicile. This does not of course exclude a Member State court from summarily dismissing the case on the basis of the merits of the claim.

It is not made clear what this 'operation in other Member States' would entail. Would it be simply that one offers one services and goods in those other Member-States, would one have to have some sort of establishment in that Member State? None of that is made very clear.

I also really do not think that it would add much in substance to the possibility which claimants already have. In the cases which have been discussed by my fellow speakers, for instance, I do not believe that in the Shell case in the Netherlands it would have been very useful to sue the company in Sweden, in Croatia, Portugal or indeed any other of the 28 Member States. Hence: what possibility are we actually adding?

Importantly, the proposal as suggested does not clarify anything as to what in my experience is one of the most important stumbling blocks at the moment in suing mother-corporations for damage occurring outside of the EU, which are the infamous Articles 33 and 34 of the Brussels Ia Regulation.

For those who are not familiar with Private International Law, Articles 33 and 34 allow a Court in a Member-State to stay a case if there is a related proceeding outside of the EU, in the event what is called the sound administration of justice would justify that the case in the EU be stayed. In other words, there is a proceeding pending outside of the EU and the court in the EU MS can say that, as the proceeding is so closely related to what we are discussing here, the sound administration of justice demands that I stay my case and no longer discuss it.

Those articles at the moment are being litigated mostly in England (as several cases brought pre-Brexit continue to have importance), famously, for example in "Municipio de Mariana", a case concerning one of the dam collapses in Brazil. In that case the judge in England, at the moment, is putting quite some obstacles in the way to sue among others a mother corporation which has its headquarters in London, because, as suggested by defendants at least, there are related pending proceedings in Brazil. This case is now at the Court of Appeal for consideration of whether we can appeal among others the A33-34 issue. It illustrates how Articles 33 and 34, unless there is some clarification, or unless further direction is given to judges on how to apply these provision, may be a formidable stumbling block in seeking 'global justice' in the EU. I have a paper forthcoming on the Articles and the early case-law on them.

I do not think an Article like Article 8(5) actually adds much at all. In the Parliament's report Articles 33 and 34 are not being discussed. Moreover, one sees at the very last bit of this proposed insertion that there is some kind of merits review: Article 8(5)'s proposed additional jurisdictional ground can only be triggered when this particular behaviour can be "imputed to a subsidiary or another undertaking". There needs to be some kind of merits review in the Article 8(5) jurisdictional anchor. I believe this would not add much to assist with a speedy completion of this jurisdictional exercise.

Turning now to the proposal of the report of the JURI committee to introduce a new Article 26a providing for a forum necessitatis.

CHANGE FOR CHANGE'S SAKE? A SUCCINCT PRIMER ON THE EUROPEAN PARLIAMENT'S PROPOSAL TO AMEND BRUSSELS IA WITH A VIEW TO BOOSTING CORPORATE DUE DILIGENCE

The forum necessitatis idea, effectively means using courts in the EU as sort of a court of last resort, if for all sorts of reasons there is a problem of access to justice in the courts outside of the EU. The conditions that are attached and included at the very end of the provision are that there be a sufficient connection with the Member-State or the Court seized. Here as well I think there are similar concerns as to those Catherine Kessedjian pointed out in her analysis.

This forum necessitatis clearly would add an extra, a completely new forum that would be added to the arsenal of Brussels Ia. Such proposal was also made by the European Commission when they reviewed the main jurisdictional rules of Brussels I in 2012. It was in fact the European Parliament that rejected these proposals, not because they do not believe in the sound administration of justice for business and human rights and other cases, but because they pointed out that the more the EU expands its jurisdictional rules to cases that have less of an immediate link with the European Union, the more, of course, it is likely to be confronted with existing proceedings elsewhere and with policy concerns, about the EU interfering in issues which are not necessarily of their business.

It is therefore somewhat surprising that, despite there not having been changes at the international level in terms of international consensus on jurisdiction, we see this is being proposed again, although by the Parliament this time, and again without any detail as to what that 'sufficient connection' might mean. Lean and mean jurisdictional rules assist with speedy justice. Protracted lines of enquiry over vague or sometimes even redundant civil procedure provisions, do not.

Note:

The proposal is that a new paragraph 5 be inserted in Article 8: (5) In matters relating to business civil claims for human rights violations within the value chain within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, an undertaking domiciled in a Member State may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship within the meaning of Article 3 of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability.

And that a new Article 26a be inserted: Regarding business-related civil claims on human rights violations within the value chain of a company domiciled in the Union or operating in the Union within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: 1. if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or 2. if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seized under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seized.

BUSINESS AND HUMAN RIGHTS - GOOD ADMINISTRATION OF JUSTICE THROUGH JURISDICTION AND APPLICABLE LAW



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The report of the JURI committee with recommendations to the Commission on corporate due diligence and corporate accountability published on the 11th of February 2021 included a proposal to revise the Brussels I Recast Regulation so that a new paragraph 5 would be inserted in Article 8 according to which: In matters relating to business civil claims for human rights violations within the value chain within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, an undertaking domiciled in a Member State may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship within the meaning of Article 3 of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability.

I should make very clear from the very beginning that I don't think 8.5 is a good provision.

Before I analyse why I disagree with the proposal, I would like to make a preliminary remark. At the jurisdictional level, we need two elements so as to avoid protracted litigation: (1) we need simple, effective rules; (2) we need a very minimal level of evidence required from claimants. Claimants must not be obliged to go through a complicated evidence phase just for the court to know whether it has jurisdiction or not. Access to justice requires that claimants be allowed to establish jurisdiction with as little evidence as possible.

Now, the proposal for an article 8.5 does not seem to take stock of the rules we already have in the Brussels I Recast Regulation. If we are talking about suing corporations who are "domiciled" in the EU (domicile being used in the EU law sense of the word) claimants already can do that with the Brussels I Recast Regulation as it stands now. We do not need to add a provision. Article 4.1 of Brussels I regulation allows anybody in the world to sue a EU based corporation for any activity in the world. This is what we call in PIL jargon "general jurisdiction". It means that whatever the acts in dispute have been perpetrated, even outside the EU, a court in the EU has jurisdiction as long as the defendant is domiciled in the EU. We therefore do not need the kind of language that we see in the proposed article 8 5.

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In addition, if there is more than one defendant, domiciled in any other member State, that additional defendant can be joined easily under article 8.1. Here again, we have all what we need and do not need to have an additional rule.

Now, the situation is very different if we are talking about joining defendants domiciled outside the EU (in third States). That is the situation that we had in the cases like Vedanta,, Shell, or Kik. This is the usual scenario we are confronted with and the real difficulty in practice, because the Brussels I Recast Regulation is silent on this scenario. The consequence of this silence is that this issue is left to member States' laws. Some member States do allow the joinder (France, Italy, for example). Other don't allow it. And even in countries where the joinder is possible, the conditions may be different. This situation, for business violations of human rights is not acceptable because claimants do want to have every potential participant in the violation before the same court. It does not matter at this stage whether the other defendants actually did participate in the violations. What is important is that good administration of justice requires that we have an efficient way of getting all those potentially involved before the same court. In order to do that, we just need to supplement article 8.1 by saying that the rule in 8.1 applies to defendants located outside the EU. We could propose a general rule because the joinder may be useful outside the specific cases of business violations of human rights. But if a general rule is not acceptable to member States, then we could limit its applicability to business violations of human rights. A short sentence will suffice.

The only remaining discussion is whether we should keep the severe conditions incorporated in article 8.1 also for business and human rights. My position on this is not fixed. I can see advantages and inconveniences in keeping the requirements. The Court of Justice was clear as to why these requirements are important: avoid abuse of jurisdiction. Therefore, we need to discuss the pros and cons of keeping such strenuous requirements.

In conclusion on this point: we need not add any rule if the defendants are located in the EU. In this case we have all we need. If, however, we speak of joining defendants located outside the EU (this is the reality of all the recent cases we saw in courts in the EU) then we only need to extend 8.1 to them.

The report of the JURI committee with recommendations to the Commission on corporate due diligence and corporate accountability published on the 11th of February 2021 included a proposal to insert a new Article 26a according to which: Regarding business-related civil claims on human rights violations within the value chain of a company domiciled in the Union or operating in the Union within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised.

It is a bit surprising that the EP is proposing a forum necessitatis rule, because this was proposed in the past and was rejected. To be fair, the present proposal would be limited to business violations of human rights, when the previous attempt was a general rule applicable in all cases. I fully support the proposal in principle.

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However, I disagree with the last requirement that “the dispute has a sufficient connection” with the forum. This requirement was, very unfortunately, set by the European Court of Human Rights in the *Nait Liman* case. It is an unfortunate requirement because the threshold is much too high. In that case, the Court in Strasbourg refused to consider that the fact that *Nait Liman* was a lawful refugee and resident of Switzerland was “sufficient”. Requiring a “sufficient connection” resemble a classic jurisdictional basis. But in cases where a rule such as *forum necessitatis* is needed the claimant cannot possibly establish a “sufficient” connection. In consequence, any link would suffice even if it is a tenuous link (requiring a link makes *forum necessitatis* different from civil universal jurisdiction). For example in France, in an arbitration case, the Court of cassation decided that the simple fact that the ICC (the institution under the auspices of which the arbitration was to take place) was headquartered in Paris was a proper link to use *forum necessitatis* when the link was far from being sufficient for jurisdictional purposes (*NIOC* case).

In conclusion on this point, the proposal of the EP should require “a link or connection” but not a sufficient connection. A final remark about applicable law: we need to neutralise article 17 of Rome II which gives too easy an escape to businesses in Human rights matters. Indeed, the very reason why violations of human rights are possible in third countries is because the level of safety rules is very low. Keeping article 17 will allow, all too often, the defendant to escape liability because it would have respected these minimal rules.

On the contrary, a reverse article 17 should be inserted. By “reverse Article 17” I mean that the defendant would not be allowed to act in the host country in a manner that would not be acceptable or legally possible in its home country, assuming the home country (i.e. a European country) provide a higher threshold of safety than the host country.

SOME REMARKS ON THE PROPOSED AMENDMENTS TO ROME II REGULATION AND THE APPLICABLE LAW TO THE BUSINESS-RELATED HUMAN RIGHTS CLAIMS



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The application of the set of rules established under Rome II Regulation ([Rome II](#)) has often led to unsatisfactory solutions for the claimants in business-and-human-rights disputes. Therefore, [the European Parliament has proposed to amend Rome II](#) as to introduce a new art. 6a specifically focused on the business-related human rights claims.

According to this new provision, the applicable law to the non-contractual obligations arising from the business-related human rights violations within the value chain of an undertaking either domiciled in a EU Member-State or operating in the EU is the law of the country in which the damage occurred (the *lex loci damni*), unless – and this is the news – the claimant chooses the law of the country in which the event giving rise to the damage occurred (the *lex loci actus*), or the law of the place where the parent company is domiciled or, lacking a domicile within the EU, the law of the country where it operates. Therefore, art. 6a provides victims of human rights abuses with the right to choose the applicable law with the highest human rights standards between the four different options.

Another relevant aspect of art. 6a is its large coverage. In fact, the chosen applicable law will regulate the non-contractual obligations arising from human rights violations occurred within the value chain. The proposed Directive explicitly defines the “value chain” as including all the activities, the operations, the business relationships and the entities with which the undertaking has a direct or indirect business relationship. Thus, the reference to the value chain makes art. 6.a particularly adequate to deal with cases, such as the Rana Plaza or KIK case, where the damages were materially caused not by a subsidiary company, but by an overseas supplier of a European undertaking.

Moreover, the introduction of this special choice-of-law provision will allow victims of human rights abuses to have the law of the parent company applied with certainty, upon their own request.

Instead, under Rome II, the application of a law different from the *lex loci damni* is possible only if it is considered as the closest connected law under article 4.3. However, such an assessment depends on a complex and discretionary judicial evaluation that aims to verify that, on the basis of the circumstances, it is clear that the tort is manifestly more closely connected with a country different from the country where the damage occurred. The practical implementation of this criterion has been openly criticized as leading to unforeseeable outcomes in practise. For instance, its application was recently rejected by the High Court of Justice (Queen’s Bench Division) in [Hamida Begum v. Maran](#).

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Therefore, even though such a sophisticated private international law criterion would, at least theoretically, represent a suitable tool providing victims of human rights violations with an acceptable solution, its practical application is unsatisfactory. This is somewhat justified, as it is established as an exception to the application of the *lex loci damni*. Instead, the introduction of art. 6.a would lead to apply the law chosen by the victims, with certainty and with no need to demonstrate its closer connection, and would therefore be more favourable for them to obtain a fair compensation.

Few remarks on the fourth connecting factor established by art. 6.a. This rule is conceived to be applied if the undertaking lacks a domicile in a Member-State of the EU. In this case, claimants can select the law of the State where the undertaking operates. Thus, this provision goes in the same direction of giving the victims the possibility to choose the law with the highest human rights standards, being acknowledged that it should be interpreted as referring to the law of "the EU Member-State" (instead than "the country") where the company operates.

This criterion extends the subjective scope of application of art. 6.a to the multinational corporations that do business in the European market, even though their parent company is not domiciled in an EU Member-State. Therefore, this provision is fully in line with the proposed Directive on human rights due diligence ("the Directive"), whose art. 2 establishes that human rights due diligence (HRDD) processes must be implemented by the undertakings either governed by the law of a Member-State or established in the territory of the EU, or governed by the law of a third country and not established in the territory of the EU, when however they operate in the internal market, selling goods or providing services.

In allowing victims to obtain that the law of an EU Member-State is applied, also when the human rights violations are allegedly committed by a corporation whose parent company is not domiciled in the EU, this connecting factor significantly extends the duty to comply with the European standards on HRDD and makes such a compliance a sort of preliminary requirement to do business in the European market.

The inclusion of this criterion is very far-reaching, as it might avoid that in the future corporations escape the application of the new amended provisions through offshoring. In fact, regardless of whether they decide to move their parent company to an extra-European country, as long as they will do business in the European market, their human rights abuses will be potentially subjected to the application of the law of the Member-State where they operate, if the claimants so require.

Finally, the status of the Directive's rules as overriding mandatory provisions, or the acquisition of such a status, once transposed into the domestic laws of the European Member States, should be addressed. In fact, this is relevant for the functioning of private international law, in so far as the overriding mandatory provisions must be mandatorily respected regardless of the applicable law, as explicitly recognized under art. 16 Rome II.

Being acknowledged that the introduction of art. 6.a is the preferable solution, such a qualification would be protective for the victims of business-related human rights violations, in case the proposed amendments are rejected. In fact, should this hypothesis occur, the European HRDD standards would be mandatorily respected by the European multinational corporations and the undertakings operating in the EU market, regardless of the application of the *lex loci damni* to their non-contractual obligations arising from torts committed in third countries.

SOME OBSERVATIONS ON THE PROPOSED ARTICLE 6A ON THE LAW APPLICABLE TO BUSINESS-RELATED HUMAN RIGHTS CLAIMS



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Within the framework of the Webinar organised by the Nova Centre on Business, Human Rights and the Environment on “Corporate Due Diligence and Private International Law”, Dr. Angelica Bonfanti and myself were entrusted with the task of commenting the proposed text for Art. 6a on the law applicable to “Business-related human rights claims”, as a potential addition to the Rome II Regulation. While Dr. Bonfanti and myself gave a collaborative presentation and engaged in a fruitful academic dialogue with each other, the following lines are restricted to reprising some specific points of my own intervention, under the understanding that Dr. Bonfanti will also prepare a text on her own contributions to the discussion.

Our intervention began with me presenting the current choice-of-law legal-framework for “human-rights-related” torts (I deliberately used this shortcut instead of the long paraphrase used in the draft legislation): the general rule in Art. 4 Rome II (4.1 main provision, 4.2 rule on common domicile rule, and 4.3 escape clause) applies at the present, and a separate special provision, Art. 7, deals with choice of law in respect of non-contractual obligations arising from damage to the environment. The latter was presented under the understanding that the proposed new Article seems to be largely inspired on it.

On the four connecting factors and the elective structure

After Dr. Bonfanti engaged with some general aspects of the proposed text, I took over again to precisely delve in the inspirational link between both Articles, beginning with the elective structure of Art. 6a and the four connecting factors included therein. In my opinion, both features are to be celebrated.

In reality, the four potentially applicable legal systems are three, because the third and fourth connecting factors exclude each other (the fourth connecting factor would operate where the parent company “does not have a domicile in a Member State”). And actually, in, many instances, those 3 potentially applicable legal systems will actually boil down to two, as *lex loci damni* and *lex loci actus* tend to coincide in the majority of the situations that the proposed legislation targets. So, frequently, the choice of law will be performed between the *lex loci damni*, and the law of the domicile of the parent company (or the fourth connecting factor as its “substitute”) (1).

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In any case, what is the rationale of having four connecting factors? Basically, what the European legislator would want, if this proposal went forward, would be to pull upwards the level of protection of human-rights-violations victims by getting corporations to adjust to the most stringent possible level of protection. How exactly so? Here is where the inspiration and the link between the proposed Article 6a and Article 7 become obvious. If we go back to the explanatory memorandum to the Rome II proposal, that memorandum suggests in respect of Article 7 that it is based on a policy of prevention through incentives, incentives to reach a higher level of protection. So, in a nutshell: what Article 7 aims at, and what proposed Article 6a would aim at too, is to allow the victim to choose, amongst several options, the law that provides for the biggest compensation, thus incentivizing potential tortfeasors to either invest in prevention or adapt to the law with the most stringent standards.

For corporations, ascertaining *ex ante* which law amongst the potentially available options is the most protective one, in respect of each of its various lines of business, is not a complicated risk-calculation operation at all. Conversely, Professor Jan Von Hein has stated that, in his opinion, it may be too complex for victims to identify *ex post facto* which law will be the most beneficial one for them, amongst those that the 4 connecting factors point to. I personally believe that this “difficulty” is the price to be paid for having a range of choices in order to try to maximize the victim’s redress.

Structurally, the four connecting factors are in a non-hierarchical position, even if *lex loci damni* is the default one for situations where the victim does not perform a choice of the applicable law. Significantly, as with Art. 7, the prerogative of choosing the applicable law belongs to the victim and not to the relevant courts. This configuration is preferable to that of other structurally similar rules elsewhere (where the prerogative does belong to the relevant court) as it allows victims to better seize their interests. In other words, there is a choice-of-law empowerment of victims, and this is to be celebrated as well.

On the connecting factor of the domicile of the parent company

In the proposed Art. 6a, the “crown jewel” is the connecting factor of the domicile of the parent company. This is a great addition that addresses the core of the policy debate on business and human rights. It addresses the demands that civil society has historically put forward: that transnational corporations should respond the way they would do it at “home”.

Why the domicile “of the parent”? The law of the domicile “of the defendant” would not be sufficient in certain cases, for instance where procedurally it was only possible to attack the subsidiary. Ultimately, the domicile of the parent responds to the idea of trying to reach the legal system with higher standards where the leading company habitually operates.

I understand that, when addressing this connecting factor in the context of the Global-North/Global-South relationships, certain voices consider it to be “colonialistic”. I politely dissent and consider quite the opposite: it is not offering this option what would actually be “colonialistic”. As regards jurisdiction, offering the courts of the home State of a corporate defendant as an option to victims increases their chances for effective access to justice. Once the option is available, victims can choose whether to litigate before the said courts or not. A similar reasoning goes as regards choice of law: offering the “law of the domicile of the parent” increases victims’ chances to reach effective redress. Then allowing them to choose it (or not, at their will) provides them with freedom and control over certain fundamental aspects of the litigation. Both factors, in this context, precisely amount to an anti-colonialistic stance.

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While certain actors fear that the insertion of the “domicile of the parent” connecting factor may trigger an off-shoring reaction (i.e. European corporations moving away from the EU) this fear needs to be relativized in two senses. First, there is empirical research performed by Eurostat in 2007 and 2011 which demonstrates that the factor “less regulation affecting the enterprise, e.g. less environmental regulation” is amongst the least heavy-weighting factors motivating international off-shoring **(2)**. Second, the precise purpose of the fourth connecting factor in Art. 6a (“...where it does not have a domicile in a Member State, the law of the country where it operates”) is to take away the incentive to move away from the EU: any actor operating in the EU “from the outside” will still come within the scope of Art. 6a. Thus the only way to “escape” from it would be to completely abandon the idea of operating within the EU internal market, which is an idea established businesses are unlikely to embrace **(3)**.

On the future relationship between (an enacted) Art. 6a and Art. 7: characterization problems

The potential future coexistence, within Rome II, of a choice-of-law rule on environmental torts and another one on human-rights-related torts may lead to characterization problems: where to draw the line? when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become potentially very contentious.

What distinguishes *Mines de Potasse* (which would generally be thought of as “common” environmental-tort situation) from the recent Dutch ruling in *Milieudefensie v. Shell* (which would typically fall within the “Business & Human Rights” realm) or from *Lluyia v. RWE* (as climate-change litigation finds itself increasingly connected to human-rights considerations)? There is a number of criteria that could be used to try to draw the line, but they may be highly controversial.

Therefore, since: i) there may be arguments (some arising from the very EU Parliament’s report) **(4)** to understand the category of human-rights violations expansively, and subsequently consider every single instance of environmental tort a human-rights-relevant scenario; and ii) the rationale of Art. 6a and 7 is the exactly the same (one is inspired on the other, only the new one contains further choice-of-law options), Rome II should be amended accordingly and smartly. Thus, I argue that the proposed (Art. 6a) text should be used, with some minor adjustments, as a new text to Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts **(5)**.

On overriding mandatory rules

The final point I addressed in my intervention (as a part of an inspiring dialogue with Dr. Bonfanti) was the possibility of conferring the condition of “overriding mandatory rules” to the transpositions of the proposed EU Directive on corporate due diligence and corporate accountability (either explicitly or through judicial interpretation). My core contention on this topic was that doing so would not be sufficient to adequately address situations where somebody sustains “... damage ... in the context of business-related civil claims for human rights violations ...”. In other words, labelling the Directive’s transpositions as overriding mandatory rules is not an alternative/substitute to having an adequate choice-of-law rule establishing the domestic law to be applied where somebody sustains the said kind of “... damage”.

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The content of the proposed Directive is mainly “regulatory” in nature and aims at ex ante prevention, establishing obligations that may trigger “administrative” sanctions if not respected. The Directive does not contain a comprehensive regime of civil liability. Moreover, the directive does not contain sufficiently defined standards of behaviour that may be used to assess the tortfeasor’s fault or lack thereof within the framework of fault-based civil liability.

In sum, if Art. 6a is not enacted, Art. 4, a general provision, not adequately equipped for dealing with human-rights-related torts, will still be called to solve the choice-of-law equation. Therefore, the proposed Art. 6a is much required.

Footnotes:

1. It is true that under EU Private International Law a corporation may have up to three different domiciles, but as P. A. Nielsen classically put it when discussing that point within the framework of the original Brussels I Regulation those three “possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have [...] consequences” (P. A. Nielsen, “Behind and beyond Brussels I – An Insider’s View”, in P. Demaret, I. Govaere & D. Hanf (eds.), 30 years of European Legal Studies at the College of Europe (Liber Professorum 1973-74 – 2003-04), Cahiers du Collège d’Europe N°2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243).
2. The information referred is part of a set of 4 studies published by Eurostat on September 2013. The precise study commented (“Motivation factors for international sourcing by economic activity (2009-2011)”) can be found under the following URL:
3. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=iss_11sbmot&lang=en.
4. Dr. Angelica Bonfanti’s text should be consulted, as she raised this point first, and entered into different aspects thereof.
5. See, for instance, Recital Q and point 5 of the motion in the EU Parliament’s final report.
6. I have studied this point in much bigger detail in: E. Álvarez-Armas, “Rome II in the face of human-rights challenges: the law applicable to SLAPPs and to human-rights-related torts”, CeDIE Working Papers – Cahiers du CeDIE, n°2021/1, <http://uclouvain.be/fr/instituts-recherche/juri/cedie/cahiers-du-cedie.html>

SOME OBSERVATIONS ON THE PRIVATE INTERNATIONAL ISSUES IN THE SHELL CASE



CHUKWUMA OKOLI

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In the Shell case, there were actually four Nigerian farmers and a non-governmental organisation from the Netherlands that sued Shell's subsidiary and the parent company in the Netherlands. Shell's subsidiary is located in Nigeria, while the parent company was actually domiciled in the Netherlands. There were jurisdictional challenges brought by Shell to the claimants' case. The facts of the case was that of an oil spillage that occurred in Nigeria, allegedly caused by Shell - and the claimants were asking Shell to remedy the oil spillage and to pay compensation for it.

Now, several issues arose such as the issue of access to justice, the jurisdictional issue and I also want to talk about the applicable law issue. At first instance, the court decided in one of the cases that there was no reasonable prospect of success on the claim against the parent company, because it was actually the subsidiary that was alleged to have carried out the environmental damage in Nigeria. There was no dispute as to the fact that the applicable law was Nigerian law. On the issue of jurisdiction, the Dutch courts applied article 7(1) of the Dutch Civil Procedure Code, which holds that when there is a sufficient connection between two defendants, the Dutch court can join both cases to hear them together. In this case the court considered that there was a sufficient connection. But the important point is that it took about six years for this issue to be resolved in the Dutch courts. From 2009 to 2015, just on this preliminary issue of jurisdiction- it took about six years. In total, the case took about eleven years to become completed on the substantive issue.

If there had been special private international law provisions in this respect, this case would not have taken this long to be completed; it would have been obvious to hold that the parent company and its subsidiary in Nigeria could be sued in the Netherlands. And that's what the proposal from the JURI Committee of the European Parliament on Corporate Due Diligence and Corporate Accountability is trying to achieve.

Then, on the issue of applicable law that I've briefly talked about, although there was no contest on the applicable law being Nigerian law, the court actually held that there was a duty of care owed by the parent company to the claimants in ensuring that the subsidiary carried out its activities without harming the claimants. But I question the way the Hague Court of Appeal applied Nigerian law, because if you look at the Nigerian Supreme Court cases, it has not advanced in the way English law has advanced to hold the parent company liable for the acts of the subsidiary, on the basis that the parent company owes the claimants a duty of care. Nigerian case-law considers that a parent company and its subsidiary are separate entities, and the parent company can only be held liable where the subsidiary is an agent of the parent company - that is the only possibility for a parent company to be held liable.

SOME OBSERVATIONS ON THE PRIVATE INTERNATIONAL ISSUES IN THE SHELL CASE

This is actually an important issue because in such situations as in the Shell case, the claimants should be able to have choices as to what law should apply. Fortunately, in the report of the JURI committee with recommendations to the Commission on corporate due diligence and corporate accountability, the proposal to include a new Article 6(a) in the Rome II Regulation provides as alternatives: the law of the place of damage, the law of the place giving rise to the damage, the law of the place where the parent company is domiciled, and the law of the place where the parent company operates. This proposed approach should provide sufficient remedy to victims of alleged business-related human rights violations as in the Shell case.

It is also a good thing that the proposed Article 6(a) of Rome II does not provide for an escape clause like Article 4(3) of Rome II. This is because the escape clause could lead to an unfavourable law; the closest law does not necessarily mean the better law for the claimant under Rome II.

My only critique is that the new provision for business-related human rights claims does not sufficiently state how its provisions are different from environmental damage under Article 7 of Rome II. This raises some question in cases of environmental damage with human rights implications as in the Shell case: will the claimant rely on the new Article 6(a) or the already existing Article 7 of Rome II? My suggestion is that this problem can be resolved if the concept of environmental damage under Article 7 of Rome II is partially or completely extinguished, and the new Article 6(a) of Rome II applies to all such cases of business-related human rights and environmental claims.

CORPORATE DUE DILIGENCE IN THE SUPPLY CHAIN AND IN GROUP OF COMPANIES: SOME CONSIDERATIONS ON ISSUES OF SUBSTANTIVE LAW



MARC-PHILIPPE WELLER

About the author: Prof. Dr. Marc-Philippe Weller is Vice-Rector for International Affairs and Director of the Institute for Comparative Law, Conflict of Laws and International Business law at Heidelberg University/Germany.

I would like to start by looking back into the last century, precisely into the 1970s, when the famous economist Milton Friedman stated that “the social responsibility of business is to increase its profits”. And you all know that, from there, the so-called shareholder approach became the predominant approach or principle in business. Stakeholder interests, that means the interests of other parties such as employees and so on, weren’t taken into account.

Accordingly, multinational companies formed and began externalizing their risks. How did they do that? On the one hand, through supply chains, global supply chains, with independent subcontractors and independent suppliers, and, on the other hand, huge groups of companies with parent companies in the so-called global north and subsidiaries in the so-called global south. Such multinational companies used governance gaps in the global south, where standards are inferior compared to the global north, to increase their profits. Unsurprisingly, we mainly observe human rights violations being committed by subsidiaries, subcontractors and suppliers abroad, that means in the global south.

Now, if you are a victim of such a human rights violation, of course you can sue the supplier or the subsidiary in the global south, as – of course – there are established legal remedies against the supplier or the subsidiary. However, you are likely to face two problems: the main problem is the risk of insolvency of such subsidiaries and subcontractors, as they may be either illiquid or not have enough assets to be seized, particularly in the case of large-scale lawsuits like, for example, the Shell or the Vedanta proceedings (as Claire showed). The second problematic aspect is that, sometimes, the legal systems are not as well developed as in the global north. That means that you sometimes face corruption, sometimes you lack an independent judiciary. As a result, the multinational company will often win those proceedings and not the victims of the human rights damage. And that has led to a movement towards the global north in the last years, where we can observe a stark increase in the so-called human rights litigation. This trend began in the USA but quickly made its way over to Europe. Claire showed us some prominent cases from the UK, the Netherlands, and also from Germany.

I think it is fair that mother companies must bear the damage. As the famous German economist Walter Eucken said: “Whoever takes the benefit from an undertaking must also bear the damages and the risks of that undertaking.” That means if you establish supply chains and if you establish a global group of companies, you have to bear the damages arising along your supply chains and within your corporate structures.

A similar discussion went on at the level of the United Nations, and – as a result – the United Nations established the so-called guiding principles on business and human rights (UNGPs), also called Ruggie Principles. They have three pillars, and our topic today focusses on the second pillar: corporate responsibility. Those principles establish that large corporations have a so-called human rights due diligence duty, a duty to establish a due diligence system to safeguard human rights.

CORPORATE DUE DILIGENCE IN THE SUPPLY CHAIN AND IN GROUP OF COMPANIES: SOME CONSIDERATIONS ON ISSUES OF SUBSTANTIVE LAW

However, there is one problem with the UNGP's. As you know, they derive from public international law, and, in addition, it is a soft law instrument. That means they don't impose duties on private actors, they only oblige states.

Of course, states have a duty to protect employees, for example. How can they do that? Well, by establishing tortious duties, for example, or by modifying corporate law. We are analysing one of those legal instruments today: the proposal of the European Parliament.

A prominent case from Germany is the so-called KiK case. KiK stands for "Kunde ist König". It's a textile discounter which produced in factories in the global south, inter alia, with Ali Enterprises Ltd, a company in Karachi, Pakistan. About five or six years ago, there was a devastating fire in the Pakistani factory with a lot of people injured and dead. The victims of that fire claimed damages from KiK, the contracting company in Germany, before the German courts.

If you look at this triangular relationship, it is typical for such cases: you have, on the one hand, the victims (the later claimants), then you have the supplying companies (in this case Ali Enterprises in Pakistan), and you have the company in the global north (here KiK GmbH in Germany). The claimants typically argue that the company in the global north, in Europe, is able to influence the production process abroad because they are the main customers or even the parent company of the group. Deriving from that influence or power, the European company has a tortious duty of care not only towards its own employees but also towards the employees of the subsidiary or the supplier.

In more abstract terms, you can see that you have a parent company or a retailing company (in a group of companies we are talking about a subsidiary and a parent company, and in supply chains you refer to the retailing company and the supplier or subcontracting company), and you have the victims. The victims usually, at most, have a contractual relation with the subsidiary or the supplier. They are employees, for example, who are suffering from the bad working conditions in their respective countries.

The question is how can you establish liability of the parent company? There are different approaches.

One approach, when you have a contractual relationship between the victim and the subsidiary, is to pierce the corporate veil of the subsidiary in order to seize the assets of the parent company. Especially when a subsidiary is insolvent, this might be an option. However, it's difficult to establish because it is a company law approach, and the question of private international law would be: which law is applicable to the piercing of the corporate veil? Probably it would be the law of the subsidiary - I think that's the prevailing opinion. However, that would pose problems because we would then have to assess and evaluate the foreign law from a European perspective, which is always difficult in such cases.

That's why the second approach is more convincing. It's the approach via tort law, through delictual liability. Here, you have two possibilities.

The first one is to make the parent company vicariously liable for its subsidiaries or suppliers. It would mean that the parent company is liable for another person, for another legal entity (the subsidiary). The problem in these cases is that this other person is not a natural person, it's not an employee of the company, it is an independent company, so that establishing vicarious liability would - at least from a German perspective - probably need an act of the legislator and, in either case, would not be easy to establish.

CORPORATE DUE DILIGENCE IN THE SUPPLY CHAIN AND IN GROUP OF COMPANIES: SOME CONSIDERATIONS ON ISSUES OF SUBSTANTIVE LAW

The second possibility, the one the European Parliament is focussing on, is to establish a duty of care of the parent company. Of course, you already have a duty of care of the subsidiary vis-à-vis the employees of the subsidiary, but this would be a "second" duty of care of the parent company. The crucial question concerns the scope of this duty: is it limited to the legal entity in question, that means is it limited to incidences within the parent company, or can you extend this duty of care to the subsidiary, to suppliers? The duty of care now contained in article 4 of the proposal of the European parliament seeks to establish such an "extended" duty of the parent company over the employees of subsidiaries and their suppliers.

So these are the questions within the substantive law, and you can imagine that it gets even more complicated when we now discuss the question of forum, i.e. where can you sue those companies, and the applicable law, because this is the decisive, the predominant question today.

Thank you.

CONCLUDING REMARKS



BENEDITA SEQUEIRA

About the author: Benedita Sequeira is Research Assistant at the Nova Centre on Business, Human Rights and the Environment. She is a student of the Master's degree on International and European Law from Nova School of Law and an Invited Assistant Lecturer at the University of Porto where she teaches Private International Law, Civil Procedure, Executive Civil Procedure and Tax Law.

The panel for the second episode of the webinar series was composed by Eduardo Álvarez-Armas (Brunel Law School), Angelica Bonfanti (Università deli Studi di Milano Statale), Claire Bright (Nova School of Law), Catherine Kessedjian (Pantheon-Assas), Chukwuma Okoli (Asser Institute), Geert Van Calster (University of Leuven) and Marc-Philippe Weller (Heidelberg University), and was chaired by Alexander Layton QC (Twenty Essex chambers).

The first speaker, Claire Bright outlined the private international law hurdles to accessing justice and remedy recurrently encountered by claimants in the context of Business and Human Rights litigation. In particular, she illustrated the jurisdictional issues by reference to the recent Vedanta and Shell cases. She also highlighted the issues encountered by claimants with respect to applicable law by reference to concrete cases. The scholar concluded that "regulatory reform is needed in order to shorten and simplify proceedings and ensure affective access to remedy" and substantive justice.

Marc-Philippe Weller explored the governance gap arising out of the rise of global supply chains, with, on the one hand "independent subcontractors and independent suppliers, and, on the other hand, huge groups of companies with parent companies in the so-called global north, and subsidiaries in the global south," where legal standards are less stringent. He outlined the difficulties faced by claimants attempting to bring legal suits in the host States in the global south, having led to an increased number of claims being filed before home States courts in the global north. The scholar described the triangular relationship between the victims, on the one hand, the subsidiary or supplying company, on the other hand, and lastly, the parent or retailing company. He explored the different approaches used to establish liability in such types of cases.

Chukwuma Okoli focused on the private international law issues which arose out of the recent Shell filed in the Netherlands by four Nigerian farmers and an NGO in the Netherlands against both the parent company and the Nigerian subsidiary, on the grounds of an oil spillage and the resulting damage which that took place in Nigeria. He emphasized that it took about six years, for the preliminary issue of jurisdiction to be settled in the Dutch Courts. With regards to the issue of the applicable law, the scholar highlighted the limitations of the current conflict of law provisions under the Rome II Regulation under which the applicable law to this type of cases is the law of the host State (in this case Nigerian Law).

The discussion then moved towards the topic of the proposed amendments to the Brussels I recast Regulation which were included in the European Parliament Committee of Legal Affairs' Draft report with recommendations to the European Commission on corporate due diligence and corporate accountability which was published on the 11th of February 2021. It is worth pointing out that those recommendations were eventually excluded from the resolution adopted by the European Parliament on the 10th of March 2021. The proposed amendments sought to both expand the jurisdictional basis of Article 8 and introduce a forum necessitatis clause.

CONCLUDING REMARKS

Catherine Kessedjian highlighted that at the jurisdictional level, what is needed are simple and effective rules, that require a minimal level of evidence from claimants.

In relation to the proposition for a new paragraph 5 to be inserted in Article 8 (1), Geert Van Calster pointed out that it would not add much to what is already provided for by Article 4 of the Brussels I recast Regulation under which it is already possible for claimants to sue an undertaking at its place of domicile. The scholar highlighted that the addition of the proposed article according to which the undertaking could also be used in a Member State in which it operates would not have solved the jurisdictional issues identified in concrete cases like the Shell case. This view was widely shared amongst the panellists.

Catherine Kessedjian added that what would be needed, instead of that provision is to add a specific provision allowing to join defendants which are domiciled outside of the EU to proceedings that are brought in the EU against EU-domiciled defendants. The scholar highlighted that 'good administration of justice requires that we have an efficient way of getting all those potentially involved before the same court.' She proposed to add a provision to supplement article 8.1 - which allows closely connected claims filed against various defendants in the EU to be heard before the same forum - to be extended to defendants located outside of the EU.

Geert Van Calster also points out that there are no clarifications on the new proposal with regard to Articles 33 and 34 of the Brussels I recast Regulation. These provisions allow the Court of a Member-State to stay a case if a related proceeding outside of the EU if the principle of the sound administration of justice justifies it. The scholar warned against that 'unless further direction is given to judges on how to apply these provision, may be a formidable stumbling block in seeking 'global justice' in the EU.'

Concerning the proposal to introduce a forum necessitatis provision, the scholar considered that this provision would clearly add an "extra" in the form of 'a completely new forum that would be added to the arsenal' of the Brussels I Recast Regulation. Catherine Kessedjian also expressed fully support for the proposal in principle. However, she expressed concerns in relation to the requirement of a 'sufficient connection' in light of the high threshold that has been used in practice in cases like Naït Liman. She argued that 'any link would suffice even if it is a tenuous link' in relation to the forum necessitatis doctrine. In relation to the applicable law aspects, Eduardo Álvarez-Armas and Angelica Bonifanti discussed the propositions of the Draft report to revise the Rome II Regulation.

Eduardo Álvarez-Armas presented the current conflict of law provisions under the Rome II Regulation, and highlighted that, under the general rule set out in Article 4(1), the law applicable to tort disputes is the law of the place where the damage occurred. He also discussed the special rule for environmental torts under Article 7.

Both scholars supported the proposal to insert a new Article 6a providing for a special choice of law provision specifically for business-related human rights claims which would have allowed claimants to choose between the following three different laws as an alternative to the law of the place where the damage occurred (general rule under Article 4(1)):

- 1) law of the country in which the event giving rise to the damage occurred;
- 2) the law of the country in which the parent company has its domicile or,
- 3) where it does not have a domicile in a Member State, the law of the country where it operates

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The proposal also received wide support from the panel. Angelica Bonfanti highlighted that the proposed Article 6a would allow victims of corporate human rights abuses committed by European companies in foreign countries the possibility 'to choose the applicable law with the highest human rights standards between the four different options'. In particular, she highlighted that such provision would allow victims to have the law of the parent company applied with certainty upon their own request.

Eduardo Álvarez-Armas referred to the implicit intention of the European legislator, to increase the level of protection, by 'getting corporations to adjust to the most stringent possible level of protection'. In particular, the scholar pointed out that the possibility for the claimant to choose the law of the parent company's domicile as the applicable law ultimately 'responds to the idea of trying to reach the legal system with higher standards where the leading company habitually operates' and increases the possibility for affected individuals to obtain effective remedy.

Angelica Bonfanti highlighted that the aim of the last connecting factor (allowing the claimant to choose the law of the Member State in which the defendant operates) is to apply the law of a EU Member States in relation to undertakings which are domiciled outside of the EU but which do business in the EU. By extending the scope of application of Article 6a to non-European domiciled companies, the connecting factor makes compliance with European standards on human rights due diligence a sort of preliminary requirement to maintain business in the European market. The scholar pointed out that it might also avoid the phenomenon of restructuring and offshoring of European companies once the framework enters into force. Finally, Eduardo Álvarez-Armas referred to the characterisation problem that can arise from the coexistence of proposed Article 6a and Article 7 of the Rome II Regulation, and proposed that Article 7 should be removed from the Regulation, so as to use the text of Article 6a as an over-comprehensive provision for both corporate-related human rights and environmental harms, which are very closely interconnected.

Finally, the various panellists emphasized the importance for the provisions contained in the upcoming EU-level directive on mandatory human rights and environmental due diligence to acquire the status of overriding mandatory provisions. Catherine Kessedjian mentioned in that respect that expressly giving them the status of overriding mandatory provisions in the text of the legislation would mean that they have to be mandatorily respected regardless of the applicable law – as per Article 16 of the Rome II Regulation – which would be crucial to ensure that they are upheld.

Footnote:

1. The proposition provided for the Regulation (EU) No 1215/2012 to be amended as follows: '(1) A new paragraph 5 is inserted in Article 8: (5) In matters relating to business civil claims for human rights violations within the value chain within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, an undertaking domiciled in a Member State may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has a business relationship within the meaning of Article 3 of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability.'

CORPORATE DUE DILIGENCE IN CONTRACT AND COMPANY LAW



CORPORATE DUE DILIGENCE IN CONTRACT AND COMPANY LAW

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TRANSCRIPT OF THE KEYNOTE SPEECH DELIVERED BY THE PORTUGUESE SECRETARY OF STATE FOR COMMERCE, SERVICES AND CONSUMER PROTECTION, JOÃO TORRES



JOÃO TORRES

About the author: João Torres is the Portuguese Secretary of State for Commerce, Services and Consumer Protection. His full biography can be found [here](#).

I would first and foremost like to thank the organization and especially Nova School of Law for the invitation that was so kindly addressed to me.

It is with great honour that I join you today in the opening session of this seminar, dedicated to the importance of Corporate Due Diligence in Contract Law and Company Law.

The ways in which we have evolved as a society, especially during the last decades have brought about a Digital Revolution of sorts. It is fair to say that nowadays it is easier for everyone to contact and keep in touch with one another and even with the rest of the world.

This revolution has made us collectively aware, as nations and as individuals, of both the positive and negative impacts of entrepreneurial activity, at home and abroad. This is especially true regarding the activity of multinational enterprises (MNE) which operate across the globe. As of today, we recognise that despite the irrefutable progress achieved by decades of multilateralism and international cooperation regarding standards, regulations and law enforcement, a lot of grey areas remain when it comes to the application of national legislation to multinational enterprises.

Public recognition of these difficulties has risen in the last few years, accompanied by public awareness regarding inequality and social justice. Such inequality has become more evident with the arrival of the COVID-19 pandemic, as the vulnerable became ever more vulnerable, their lives severely impacted by unregulated global supply chains, which in turn throw the defence of human rights into jeopardy.

The issues that I just mentioned are not more visible in Portugal than in other parts of the world, nor can we ever hope to solve them in an isolated fashion, as some of them occur on a global scale. Despite their magnitude, international entities such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the European Union (EU) itself, have steadily begun building instruments with the goal of creating a level playing field for the activity of MNE among the world.

At home, the Ministry for the Economy and Digital Transition is particularly aware of the challenges regarding these efforts, as it plays the role of National Contact Point for the OECD guidelines regarding such matters. These Guidelines consist in a multilateral agreement regarding the promotion of a comprehensive code of responsible business conduct (RBC), which several governments have agreed to carry out. As of today, 46 countries have adhered to these guidelines, including 12 non-OECD countries, which encourages us to confidently proceed with its pursuit.

TRANSCRIPT OF THE KEYNOTE SPEECH DELIVERED BY THE PORTUGUESE SECRETARY OF STATE FOR COMMERCE, SERVICES AND CONSUMER PROTECTION, JOÃO TORRES

The OECD Guidelines for multinational companies consist in a credible mechanism to fight the adverse impact of the COVID-19 pandemic on human rights and to prevent increasing social inequalities, with the process of Due Diligence playing a major part in it.

Essentially, it constitutes a series of guidelines for companies, providing a roadmap that businesses should follow in order to identify, prevent and mitigate the current and potential negative impacts of their activity, be it environmentally or socially, while also accounting for how those impacts shall be addressed. This process comprises meaningful consultation with potentially affected groups and other relevant stakeholders, in areas such as employment and industrial relations, human rights, environment, transparency, combating bribery and corruption, consumer protection, science and technology, competition and taxation.

The European Union, as well as other global multilateral bodies and conventions has adopted binding legislation to address human rights and environmental violations in the sectors traditionally worst affected, such as the extractive industries and timber.

Here at home, the Portuguese Ministry for the Economy and Digital Transition is also committed to have the “United Nations Guiding Principles on Business and Human Rights” adopted by Portugal throughout 2021, through the approval of the respective “National Action Plan for Responsible Business Conduct and Human Rights”, which shall include 3 initiatives related to responsible business conduct and due diligence, namely:

- Conducting the construction and adoption of the Portuguese national plan for the application of OECD Guidelines for Multinational Enterprises activities;
- Increasing awareness among companies with respect to the impact of identification, prevention, mitigation and repair of negative impacts that their activity may cause, through the publication of the Guide on Repair Mechanisms and the promotion of the OECD Guidelines for Multinational Enterprises and Due Diligence Processes;
- Promoting the European and International guiding instruments in the fields of responsible business conduct and Human Rights, namely, the OECD Guidelines for Multinational Enterprises, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the United Nations Guiding Principles on Business and Human Rights and Legal Instruments to protect fundamental rights (such as EU anti-discrimination directives and European Convention on Human Rights).

The great societal changes of our time, namely globalisation, business internationalisation, integration in global value chains and sustainable development in all its dimensions are now converging towards the notion that companies must assume a role in the prevention of human rights and labour rights violations in their business activity. Due diligence shall become a vital instrument to improve decision-making within companies, as it prevents, mitigates and, when necessary, helps to remedy the adverse impacts of business activity on society.

In Portugal, we too shall take the necessary steps towards the ultimate goal of defending Humans Rights. Throughout history, governments have been steadily moving towards protecting these very same rights and it is high time that companies help us in this journey.

THE RELEVANCE OF THE HISTORY AND NATURE OF COMPANY LAW IN THE CONTEXT OF HUMAN RIGHTS AND THE ENVIRONMENT



STEPHEN TURNER

About the author: Stephen Turner is a Senior Lecturer in Law at the University of Essex. His full biography is available [here](#).

Firstly the company as we know it is a legal construct that humans designed and it was designed to achieve certain purposes. The second is that the corporation that we know today, the core essence of the modern corporation came about in the late 18th century, the late 1700s in the United States and in the early 1800s in the different countries of Europe. So that design is actually over 200 years old. The third point is that that basic design, that legal construct, that was adopted at that time was comprised then and is still comprised of three key legal features, those being separate legal personality, limited liability for shareholders, and duties that directors have to ensure that the decisions that they make are consistent with the company's best interests.

And it is worth noting, and this is important, that model has been replicated (with minor variations) in just about every jurisdiction in the world. You could say that it is one of the most successful legal constructs of modern civilisation, and yet despite this incredible success, and the benefits that are brought to society and communities from companies and business, companies have been directly or indirectly responsible for so much harm that has been done to communities, individuals and the environment in many different ways. So why are these three factors and the historical development so important when we consider companies within the context of human rights and equally the environment?

Well, to go to the first point, the fact that the company is a legal construct that was designed by our forbears two centuries ago, means that ultimately that legal construct can be re-designed. There is absolutely no reason why it shouldn't be re-designed. If humans design a robot that starts acting in an undesired manner, the robot gets redesigned and reprogrammed, there is technically no reason why the legal construct of the corporation cannot be redesigned.

The second point, the fact that the design of the corporation is one that was made over two hundred years ago, means that it was designed long before the contemporary challenges that the international community currently faces and it wasn't designed with modern day usage in mind in terms of multinationals, extended international supply chains, parent - subsidiary relationships across jurisdictions and the modern day stock markets with all of the implications that they bring.

And the third point is that each of the three features of the legal construct of the corporation as it was designed 200 hundred years ago are each separately and jointly responsible for contributing to negative impacts upon peoples' human rights and the environment. In other words 'separate legal personality' can have the effect of insulating companies within a group, and also directors of companies from accountability for human rights and environmental violations. Limited liability similarly insulates shareholders from liability relating to human rights and environmental violations; and directors duties inevitably place a responsibility on managers within companies to ensure that decisions protect the investments that have been made and this tri-partite legal construct can have the overall effect of steering decision-making of companies towards outcomes that are commercially successful but which may not necessarily be positive outcomes for outside interests such as those of individuals, communities and the environment that can be affected by the operations of companies.

THE RELEVANCE OF THE HISTORY AND NATURE OF COMPANY LAW IN THE CONTEXT OF HUMAN RIGHTS AND THE ENVIRONMENT

So to sum up, there are questions marks over anything that was designed over 200 years ago when it comes to their adequacy and capacity to meet contemporary international challenges. Therefore, we should not be surprised that this legal construct that emerged in the late 18th century now fails to match up in a number of different ways.

How does this historical development interact with contemporary approaches to business and human rights and specifically the idea of mandatory human rights due diligence?

The historical development of the corporation, in other words that legal construct that has now been with us for over 200 years arguably interacts directly with contemporary approaches to business and human rights . This is because whatever responses take place within the international community to issues related to human rights do so within the context of that legal construct of the corporation, in other words the construct of separate legal personality, limited liability and directors' duties. And that is because that legal construct so powerfully and often so subtly steers corporate decision-making towards decisions that necessarily need to achieve commercial success even if at times human rights interests and that of the environment have to take second place or possibly end up not being accounted for properly at all.

This helps us to understand the context in which human rights due diligence has evolved in two key ways. Firstly it explains why corporations are legally predisposed towards making decisions that are commercially oriented rather than necessarily oriented towards human rights and the environment. Secondly, it helps to explain the historical development or the events that have led up to what we now understand as human rights due diligence and now the debate about mandatory human rights due diligence.

So when we take a step back and look at the developments in this field, lets say over the last 50 years or so since the UN really started actively engaging with this issue. We see the difficulties that have arisen owing to the power, the ubiquitousness and seeming inevitability of the legal construct of the corporation.

There have been numerous types of non-binding initiatives or non-mandatory initiatives which have been useful in provided advances in this field. Even in the 1970s the United Nations Developed a Code of Conduct for Transnational Corporations in 1974, later there were the CERES Principles, the UN Global Compact, the OECD Guidelines, and on top of that there now the multiple voluntary accountability regimes that request that companies report on their human rights and environmental performance and some of these are linked to stock market indices namely FTSE for Good and the Dow Jones Sustainability indices but the reason why the historical development of companies and the legal construct of the company is so important within the context is that each of those elements of the legal construct of the company in all jurisdiction are hard law, separate legal personality is hard law, limited liability is hard law, and directors duties are hard law, therefore for any corporate lawyer, looking at the responsibilities that their company has, they will of recognise and advise that ultimately their company needs to firstly comply with the hard law as the first priority.

THE RELEVANCE OF THE HISTORY AND NATURE OF COMPANY LAW IN THE CONTEXT OF HUMAN RIGHTS AND THE ENVIRONMENT

And this is so important when we consider John Ruggies work and the difficult task that he faced. As a shrewd expert in diplomacy and pragmatism, he recognised that within this context small steps were better than no steps at all. And he recognised that the international community is in fact a community that is made up of indigenous groups, vulnerable people, communities but also is made up of companies, company directors, shareholders, governments and ultimately if any progress were to be made, it would be necessary to chart a course that represented a pathway that all of those groups could ultimately engage with and he also recognised the limitations of public international law. And hence the 'protect, respect and remedy framework' and ultimately the notion of human rights due diligence emerged as pathway and a framework around which all of the above mentioned parties could potentially engage.

It is therefore understandable that John Ruggie recognised the danger of over-ambition that could disrupt and possibly destroy legitimate gradual and progressive change.

But arguably what the history shows us and the legal construct of the corporation show us is that the pathway ultimately needs to be one that leads towards reform that is has all of the hallmarks of that early historical development. In other words it needs ultimately to create hard law, it needs to be ubiquitous in all jurisdictions, it needs to be part and parcel of corporate law and the way that corporate law operates.

We can get lost sometimes in debates about the right approaches to reform. One thing that the history shows us is that in whatever steps we take, we should never underestimate the sheer strength of the tripartite legal construct of the company, but also should never underestimate ourselves and the capacity that we have in the redesign of the corporation and what it should be, in exactly the same way that our ancestors over two hundred years ago fashioned and designed what we have inherited as the company and company law.

CORPORATE LAW AS A BARRIER TO HUMAN RIGHTS CLAIMS AND THE PROMISE OF MHREDD LAWS



RACHEL CHAMBERS

About the author: Dr. Rachel Chambers is a Postdoctoral Research Associate in Business and Human Rights at the University of Connecticut and Co-Director of the Teaching Business and Human Rights Forum. Dr. Chambers practised in law as a Barrister (England and Wales) for nearly a decade before moving into academia and she has worked as a consultant to the UN Global Compact and Amnesty International.

How have the concepts of separate corporate personality and of the corporate veil affected victims' attempts to seek remedies directly against companies that they alleged have harmed them? How could a statutory duty or remedy help to overcome these barriers?

Corporate groups are made up of numerous separately incorporated enterprises connected through links of stock ownership, contract or loose or informal ties. These enterprises include the parent company; subsidiaries; associate companies; and other affiliate companies such as supply chain contractors and subcontractors, joint ventures and other business partners of similar identity. Each enterprise, in accordance with the corporate law principle of separate corporate personality, is legally distinct, meaning that, for the most part, the law does not treat the corporate group as a single entity. But in practice, to varying degrees, parent or lead companies exercise influence and control over the activities of the affiliate companies in the group, allowing them to pursue groupwide strategies and function essentially as a whole.

The corporate law principles of separate personality and limited liability go hand in hand. Turning to limited liability, shareholders investing in a limited liability company are only in principle liable for the value of shares owned in the company. This has great significance in corporate groups where the connection between the companies is one of equity ownership. The ability of parent or lead companies to exert influence and control across the corporate group while retaining legal separation from the entities that make up the rest of the group, makes corporate groups, and in particular multinational enterprises, uniquely able to deal with and take advantage of the economic and regulatory reality of the globalized world in which they operate. For example, this allows parent companies to structure their liability risk by undercapitalizing their foreign affiliates that might be targeted of legal claims, due to the risks to people or planet of the activities they undertake, while at the same time reaping the economic benefits of these activities.

If harm eventuates, victims' attempts to seek remedies from corporate groups are met with the significant hurdle of establishing the parent or lead company's liability for harm that has ostensibly occurred through the actions of the subsidiary or supplier. An example is *AAA v. Unilever*, in the UK courts. 218 claimants, Kenyan nationals, brought a mass tort claim against Unilever PLC and its Kenyan subsidiary, the owner of a tea plantation in Kenya where the claimants work and where they suffered severe ethnic violence at the hands of third parties. The claimants argued that their claims necessarily concerned Unilever PLC- the parent company in London- because they alleged it was responsible for ensuring that the Kenyan subsidiary had adequate management systems in place in the circumstances to protect workers from the ethnic violence that occurred. Unilever PLC predictably sought to hide behind separate corporate personality and limited liability in its defense of the claim.

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This case reached the Court of Appeal in England, which declined jurisdiction of the English courts, on the basis that the corporate structure was sufficient defense, and that there was insufficient evidence that Unilever PLC was responsible for the alleged failings of its Kenyan subsidiary. The court focused on the fact that although the parent company had policies in place to address the risks in question, i.e., concerning ethnic violence, these were high level, generic documents, which left the specifics to be established at local level by the subsidiaries.

As solicitor Daniel leader from Leigh Day & Co in London, the law firm which represented the claimants, noted: this was the biggest risk to the largest concentration of Unilever workers, anywhere in the world. But nonetheless, the claim was unsuccessful.

So how could a statutory duty or remedy help overcome these hurdles? Mandatory human rights and environmental due diligence requires companies to identify and map their human rights risks, using tools such as saliency from the UN Guiding Principles to identify where the biggest risks to human rights and the environment lie, and then to address these risks. This means that parent companies are no longer in a position to try to distance themselves from their global affiliates in order to avoid liability as Unilever PLC did with respect to the risk of ethnic violence to its subsidiary's workers.

But will the process of human rights and environmental due diligence alone be enough for claimants to succeed in getting over the significant hurdle or hurdles separate personality / limit limited liability present? In the UK, the Supreme Court has recently widened the test for direct liability of parent companies in the well-known case *Lungowe v. Vedanta*, by looking at the relationship between the parent and the subsidiary as regards the particular operations that caused the harm and asking whether the parent company had undertaken a sufficiently close intervention into the relevant operations of the subsidiary to attract the requisite duty of care. This is a positive development for claimants but establishing a sufficiently close intervention remains a major hurdle for them. Only two cases have been successful at trial: one a domestic case in the UK chapter (*Chandler v. Cape*) and recently a Dutch case (*Four Nigerian farmers v. Shell*).

Claimants may be helped in getting over the separate personality / limited liability hurdle if civil liability is included within the mandatory human rights and environmental due diligence law.

There are different models for these laws currently in discussion and at various stages within the legislative processes around Europe. When civil liability is a component, the question is, on what basis will the parent company face potential liability for harm that occurs through the actions of subsidiaries or suppliers. The laws that are currently in place or under debate greatly differ in this respect- the German proposed law does not address civil liability at all; the French duty of vigilance law expressly links the duty of vigilance to the general provisions for civil liability in the French civil code. This is fault-based liability requiring, in terms of causation, that a company's failure to establish or effectively implement a duty of vigilance plan (the breach) be the cause of the damage. In practice, this is complex and likely to be difficult to prove, when a subsidiary or business partner is the primary perpetrator of the human rights violations.

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The 2020 draft of the proposed treaty on business and human rights provides for civil liability for human rights violations, but limits liability to the failure to prevent another person (or legal entity) from “causing or contributing to a human rights abuse” in two different situations:

- The first situation is based on control: the parent company must legally or factually control or supervise the entity that caused or contributed to the harm.
- The second situation is based on whether the company should have foreseen the risks of human rights abuses occurring in the conduct of the business activities in question.

Certain commentators in the UK have put forward the “principal elements” of a human rights and environmental due diligence law, which also contains a “failure to prevent” offense, but without limitations contained in the draft treaty. This is one of the most ambitious proposals to date, but it has not yet been articulated as a full draft law or put before lawmakers for their consideration. The UK model overcomes the difficulties of separate personality and limited liability by shifting the burden of proof to the parent company when harm is proven, requiring the company to prove that it acted with due care to prevent human rights and environmental impacts through its due diligence.

You have also recently completed a comprehensive study on the role of a regulator in enforcing a possible mandatory human rights law. Although this was in the UK context, many of the same principles and practicalities would apply in an EU context, given the nature of companies as creatures of statute. What could be the role of regulators to enforce a corporate due diligence duty as a standard of care?

Using the principal elements of a draft UK law mandating human rights and environmental due diligence that I mentioned before, I, along with Sophie Kemp and Katherine Tyler, partners from UK law firm Kingsley Napley, researched what an ambitious and innovative UK regulator would look like, that properly polices corporates for extraterritorial human rights and environmental abuses.

The three duties that are contained in the principal elements document formed the basis of our research: 1. A duty on commercial and other organisations to prevent adverse human rights and environmental impacts of their domestic and international operations, products, and services including in their supply and value chains; 2. A duty on commercial and other organisations to develop and implement reasonable and appropriate due diligence procedures to prevent adverse human rights and environmental impacts; and 3. A duty on commercial and other organisations to publish a forward-looking plan describing procedures to be adopted in the forthcoming financial year, and an assessment of the effectiveness of actions taken in the previous financial year.

Our research demonstrates that an ambitious and dedicated regulator with strong powers could add real value to the enforcement of the proposed law. We essentially view the regulator’s role is twofold. Firstly, in respect of the human rights and environmental due diligence procedures themselves, i.e., ensuring, both through a complaints process and through examining a sample of reports on human rights and environmental due diligence, that the process has occurred in accordance with the law. Secondly, in situations where harm eventuates despite the company undertaking human rights and environmental due diligence, the regulator should have the ability to investigate, prosecute, and ultimately to apply civil penalties, rising up to criminal penalties in situations of serious human rights violations.

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Recently four Dutch political parties put forward a proposed human rights due diligence law for the Netherlands. This is the most advanced proposal yet for a regulator to work in this space. The Dutch model does not include powers to investigate and penalize incidents of human rights harm. But the proposed regulator would have the power to examine companies' human rights due diligence, receiving complaints that allege inadequate or insufficient due diligence. It would also hold a positive role, sometimes called dynamic standard setting, whereby it would share good practice of corporate human rights due diligence and develop guidance on the basis of this good practice to inform other companies on what is expected of them. The carrot and stick approach that the draft law incorporates gives the regulator a role in shaping corporate due diligence as a standard of care.

CONTRACTING FOR HUMAN RIGHTS AND CORPORATE DUE DILIGENCE: USING THE ABA WORKING GROUP'S MODEL CONTRACT CLAUSES 2.0



SARAH DADUSH

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What was the original concept behind the Working Group's model contract clauses (MCCs) and what are some of the key elements of the MCCs, in particular with respect to implementing the UNGPs and corporate human rights due diligence?

At its inception, the model contract clauses (MCCs) project was about finding ways to operationalize firms' human rights policies contractually, so that these policies could do more work to protect workers' human rights. A great many firms, especially consumer-facing firms, have made public commitments to upholding human rights (e.g., supplier codes of conduct, anti-trafficking and forced labor and anti-child labor policies, subscribing to initiatives like the UN Global Compact), often posted on their websites. As common as they are, however, these policies often do little more than communicate the company's good intentions to protect human rights. Companies are rarely compelled to take measures to ensure that their own policies are in fact implemented.

The MCCs seek to address this gap by offering language and drafting guidance for implementing companies' human rights policies contractually. They aim to embed concern for the human rights performance of the supply chain into the legal and operational life of the company(ies), in the hope that this will yield better outcomes for workers and their communities. A key contribution of the MCCs, which have now been published in two versions, 1.0 and 2.0, is to place production process conformity on contractual par with product conformity. In other words, the MCCs treat a failure to respect workers' human rights in the production process as a contractual breach, much as typical contracts for the sale of goods would treat a failure to deliver the goods on time or in accordance with the design specs as a breach. This is a major innovation because expanding the contractual focus to include the production process brings workers' human rights into the contract's—binding and enforceable—sphere.

With respect to MCCs 2.0, published in March 2021—see [here](#) for the entire MCC 2.0 toolkit—a few key elements deserve mention. Version 1.0 was drafted to be very “buyer-friendly,” meaning that it made the supplier solely contractually responsible for meeting the buyer's human rights standards and created no obligations for the buyer to ensure that their contracts are negotiated or performed in a way that upholds their own human rights standards.

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This approach was problematic because it overlooked the reality that the buyer's purchasing practices can generate intense commercial pressure on suppliers, which in turn can lead to the degradation of working conditions and violations of workers' human rights. Indeed, poor purchasing practices such as aggressive (below cost of production) pricing, imposing unreasonably short and non-negotiable timelines, making last minute order changes, and engaging in irresponsible exits (a practice that has been particularly prevalent and harmful during the pandemic) are often a root cause of human rights harms in global supply chains.

Otherwise put, unfair commercial practices by buyer firms can lead to the unfair treatment of workers. In the language of the UN Guiding Principles on Business and Human Rights (UNGPs), unfair commercial practices and unfair contracts can "cause or contribute" to adverse human rights impacts.

MCCs 2.0 address the buyer piece of the human-rights-in-supply-chains problem, offering new model clauses that, if incorporated into the supply contract, would obligate the buyer to engage in responsible purchasing practices. The MCCs 2.0 are supplemented by a Responsible Purchasing Code of Conduct, aka, the Buyer Code, which contains a set of principles and standards for responsible purchasing practices.

The MCCs 2.0 toolkit thus shifts toward a shared responsibility model that holds both supplier and buyer responsible for the human rights performance of their contract.

The shift toward shared responsibility flows from another, even more fundamental shift in MCCs 2.0, which is to move away from a "compliance" approach (with "one and done" representations and warranties) toward a process-based, human rights due diligence approach to contractual performance. Indeed, the MCCs 2.0 are the first model contract clauses to integrate human rights due diligence principles into every stage of the buyer-supplier relationship. They seek to translate the principles contained in the UNGPs and the Organization for Economic Co-operation and Development (OECD) Due Diligence Guidance into contractual obligations that require both buyer and supplier to cooperate in upholding human rights.

The translation is not perfect, but our hope is that it will at least offer a helpful foundation for conversations about what it could and should look like to bring HRDD principles into contractual arrangements and indeed to draft HRDD-aligned contracts. That conversation is particularly relevant today, given the forthcoming EU legislation on mandatory human rights due diligence, which would require all companies doing business in the EU (whether or not they are domiciled or incorporated in the EU) to engage in HRDD. There are other noteworthy elements of the MCCs 2.0 toolkit, but for purposes of this writing, the above should suffice.

When drafting model contract clauses, how does one introduce flexibility to avoid a one-size-fits-all approach that could lead to box-ticking?

The MCCs are designed to be used by companies operating in any number of sectors (e.g., apparel, electronics, automotive, agriculture). A company wanting to adopt the MCCs need not adopt them all or in a wholesale way. Companies can select the MCCs that are the best fit for their industry-specific needs, human rights exposure, and institutional commitments to advancing human rights. The MCCs can be adapted and edited to suit the adopter's needs. They are also modular, meaning that they include bracketed language with alternative formulations. The Report includes drafting guidance to assist adopters in selecting and adapting the MCCs.

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Beyond adoption, our hope is that companies will use the MCCs 2.0 toolkit to support a rich internal conversation about improving their contracts and commercial practices, in order to improve the human rights performance of their supply chains. The more the MCCs and the Buyer Code are used as part of an institutional rethinking process, the less likely it is that they will be reduced to just another “tick box” exercise.

Like the MCCs, the Buyer Code can be incorporated into the contract (as “Schedule Q”), but it can also be adopted independently, as a standalone commitment to responsible purchasing. The Buyer Code is drafted to be a “gold standard” for responsible purchasing practices and can be adopted wholesale or adapted to suit the needs of the particular user.

How do the MCCs address the issue of providing remedy for victims, given that victims are unlikely to be parties to the contract?

Remediation was a crucial issue for the Working Group. The problem we faced was that typical contract remedies for breach tend to (a) be financial and (b) flow only between the parties to the contract (buyer and supplier), from the breaching to the non-breaching party. This structure does not work well for breaches related to human rights or the production process as such breaches involve a third party: the victims of the breach, usually the workers.

Absent a third-party beneficiary clause (a model third-party beneficiary clause granting broad rights to workers and others is offered in footnote 69 of the [Report](#)), workers have no rights under the contract. And even if workers did have rights under the contract, typical contract remedies may not be appropriate or adequate for addressing the harms suffered.

To address these challenges the Working Group developed a set of MCCs dealing specifically with human rights remediation (e.g., restitution and financial compensation, apologies, ceasing the harm and taking measures to prevent the harm from re-occurring). The main objective of these MCCs is to place human rights remediation ahead of typical contract remedies, so that remediation becomes the first “contractual response” to a human rights-related breach.

At the outset, the supplier is required to have a robust operational level grievance mechanism (OLGM) in place to address workers’ human rights-related grievances. In the event that a human rights-related breach occurs and is not sufficiently addressed by the OLGM, the supplier must, in consultation with affected stakeholders, prepare and implement a remediation plan. Victims must also be consulted in assessing the completion of the remediation plan.

Importantly, if the buyer’s purchasing practices somehow caused or contributed to the adverse impact, then the buyer must participate in providing remediation, by contributing financially and non-financially, in proportion to its responsibility for the adverse impact.

Placing human rights remediation ahead of typical contract remedies is also intended to discourage buyers from engaging in “cut and run” responses to human rights issues in their supply chain. If something bad happens in connection with the contract, the buyer should not terminate without first supporting the remediation process. Buyer firms should come to termination as a last resort, in other words, only when it becomes evident that they are dealing with a “bad” supplier or a supplier who has no intention and/or no capacity to remediate.

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The shift in the MCCs 2.0 toward HRDD matters here, too, since the UNGPs and the OECD Guidance require the involvement of stakeholders at every stage of the due diligence process—identifying, assessing, mitigating, and remedying human rights risks. Thus, HRDD-aligned contracts, such as those adopting the MCCs, would bring workers into the contract, even if they are not given third-party beneficiary enforcement rights. In line with this, another place workers/victims are given some “voice” in the contract is the dispute settlement section in Article VIII of the MCCs.

In short, regardless of whether workers are identified as third-party beneficiaries to the contract—many companies will hesitate to give broad rights to workers—the MCCs require the buyer and the supplier to engage with affected and potentially affected stakeholders at every opportunity.

SUSTAINABILITY AND THE CONTRACTUAL ORGANIZATION OF PRODUCTION



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Many studies including the Study for the European Commission on Due Diligence through the Supply Chain found that contractual clauses are still the most utilized tool, for supply chain due diligence, however there's also evidence that contractual clauses often undermine human rights in practice. Could you elaborate on the status quo of contracts in the value chain within this context?

To start with, I really enjoyed the previous presentations, such as Stephen on historical developments related to the corporation and Rachel on corporate groups. Of course, the other means for organizing production apart from corporation and corporate groups is by sourcing from others by contract.

We have to some extent come to grips with multinational corporate groups composed of parent companies and various tiers of subsidiaries. For one example, I refer to the picture on page 28 of Richard Meeran's article 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States'. The basic gist of the picture is that you have the parent company, RTZ Corporation, on top. Connected to the parent company you have several tiers of subsidiaries situated in different countries. In many cases the previous tier has full equity ownership of the next tier subsidiary and, if not, then you see a percentage between the lines linking the different companies which identifies how much equity one company owns in another.

These kinds of pictures of corporate structure are something that multinational corporations readily have at hand so that they know exactly the structure of the corporate group and how they best might govern it. But from the outside, it may be very difficult to discern how the group is organized: who owns what and who controls what. This is because in principle each of these companies should be an independent company: that is why they have the benefit of limited liability, and it is important for parent companies to maintain this aura of independence for legal reasons. So parent companies try to balance the active governance and relative independence of their subsidiaries. This is depicted to for example by Lord Briggs in § 51 of the recent UK Supreme Court decision Lungowe v Vedanta: At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group.

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The same balancing between coordination and independence is very much true of contractual organization. The main difference is that instead of an underlying foundation of equity ownership, a lead firm's contractually organized "value chain" consists of seemingly independent corporations connected through contractual relationships. An illustrative picture, a "value chain flow chart", is available on page 188 of Peter Kajüter and Harri Kulmala's article '[Open-book accounting in networks: Potential achievements and reasons for failures](#)'. The picture looks in many ways similar to the one of a multinational group, except that it is standing on its head in comparison. At the bottom you have the lead firm and above it several tiers of suppliers to which it has a contractual relationship. Instead of using equity ownership as a foundational organizational principle, you have a value chain organized around the principle of contractual relationships.

A similar history as Stephen's in relation to the development of corporate form could be drawn in relation to contract. In short, there is a very particular historical development behind how contract has shaped into a mechanism for limiting liability. Basically, the doctrine of privity of contract means that a contract is from a legal perspective seen to have effects primarily on its parties, but this concept of privity and what it means in practice has evolved and continues to evolve over time. From a traditional, classical contract law perspective, the lead firm should not have the kind of a picture as we see in the value chain flow chart depicted by Kajüter and Kulmala. Contract law, as it is taught today, is not calibrated to dealing with actors gaining such a bird's eye view of the internal workings of several tiers of contractual suppliers, their cost structures, and how they organize the transportation of goods between one another. From a legal perspective it might even be said that such contractually organized and nonetheless centrally coordinated value chains do not exist. While they are daily bread in management and logistics practice and theory, in contract law such pictures are not discussed. In comparison to corporate groups, which we still struggle to meaningfully tackle through law, contractually organized value chains are even more in the dark of the night (see [The IGLP Law and Global Production Working Group 2016](#)).

From a governance perspective, I would argue that for big corporations there is very little difference in governing production under corporate law principles of equity ownership or contractual relationships. We have companies such as BMW with a global supplier network of 12,000 suppliers in 70 different countries. Most probably BMW ensures the value-chain-wide operation and efficiency of this global complex of suppliers through mechanisms such as the value chain flow chart described by Kajüter and Kulmala in the context of German automotive manufacturing. And then we have other companies, like the global transport giant Mærsk, who use the transparency afforded by contractual governance mechanisms, such as the open books mechanism described by Kajüter and Kulmala, to develop transport logistics between BMW's 12,000 suppliers in 70 different countries in a way that can [reduce carbon emissions](#). Or we have broad sectoral alliances of garment lead firms coming together under the Accord for Fire and Building Safety in Bangladesh to organize a contractual mechanism that connects lead firms to the employees of several tiers of Bangladeshi suppliers in order to develop safe working conditions (the [Accord is publicly available](#); for one analysis see [Salminen 2018](#)).

Thus from a governance perspective there is little difference in whether we are dealing with corporate groups or contractually organized value chains. The same continuum of governance as mentioned by Lord Briggs in Vedanta, from passivity to what in practice is a single entity, can take place in either form of organization. From a practical perspective, of course, there is a very big difference due to much more focus having been given to corporate groups to date than to contractually organized value chains. If we take the example of reporting, group level corporate reporting is something of an established standard, but value chain wide reporting lags far behind. For example, while the Greenhouse Gas Protocol has in 2011 expanded from corporate-group-focused greenhouse gas reporting (so-called 'scope 1 emissions') towards value chain wide reporting (so-called 'scope 3 emissions'), the first is still seen as the core of the GHG protocol's corporate standard while the latter is an "optional" reporting category (see the [Revised Edition of the Greenhouse Gas Protocol](#)).

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The problem is clear. Companies can outsource production contractually to gain competitive advantage. At the same time, they outsource the negative externalities of production, for example by outsourcing resource-intensive aspects of production to countries without access to clean electricity or renewable resources, or by outsourcing labour-intensive aspects of production to countries where social or labour standards are not comparable to those in the lead firm's own jurisdiction. Our lacking understanding of contractual value chains and how to tackle them means that this part of the global sustainability problem is much more in the dark than in relation to corporate groups.

How do lead firms govern their contractually organized value chains? Most companies today have codes of conduct that establish standards that they expect their suppliers to follow, for example in relation to labour conditions or the environment. These codes of conduct are to various degrees integrated into supply contracts and may give lead firms a right to terminate the supply contract if they are not followed. But in many cases codes of conduct are not enough. For example, if suppliers are located in other jurisdictions, they typically operate under very different standards than the lead firm. They may not have the financial, technical, or processual means of putting in place standards that lead firms require. If lead firms want to have a value chain functioning effectively in relation to its standards, the lead firm will also need transparency over the relevant actors of the chain. The lead firm needs to know what the different tiers of suppliers are capable of to identify problems in relation to putting in place the required standards. Only once they know what the problems are can they start tackling those problems together with affected suppliers, for example by providing financial, technical, or processual support. This applies in the same way to maintaining logistics, R&D, and cost management, as in Kajüter and Kulmala's example above, as it does to different forms of sustainability, such as the Carbon Pacts and the Accord on Fire and Building Safety in Bangladesh (for an overview of approaches to governance through contract, see Salminen 2020).

Many of the transnational sustainability laws that have sprouted up in the recent decade and, for example, the proposed due diligence directive included in the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, try to tackle this reality of contractual value chains (generally on the relationship of value chains and current regulation, see Salminen and Rajavuori 2019). But we are still very much trying to come to grips with the contractual form of organization. There is much work left to do in relation to broadening our understanding of contractual organization and developing knowledge about what kinds of mechanisms could best enable their sustainability.

How would you anticipate that these organizational structures and contracts will change if there's a mandatory due diligence duty?

I was just about to mention that in addition to regulatory developments, many of the legal cases we have been talking about today, for example *Lungowe v Vedanta*, are based in the tort of negligence. Basically, similar principles could be applicable in contractual contexts as well, even if there are of course differences between equity-based and contractual organization and the situation in relation to private law liability for inadequate value chain governance is still highly unclear.

At the same time, we have clear examples where lead firms, without regard to size or sector, are generally liable for their contractually organized chains, with product liability being one prominent example.

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If we were to have a similar, generally applicable regulatory approach to due diligence as we have in relation to product liability, how would things change? Let's say we take the French *loi vigilance* as a starting point, and let's say that it would be extended to cover also small and medium sized enterprises, so that it would extend the requirement of due diligence not only to the current handful of big corporations but also to a much larger group of small and medium sized corporations. The directive proposed by the European Parliament seems to be going a bit more towards this kind of an expansive approach.

From the perspective of big corporations, I do not see this would be a problem in any way. They already have transparency over their contractually organized value chains and the means to develop due diligence further, as we know from various examples such as the open books accounting practices described by Kajüter and Kulmala, the Carbon Pacts, and the Bangladesh Accord.

For smaller companies this could be problematic. However, we can imagine different kinds of solutions. One is joining together in broader sectoral instruments, such as the Bangladesh Accord, which is a collective of actors working together to govern the use of contractual suppliers. Actors could naturally also turn to sourcing in jurisdictions where standards of operation are generally adequate: this is no doubt one aim of the recent regulatory initiatives, and if all actors are similarly affected then the effects on comparative competitiveness should be manageable. And if local sourcing were not possible, companies might instead emphasize relationships with their external suppliers more than today and focus on building stable supply relationships through transparency and capability building to ensure that externalities are taken care of. All this would no doubt lead to something of a recalibration of transnational trade.

Of course, there are other layers to the problem of sustainable production. One of the things that we should definitely consider is that for example consumers can already now source directly from extraterritorially located digital platforms, thus avoiding companies established in the EU and any regulatory initiatives aimed at them. Whatever approach we take to regulating value chains through lead firms located within the EU, we will need to also account for the fact that consumers can source and are currently to a great extent already sourcing production directly from extra-territorially located platforms. Doing otherwise might move today's sustainability challenges increasingly to consumer transactions on digital platforms that are not covered by our current approaches to the sustainability of contractual organization.

COMPANY LAW: THE CORPORATE BOARD AND MANDATORY SUSTAINABILITY DUE DILIGENCE



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Company law is no holy cow

Mandatory sustainability due diligence should not be disconnected from company law. Such a disconnect reinforces the treatment of company law as a holy cow in the regulatory field, which cannot be touched while all other areas of law around the company is gradually seeing changes to promote corporate sustainability.

To leave company law out of the equation would make it more difficult to include the core role of the corporate board in due diligence. Rather, due diligence should be seen as an integral aspect of reformed duties for the corporate board, to ensure that companies mitigate the risks of unsustainability – for the sake of the company itself and for society. Any true improvement in this area needs to directly and explicitly include the role of the corporate board.

Otherwise we risk repeating the mistake committed through decades of various initiatives based on ideas of reflexive theory, where different forms of sustainability reporting (CSR reporting; non-financial reporting, etc.) have intended to influence the decision-making of the board without regulating directly. Experience has shown that this has had limited effect and is insufficient to close the gap between what boards see as their duty and what the company is asked to do.

The legal myth of shareholder primacy

Company law itself obviously does not say that companies should be governed in a way that undermines the possibilities for a sustainable future by exploiting people, destroying the environment and undermining the economic bases for resilient societies. Yet, this is what is happening today.

One reason is the still very strong social norm of shareholder primacy. I use this term, drawing on multijurisdictional comparative analysis in several projects, as a short form for a range of complex interactions between economic incentives and financial market expectations of companies. This social norm has become so strong that it has become a legal myth. Therefore, many think that companies are the property of shareholders, and that the duty of the board is to maximise returns for shareholders. The result is an extreme externalisation of the responsibility for social, environmental and economic harm committed by companies through their global value chains.

As long as that social norm is left unchallenged, any kind of norm sets around the company, any expectations of what they should report on, any kind of standards or guidelines or principles, which increasingly and more strongly are arguing that the company should internalise the interests of society and environment, will have limited effect.

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To close the gap between what boards and senior management think is their main job and societal expectations of business transitioning towards sustainability, we need to include the role of the corporate board. As Stephen Turner explains, it has to be hard law. We have to show, finally, that sustainability is as important as the financial governance of the company: that we take people and the environment as seriously as we for decades have been taking financial issues.

From human rights due diligence to sustainability due diligence

Mandatory sustainability due diligence, as hard law regulation of the duties of the board, will be a key tool for corporate governance, for risk management for the company itself – and for society. We owe thanks to the UN Guiding Principles for Business and Human rights (UNGPs), for informing much of the debate on mandatory due diligence. With that backdrop, it is natural that much of discussion has been and still is about human rights due diligence.

Yet, protection of human rights and securing company respect for human rights will have limited effect if we don't work more broadly to secure sustainability. The grand challenge of our time is to secure the social foundations for humanity now and for the future within planetary boundaries. And these are interconnected issues: it's not possible to pick out one part to say 'let's mitigate climate change first and then look at biodiversity and water and land use' and also it's not possible to say 'let's protect human rights first and then protect the very basis of our existence'. So it has to be sustainability due diligence and it has to be mandatory.

A level playing field and legal certainty

Sustainability due diligence as hard-core company law responds to the call for a level playing field from businesses that are trying to contribute to the transition to sustainability. It also provides legal certainty for all involved and for those affected within and outside of the company.

What companies meet today in their globalised activities is a very fragmented and chaotic picture of some national sector-based rules on due diligence, some reporting requirements, increasing societal expectations, and guidelines and principles in various forms. Without a level playing field consisting of mandatory rules and enforcement, it may even be irrational for a company to do a full due diligence and be open about what they find, because they may then look worse than their competitors who are still getting away with greenwashing, blue washing or SDG washing (the latter referring to the UN Sustainable Development Goals).

For all these reasons we need sustainability due diligence as a key part both of a corporate duty and a duty for the corporate board to ensure that the company creates sustainable value within the limits of our planet.

Corporate duty and a duty of the corporate board

Setting out mandatory sustainability due diligence as a corporate duty is important because it places the onus on the legal entity that has a potentially everlasting life. This opens up for public and private enforcement in various ways. However, just having a corporate duty has very strong limitations. Notably, we will then not manage to close this gap between what companies are expected to do and even mandated to do, and what corporate boards, and by extension senior management, see as their duty to do in their governance of the company.

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For that reason, to actually operationalise this and to give legal certainty to those on boards and in senior management, this should also be very clearly spelled out as a duty for the corporate board. This would entail, as is the norm in company law, that it is a duty for the board as a collective organ, with potential liability individually for the members of the corporate board.

Contrary to what some may wish to claim, this is not opening up for totally new possibilities for companies and members of their boards to be sued. Rather it would be a contribution to bringing into more foreseeable forms the international trend of lawsuits against companies for environmental and human rights harms, which illustrate the growing lack of acceptance of the status quo of corporate unsustainability. While it is crucial that due diligence does not act as a safe harbour or devolve into box-ticking exercise, proper compliance with a mandatory sustainability due diligence regime will serve as a potential defence for the company and its board.

Situating mandatory due diligence in a thoughtfully formulated reform

A duty for the corporate board to undertake mandatory sustainability due diligence should be a part of a well thought-through legal reform. It should be spelled out explicitly for the board that its duty is to promote the interest of the company. This is what company law, usually implicitly, requires across jurisdictions. However, because of the social norm of shareholder primacy, which has developed into this myth that board members are agents for the shareholders and should maximise their returns, it would be a valuable clarification to put into company law that the duty is to promote the interest of the company.

To promote the transition of business towards a sustainable future, this should be formulated so that it sets out that the board shall promote the interests of the company in a way that creates sustainable value within planetary boundaries. Further, it should be stipulated that this means setting a sustainable value creation strategy for the whole business of the company, encompassing its global value chains, assessing the business model of the company and adjusting or changing it where and when necessary. Sustainability due diligence should be included as a clearly spelled out mechanism for the board to be able to do its job.

Clicking into place a missing piece of corporate sustainability

Reforming company law means putting into place a missing piece in the jigsaw puzzle of corporate sustainability. The success of the EU's Sustainable Finance Initiative relies on investors, fund managers and banks being able to reliably assess the sustainability of their clients, their investments or project plans. This is not possible without reliable and relevant information from companies. This is recognised in the EU Commission's preparation of the reform of the so-called Non-Financial Reporting Directive - now more appropriately named in the proposal as a Corporate Sustainability Reporting Directive. Although this major step towards corporate sustainability reporting is positive, it needs the connection with hard-core company law to realise its potential.

Without company law, it is not only sustainable finance that risks failing. The entire EU Green Deal, with its various initiatives, aiming to influence production and consumption so that they become more sustainable, cannot realise its potential unless we connect the other pieces with the rules governing the key decision makers in companies. Ultimately, it is about securing a sustainable future for us all.

CORPORATE DUE DILIGENCE AND DIRECTORS DUTIES?



LÉCIA VICENTE

About the author: Lécia Vicente, the Henry Plauché Dart Endowed Assistant Professor of Law at Louisiana State University's Paul M. Hebert Law Center and Associate of NOVA BHRE.

What would be the implications of a corporate due diligence law internally within the company, namely the duties of directors and the Board. What would be the impact of a corporate due diligence duty on the ongoing conversation about directors' duties in the context of shareholder value? How would these developments interact?

Well, let me start with this. The COVID-19 health crisis has exposed how some business entities can relatively easily shift their businesses' negative impacts to other jurisdictions without being held accountable. The COVID-19 crisis has also shown that not all businesses have taken steps to mitigate the crisis's adverse effects on workers and supply chains. There are many reasons why companies have not taken those steps—possibly a lack of resiliency in the economic infrastructure, insufficient governmental support, or a lack of prioritization of mitigating such negative impacts on third parties. This is an inquiry that avails itself to empirical study.

In this context, I think about the disproportionate impact that business activities have on particular stakeholders such as women, where in many cases women are working moms, heads of households, community organizers quietly filling in the gaps that states are not able to fill. I think about the environment and the negative impacts that climate change has had on states' economies and the lives of millions of people worldwide, many of them living below the poverty threshold.

If we understand that due diligence is the businesses' obligation "to take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the environment or good governance from occurring in their value chains, and to address such impacts when they occur," as it is outlined in the annex to the European Parliament resolution of March 10, 2021, with recommendations to the Commission on Corporate due diligence and corporate accountability, then the question is: what should board of directors do? And in doing so, what should they prioritize?

I think I would get different answers to these questions depending on what side of the Atlantic I am. However, it is inevitable to think about the scope of the directors' and officers' fiduciary duties. Directors' fiduciary duties consist of two main duties - the duties of care and loyalty. There is also the duty of good faith, which Delaware courts tend to include in the duty of loyalty.

Shareholders hire directors to act in the interests of shareholders. Shareholders are interested in profit maximization. In 1970, Milton Friedman published a piece in the New York Times where he wrote that the managers' primary responsibility was to the corporation's owners: the investors. He wrote, "there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game which is to say, engages in open and free competition without deception fraud."

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However, we live in a post-Milton Friedman world. Directors cannot ignore that the world has changed and that investors want accountability, especially when responding to negative impacts deriving from climate change, supply chains, or discrimination. Investors demand accountability not because that goodwill is an expression of the investors' own self-interests, as Milton Friedman would put it, but because, ultimately, they understand that businesses, particularly publicly-held corporations, have a political role. If businesses have a political role, then managers' role can be political too. And if the managers' role can be political, then making profit may not be the only aspect of the business that managers should consider.

There are recent examples that illustrate the extension of the scope of corporations' duties of care. For example, on January 29, 2021, the Court of Appeal of the Hague ruled that Shell's Nigerian subsidiary was liable for the damages caused by oil spills from underground pipelines and an oil well in Nigeria. The plaintiffs were four Nigerian farmers and Friends of the Earth. The court considered Shell Nigeria liable and held that Shell Nigeria and its parent company should build a better warning system in one of the pipelines to detect future leaks and limit environmental damage.

More recently, on February 12, 2021, the English Supreme Court judgement in Okpabi and others v. Royal Dutch Shell Plc and another, unanimously ruled that the plaintiffs' case should proceed because the parent company owed a duty of care to the Nigerian citizens for the alleged environmental damages and human rights violations by the Nigerian subsidiary.

On March 19, 2021, in the case of a class action involving more than 15,000 Indonesian farmers, the Australian Federal Court found that PTTEP Australasia had breached its duty of care to Indonesian seaweed farmers when it failed to prevent a massive oil spill that travelled into Indonesian waters and destroyed the seaweed crops and livelihoods of West Timor farmers.

Although these cases raise questions in tort liability from different jurisdictions, the extension of the parents' company duty of care to third parties makes me think whether directors' duties of care should be extended too. It makes me think about how the boards of directors should seriously adopt due diligence strategies and take all reasonable steps to prevent harm not only to shareholders but also to stakeholders. This makes me think about how directors' duties can be contractually designed.

How can contract law design affect the scope of directors' duties?

I understand that optimizing shareholder value means paying attention to the new social values that claim a more inclusive economy. The better corporate officers and directors respond to new economic, environmental, and social challenges and values, the bigger the shareholders' return will be.

Corporate law has a significant transformative role to play in this context. In practical terms, I am thinking about the contractual design of the corporations' organic documents such as bylaws that define the business entity's contractual framework and delineate the directors' duties. Then, there is a question related to the multiple expressions of ownership in the business controlled by "contract". Who de facto owns the corporation when the corporation's contractual framework significantly extends managers' control powers? This is the object of my recent research project, which I hope will produce conclusive answers in the long-run.

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What types of legal reforms would nudge or encourage the directors to behave or decide differently?

Well, for me, I think this is a question of incentives because the board of directors, particularly their members and the directors themselves react or act based on the incentives they have. I do not know if we can talk about executive compensation or the company's profit, but incentives are significant. So I wonder how many board members want to be board members and how many directors want to be directors if they knew that they would be punished severely for making decisions based on what they feel is their technical knowledge?

So, I think that if we are talking about legal reforms, one way of creating incentives is to think about default rules. These are rules that the parties can contract around easily. I wonder about designing them in a specific way could create an incentive for our shareholders to pressure the board of directors and the directors to go in a certain direction.

Another thing that our attendee is referring to is to expand the purpose of the derivative lawsuit somehow. This is a lawsuit that shareholders file on behalf of the corporation to protect the corporation's interests. This is an interesting idea, I think, now the question is, what are the interests that we are protecting? Are we only safeguarding the interests of the corporation and what are those interests? Or do we want to pay attention to the interests of stakeholders and to what extent should we pay attention?

So this is a huge discussion; these are great questions. The third point that I would like to refer to is the concept of sustainability. In Europe, we have a definition of what sustainability is, but what about in developing countries or in emerging economies? What is sustainability for them? And when we talk about due diligence, how do we want to craft rules that pay attention to sustainability and what we mean by that?

So, I think there is a lot of food for thought, and I am so grateful that I am part of this discussion that I believe is just beginning.

CONCLUDING REMARKS



MARGARIDA ARÊLO MANSO

About the author: Margarida Arêlo Manso is a Research Associate at the Nova Centre on Business, Human Rights and the Environment and she is currently working in Luxembourg, as a trainee at the European Court of Justice, in the Chambers of the President of Chamber, Judge Ricardo da Silva Passos.

The third episode of the webinar series took place on the 25th of March 2021 and focused on the relationship between Corporate Due Diligence and Contract Law as well as Company Law.

The keynote speech was delivered by the Portuguese Secretary of State for Commerce, Services and Consumer Protection, João Torres, who affirmed the commitment of the Portuguese Government to implement the UN Guiding Principles on Business and Human Rights through the approval of a National Action Plan for Responsible Business Conduct and Human Rights in 2021.

For the discussion which followed, the panel was composed of Beate Sjøfjell (University of Oslo), Jaakko Salminen (Copenhagen Business School), Lécia Vicente (Louisiana State University), Rachel Chambers (University of Connecticut), Sarah Dadush (Rutgers Law School), Stephen Turner (University of Essex) and Stuart Neely (Norton Rose Fulbright).

The first speaker, Stephen Turner, highlighted that the historical legal construct of the corporation is not only inadequate to answer the current challenges international community is faced with, but can also be redesigned into a model that suits people's human rights and the need to protect the environment.

The scholar developed on how the three classic features of the legal construct of the corporation – separate legal personality, limited liability and directors' duties – steer corporate decision making towards commercially successful decisions that do not take adequate consideration of human rights and the environment. Mostly, the model represents a strong obstacle for solutions by the international community to the problems addressed, ultimately shaping them.

Next, Beate Sjøfjell reflected on the reasons behind the still very strong social norm of shareholder primacy. She highlighted the importance of an holistic approach to sustainability due diligence which would incorporate both a corporate duty and a duty for the corporate board 'to ensure that the company creates sustainable value within the limits of our planet'. She called for a regulatory reform with mandatory rules in this respect to level the playing field.

Rachel Chambers analysed how the concepts of separate corporate personality and of the corporate veil affected victims' attempts to seek remedies directly against companies in concrete cases. In this respect, she explored three legal cases in particular, namely, *AAA v. Unilever* [UK]; *Lungowe v. Vedanta* [UK] and *Four Farmers v. Shell* [The Netherlands]. She argued that a statutory duty would help overcome these hurdles since companies required to exercise human rights and environmental due diligence would no longer be in a position to try and distance themselves from their subsidiaries and business partners. She also highlighted the importance of including a civil liability provision to accompany the statutory duty. Finally, she underlined the important role that a regulator with strong powers could also play in the enforcement of mandatory human rights and environmental due diligence legislation.

CONCLUDING REMARKS

Lécia Vicente highlighted how the post-Milton Friedman world has moved away from shareholders' primacy. The scholar also mentioned recent examples that illustrate the extension of the scope of corporation's duties of care which include the Court of Appeal of the Hague decision against Shell, the English Supreme Court decision also against Shell and the Australian Federal Court decision against PTTEP Australasia. She affirmed that: boards of directors should seriously adopt due diligence strategies and take all reasonable steps to prevent harm not only to shareholders, but also stakeholders."

Lécia Vicente then explained how optimizing shareholder value means paying attention to the new social values that claim a more inclusive economy. She highlighted the important transformative role of contractual design of the corporations' constitutional documents which define the company's contractual framework and delineate the directors' duties.

Stuart Neely explored how the creation of a corporate duty to conduct human rights due diligence (as envisaged at the EU level), would engage the director's duties to act with reasonable care, skill, and diligence as well as to act in the best interest of the company, varying from jurisdiction to jurisdiction. He also explained how if the business which is subject to the corporate duty to conduct mandatory human rights due diligence fails to comply with the law then the director's duties are engaged because non-compliance with the law exposes the company itself to risks.

Jaakko Salminen reminded that 'the other means for organizing production apart from corporation and corporate groups is by sourcing from others by contract'. The scholar drew a parallel between the relationship between a parent company and its subsidiaries whereby the former has various means of controlling or guiding its subsidiaries, in spite of the principle of separate corporate personality, and the relationship between a lead company and its contractually organized value chain consisting of 'seemingly independent corporations connected through contractual relationships'. Jaako argued that from a governance perspective there is little difference in whether we are dealing with corporate groups or contractually organized value chains. He explained that lead firms normally govern their contractually organized value chains through codes of conduct integrated in supply chain contracts which include standards to follow in relation to social and environmental issues. However, the scholar highlighted that these codes of conduct are generally not enough for a variety of reasons including the potential lack of financial, technical and other types of means of the suppliers to adequately implement. The scholar concluded by reflecting on the ways in which mandatory due diligence will affect these kind of organizational structures and contracts.

Sara Dadush shared some of her experience working for the Business Law Section of the American Bar Association on model contract clauses (MCCs) for the implementation of the UNGPs and corporate human rights due diligence. She started by explaining that the idea behind the MCCs come from the observation that many firms have made public commitments to uphold human rights but are rarely compelled to take measures to ensure that these are effectively implemented. The scholar highlighted that the 'MCCs seek to address this gap by offering language and drafting guidance for implementing companies' human rights policies contractually'. Sara emphasized that a key contribution of the MCCs is to place production process conformity on contractual par with product conformity, meaning that failure to respect workers' human rights in the production process is treated as a contractual breach, in the same vein as a typical contract the sale of goods would treat a failure to deliver the goods on time or in accordance with the design specifications. The scholar then contrasted the two versions of the MCCs. She highlighted that whilst the version 1.0 was more 'buyer-friendly', disregarding the role of purchasing practices as potentially contributing to human rights issues in the supply chains, version 2.0 proposes MCCs which aim to ensure that the buyer engage in responsible purchasing practices. Finally, she highlighted that workers normally have no rights in relation to access to remedy under the contract.

CONCLUDING REMARKS

Next, Stuart Neely elaborated on some of the legal and practical aspects that should be borne in mind in using contractual clauses. Finally, some of the panellists explored the limitations of holding board members liable and reflected on the question of incentives, since the board of director's react on the incentives.

CORPORATE DUE DILIGENCE AND THE GREEN DEAL



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THE RELATIONSHIP BETWEEN THE UPCOMING EU-LEVEL INITIATIVES ON HORIZONTAL MHREDD AND ON FOREST-RISK COMMODITIES



DELARA BURKHARDT

About the author: Delara Burkhardt is a Member of the European Parliament since May 2019 for the German social democrats. She is the European Parliament's rapporteur for an EU legal framework to halt and reverse EU-driven global deforestation.

What are the key elements of your report and the various mechanisms envisaged as part of the initiative on deforestation?

With the Green Deal the European Union is going for being the first climate neutral continent but I think what has to come along with that is that we also take responsibility for our external footprint of environmental destruction. So Europe has responsibility when it comes to deforestation, as these forests we see burning for example had burnt down to make space for cattle and soy for the European market. Just recently, the WWF published a new study where it was shown that the EU is the world's second biggest importer of deforestation after China which is responsible for 16% of global deforestation linked to trade. This is why in October of last year, the European Parliament has made this proposal for an EU legal framework to stop the EU's complicity in global ecosystem destruction that I was the rapporteur for. Right now the European Commission is preparing a legislative proposal on this and we hope that they will of course take on board many of the Parliament's demands. I want to present to you the seven main points that the European Parliament's position is built on.

1. A framework based on mandatory due diligence

The first point is that binding measures are needed, because we see that voluntary initiatives by companies to stop deforestation have not resulted yet in a U-turn and existing certification schemes also have their own issues, for instance they sometimes don't cover all relevant products, they don't cover the full supply chain or the auditing is fraudulent. Even the companies already active in making their supply chains more sustainable that I spoke with agree that we need binding measures to have a level playing field. This is why the European Parliament proposes that the EU adopts a regulation on mandatory due diligence that obliges companies and investors to ensure that their products and services do not contribute to the destruction or degradation of forests and important ecosystems or the violation of human rights. Companies shall have to map and make transparent their entire value chain and assess the risk of their practices on forests and other ecosystems and on people in all steps of their value chain. Where they identify risks they shall take action to mitigate or prevent them with the aim to have certainty that this risk is at most negligible. I believe this is also important to restore fairness in the EU internal market: companies that strive to be sustainable should no longer be put on a competitive disadvantage. We need a level playing field in the EU that is based on the protection of our natural foundations of life.

THE RELATIONSHIP BETWEEN THE UPCOMING EU-LEVEL INITIATIVES ON HORIZONTAL MHREDD AND ON FOREST-RISK COMMODITIES

2. A framework going beyond forests: forests, ecosystems and human rights

The second point is that we need a deforestation framework that goes beyond the protection of forests only, and should also include ecosystems and human rights. Other ecosystems than forests also have a high value for the climate and biodiversity. When we prohibit turning forests into agricultural land, the pressure will shift on other valuable ecosystems, as agribusiness will convert these other ecosystems like savannahs or swamps into arable land. We have seen this development for example in Brazil where we can observe it in the Cerrado savannah or the Pantanal wetlands that have been increasingly turned into agricultural land. So this mandatory due diligence for forest risk commodities also has to be valid for other valuable ecosystems. Moreover, we made clear that we cannot speak about the destruction of forests without speaking about the violation of human rights because deforestation is often the consequence and the cause of human rights violations for example when it comes to – sometimes violent – land-grabbing and land ownership rights of indigenous people.

3. A framework going beyond legality in the producer country

The third point in our resolution is that we want a framework that is going beyond legality in the producer country. Only half of all recent tropical deforestation is the result of illegal clearance for commercial agriculture and timber plantations, according to the UK environment ministry. This narrow focus on illegal deforestation would also be lagging behind the approach taken by industry for the last decade – industry standards, company policies and global initiatives such as the New York Declaration on Forests all address deforestation as a whole rather than focusing on illegal deforestation only. The scope of the EU legislation should therefore be broader and apply to all deforestation and not only illegal deforestation.

4. A framework going beyond consumption: finance

The fourth point is that we want to go beyond consumption, as also banks and other investors should have to take their responsibility. They should be subject to the same duties to account for their impacts on nature and people. As the NGO Global Witness found out, between 2013 and 2019, European investors financed activities worth EUR 7 billion for six agribusinesses alone, which contributed to the destruction of forests in the Amazon, Congo and Papuan New Guinea.

5. A framework linking due diligence to liability

The fifth point is that we want to link due diligence to liability because we think without liability the whole concept would be a toothless. Where human rights violations or the destruction of nature took place in a value chain, although a company could have had influence to avoid this, or where risks in the value chain were misjudged and resulted in damages, European companies should be held liable under civil law for these damages and provide for compensation. Contrary to what is often claimed by parts of the business community, companies should therefore NOT be held responsible for processes over which they have no influence. They should merely comply with their own duties of care. You can imagine that this was one of the most contested elements of the report. But I believe that a legal framework without liability would be a toothless tiger.

6. A framework improving enforcement of EU rules: lessons learnt from EUTR implementation

The sixth point is that we want to learn lessons from the EU timber Regulation which is also based on due diligence. We see some weaknesses especially in its implementation, and its uneven implementation in different Member States. That is also the feedback I received from many businesses that are active in timber trade.

THE RELATIONSHIP BETWEEN THE UPCOMING EU-LEVEL INITIATIVES ON HORIZONTAL MHREDD AND ON FOREST-RISK COMMODITIES

Therefore, for this new forest-risk commodities regulation, I propose some improvements like EU-wide minimum standards for the quality and frequency of controls by national authorities, or guidance for uniform implementation across all Member States.

7. A framework including cooperation with producing countries: new generation of VPAs

The last point is that we of course are very aware that with the implementation of mandatory due diligence for forest risk commodities we need to have close cooperation with producing countries. We need to create the conditions on the ground in producing countries to implement the regulation more easily and to address the underlying causes of deforestation and human rights violations. This is why we propose a new generation of voluntary partnership agreements (VPA) where we also work together with the producing countries. They would be broader than the FLEGT VPAs and would need to reflect the abovementioned broad scope and go beyond legality of the sourcing of the commodities, but also looks at deforestation, ecosystem destruction, sustainable agricultural practices, and also governance of land tenure and labour rights.

How are the horizontal initiative on mandatory human rights and environmental due diligence and the specific initiative on due diligence aimed at forest-risk commodities related and complementary?

Indeed, there are currently two similar, yet different, initiatives under preparation by the European Commission: one specifically for companies dealing with forest-risk commodities, and one general one on human rights and environmental due diligence for all companies. We've been exchanging very closely in the European Parliament while drafting those two reports so the two reports are complementary to each other.

While requiring all companies that want to trade their goods on the European market to check their supply chains for human rights abuses and environmental damages will be a game changer to make globalisation more sustainable and fairer, I would also like to point out an important difference between the proposal for a general human rights and environmental due diligence framework, and a due diligence framework specifically aimed at forest-risk commodities such as soy, beef or palm oil: the general due diligence framework will most probably constitute obligations for due diligence as a continuous process of improvements within supply chains. But I believe that the due diligence framework for the forest risk commodities on the other hand should go further than that and should also entail the clear possibility of market restrictions if sustainability criteria are not met as this is a special high risk sector with huge impacts on the world's climate, biodiversity and people's livelihoods.

The forest-risk commodity due diligence framework should constitute due diligence as a process that is undertaken before a product is permitted to be placed on the EU market, to prove that it complies with certain sustainability criteria. Operators should be permitted to place forest and ecosystem-risk commodities on the EU market only when they are able to demonstrate that there is at most a negligible risk that the products did not originate from land obtained via the conversion of natural forests or other natural ecosystems, or undergoing degradation, and are not linked to violations of human rights.

CORPORATE DUE DILIGENCE AND CLIMATE CHANGE



IVANO ALOGNA

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Why is corporate due diligence needed in relation to climate change?

The complex reality of climate change explains the actual need of having another legal instrument to be added to the already rich toolbox existing in the environmental field. Therefore, my answer is threefold: based on scientific, geopolitical and legal considerations.

The first consideration is already quite known and is generally based on the urgency of the issue of climate change, and on the necessity of enriching this toolbox that in the last 30 years, since 1992 (year of the creation of the United Nations Framework Convention on Climate Change) has been developed yet has not been completely adequate to address the always worsening challenge of climate change. Greenhouse gas emissions have risen 60% since 1992, and if at that time the use of fossil fuels constituted 80% of the global energy system, in 2020 their use still amount for this 80%. Moreover, we are already at 1.1°C of increased warming over pre-industrial times and the Intergovernmental Panel on Climate Change (IPCC) in its last reports, including the Special one issued in 2018, warned on the consequences of aiming to a 2°C increase in global temperature, compared to keeping the increase below 1,5°C. Comparing the effects of these two kinds of scenario, the authors concluded – among many other consequences – that a 2°C increase would wipe out 99% of the world’s coral reefs by the end of the century, rather than its 70-90% with a 1,5°C increase, and also it would double the number of plant and vertebrate species that would lose their habitats.

Whilst some were hoping for a silver lining in the dramatic global experience of COVID-19 crisis, the UN Environment Programme in last year Emission Gap Report highlights that the current pandemics “offers only a short-term reduction and will not contribute significantly to emissions reductions by 2030 unless countries pursue an economic recovery that incorporates strong decarbonization”. This shows us the non-efficient or insufficient instruments currently used to reduce greenhouse gas emissions, especially from corporations.

From a geopolitical point of view, there are certainly good news related to the EU Green Deal and its objective of greenhouse gas net-zero emissions by 2050. The goal for Europe to become the world’s first climate-neutral continent is really comforting, as well as EU ambition to position itself as a global leader in the fight against climate change. In the route to boost an always more efficient use of resources by moving to a clean and circular economy, the Members of the European Parliament yesterday [21.04.2021] reached an informal agreement on the new EU Climate Law, increasing the EU’s 2030 reductions target from 40% to at least 55%. That was just in time for attending the US Climate Summit today and tomorrow with a concrete objective, with the hope of pressuring the US into increasing its own ambition.

CORPORATE DUE DILIGENCE AND CLIMATE CHANGE

As we all know, the cooperation is critical in this kind of global fight against climate change, and so it is the need for new legal instruments capable of pushing other States and their companies, such as an increased due diligence obligations, as was highlighted by the UN Special Rapporteur on Human Rights and the Environment, [David Boyd](#), in his [2019 report](#) presented to the UN General Assembly; and that was also discussed by Professor Boyd during our [webinar series on Human rights Due Diligence for Climate Change Impacts](#), organized in September at BIICL with Senior Fellow Lise Smit.

Finally, from a legal point of view, the need for corporate due diligence in relation to climate change is generally to engage directly and more effectively with the main actors behind environmental externalities and climate change: businesses. This kind of path, as was already discussed during the previous episodes of this webinar series, has been already taken in France and followed with proposals tabled in other countries, such as the Netherlands, Germany, Switzerland and Norway. However, there is also some attractiveness for companies in a mandatory due diligence law regime: on one hand, as a means to promote harmonization and to level the playing field, at least across the EU, on the other hand, in the sense of an improved legal certainty as to the standards that corporates will be held to, in a common and more harmonious path toward sustainability.

How could a corporate due diligence duty be used in the perspective of climate change litigation in the European context?

In order to properly address this question, it seems necessary a rapid introduction to the climate change litigation phenomenon, before responding about the possible uses of a corporate due diligence duty in the European context.

As you may know, climate change litigation has spread rapidly and far beyond the borders of Europe in the last decades. Starting from a handful of cases in the 1990s, as of today, there are more than 1600 cases identified globally in the [‘Climate Change Litigation Databases’](#) developed by the Sabin Center for Climate Change Law at Columbia University, covering 37 countries and 8 regional or international jurisdictions. We must, however, mention that more than three-quarters of the total of the cases are identified in the United States alone. When we talk about climate change litigation, we are talking about a very heterogeneous category of legal actions, including court cases, administrative proceedings, petitions and prosecutions, addressing both issues of mitigation as well as adaptation. Among all the cases considered to have “flooded” the courts, especially domestic courts, several types of climate change litigation have been distinguished. On one hand, we have what are called “strategic cases”, which are climate-related cases with a visionary approach, aiming to influence public and private climate accountability. On the other hand, we have also the so-called ‘routine cases’, less visible ones, dealing with, for example, planning applications or allocation of emissions allowances under schemes like the EU emissions trading system. Another important distinction is generally made in the literature between: ‘proactive’ litigation, initiated in order to engender policy change (for example, by requesting the adoption or reform of legislation); and ‘reactive’ litigation, initiated to resist such change (for example, by challenging the adoption of new or reformed legislation). Whilst the majority of climate litigation cases (approximately 75%) have been filed against States, climate change-related cases have also been filed against private actors, mostly ‘Carbon Majors’- fossil fuel and cement companies, which are major greenhouse gas emitters. Unfortunately, this kind of cases against private actors has not been successful so far.

However, I think we can start seeing interesting developments, notable related to corporate due diligence in relation to climate change in the European context.

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An interesting example comes from France, where there has been already the first legal proceedings based on the French Duty of Vigilance Law, which have been brought against the oil company Total. In this case, 14 local authorities and 5 associations (including Notre Affaire à Tous and Sherpa) brought Total to court because of its major contribution to climate change and the inadequacy of the measures taken by the company to prevent the resulting human rights, health and safety, and environmental damage. The claimants rely on the Duty of Vigilance Law, but also on the judge's power to order measures to stop or prevent environmental damage under the new Article 1252 of the French Civil Code. The claimants seek an order requiring Total to devise a corporate strategy for addressing the risks of climate change. The case is ongoing and in an order issued on last February, the judge was questioned on the jurisdiction competent for the case, and the judge confirmed the jurisdiction of the civil court.

Another interesting case, which goes in the sense of a climate due diligence, is the one of ClientEarth v. Enea. This case has been one of the most high profile cases in the EU, and it relates to the idea of the campaign 'beyond coal'. This particular power plant was meant to be the last coal-fired power plant to be built in Poland, for the cost of € 1.2 billion. There was a shareholder resolution consenting to the construction of this coal fired power plant. However, ClientEarth filed a shareholder lawsuit that sought to annul the resolution and to hold that the resolution was invalid. One of the core arguments behind the claimants' case was that the power plant harmed the company's economic interests due to climate-related financial risks. In other words, this power plant would be a stranded asset, and it was not in the country or the company's interest to build this power plant. The case was brought in the Polish Commercial Companies Court, and in August 2019 the regional court in Poland found the resolution to be invalid. This was one of the obstacles in the construction of this coal-fired power plant. Since then, there have been other factors that have stood in the way, mostly to do with decisions by investors that they will not be investing in this coal-fired plant, also because of the direction taken by the EU Green Deal.

While many companies currently interpret the duty of vigilance restrictively, as a compliance exercise limited to the implementation of internal risk management processes, the forthcoming decisions in the various litigations underway will be decisive as to the actual content of these requirements, which are now inspiring the European legislator.

However, we should mention, there is also an argument that, in fact, mandatory due diligence will increase climate litigation not only for companies who do not comply, which is probably justifiable but also against those companies who, by complying and providing details of their climate change impacts and the steps they are taking to address those. They may therefore be targeted by claimants both for the impacts that they have identified or by it being said that they are not doing enough. I think that would really be an unintended consequence of any due diligence law but it is perhaps an inevitable one.

To conclude, an important point is the extent to which corporate due diligence can be used also as a mean of defence. I think that most corporate practitioners would advocate that this should be the case, especially considering that at the moment there is significant uncertainty about what the climate-related standard of care amounts to and what companies need to be doing to discharge their duties and reduce their litigation risk. That is without considering the harmonization point I made earlier which is related to the risk of Member States exploring different avenues on this, and companies being left facing a jungle of different standards to comply with in the European context. An European harmonized and mandatory corporate due diligence would be then considered as a safe harbor to climate-related claims. And where a company can demonstrate that it has undertaken adequate and appropriate measures to comply with its due diligence, that can be a defense to a claim of breach.

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The forthcoming European legislation may really can help in this sense, providing more clarity on such standard of care for corporation – notably in relation to climate change – which is already existent through a soft law normative framework at the international level or through fragmentary regulatory developments in the different European legislations. This new EU legislation will (hopefully) provide better regulatory guidance to business, on one side, and facilitate a better access to remedies for individuals and communities affected by climate change, on the other side.

What role should trade and investment agreements play in mitigating against climate change?

To state the obvious, international trade and investment agreements are treaties that have the objective of promoting and protecting cross-border trade and investment flows. They could potentially play a key role in the efforts to boost climate-friendly trade and to direct investments to meet climate change mitigation (and also adaptation needs), and of course at the same time directing investments away from business-as-usual practices. So in a way this kind of agreements can help overcome the chronic lack of ambition necessary to create transformative solutions, if we want to avoid the most catastrophic effects of climate change and to limit global warming below 1.5 °C. That could be done – if we want to resume it very simplistically – by removing tariffs and harmonizing standards on environmental goods and services, and eliminating distortionary and poorly designed subsidies on fossil fuels and agriculture. However, this harmonization should be conducive to what we can call as a “race to the top”, towards always better standards and in the sense of improving climate policies.

Unfortunately, history tells a different story. International tariff reduction has increased trade in carbon-intensive and environmentally destructive products, such as fossil fuels and timber, more than it has for environmental goods. Moreover, also in the context of climate change, there is the classical divide between environment and trade, with a real concern that potential ambitious climate policies will fall foul of WTO rules if they are perceived to arbitrarily or unjustifiably discriminate against third countries. The classical divide now is even more evident if we consider that on one side we have the always more clear and evidence-based limits of our climate system, and the other we have trade and its centrality for economic growth. In my opinion, the original sin here is related to the old fashioned paradigm of development, considered as a synonym of economic growth, which traditionally is considered strictly interlinked with trade. Now, the problem with climate change can be resumed through the famous bathtub analogy: the bathtub represents the climate system, and the water level represents CO₂. Adding water from the tap represents addition of greenhouse gases into the atmosphere from human sources. If you keep adding water, eventually the tub will overflow and spill water on the floor (in our case, this represents our incapability of limiting the most dangerous effects of climate change). Simply said, trade and investment agreements should avoid to provide additional load to the climate system.

In the case of the EU’s trade and investment agreements, we can just agree that they should be aligned with the forthcoming EU legislation on mandatory human rights, environmental and climate change due diligence. This kind of agreements should galvanize and reinforce the efforts required of business to conduct human rights, environmental and climate change due diligence under the EU legislation, and help moving in the sense of an ecological carbon neutral transition.

LEGISLATING FOR CORPORATE DUE DILIGENCE, CLIMATE CHANGE AND ACCOUNTABILITY



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Why is corporate due diligence needed in relation to climate change?

In a few words, we need mandatory human rights and environmental due diligence for companies that covers climate change because we are already in a crisis.

Business is an important stakeholder for taking action on this in the sense that, if we are to do anything about the climate crisis – meaningfully – we need them on board. The response that we need to see from companies requires a massive shift in the way that they do business. As we’ve already seen with human rights issues, this is non-negotiable: we simply cannot go on with business as usual and expect the outcomes to change. Due diligence provides us with a model for making behavioural change since it requires companies to take action in response to a set of assessed risks and impacts. Human rights and environmental due diligence is also an appropriate response because one of its central objectives is the prevention of harm – it’s about designing a system of active risk management that prevents these things from happening and mitigates the impacts that they have. In that sense that’s what we urgently need in relation to corporate action on climate change.

We need businesses to address their risks and impacts on climate in at least two areas, the first of which is greenhouse gas emissions, and the second is the human impacts and human rights impacts of climate change. For example, we need companies to assess their own (direct) emissions and measure those as well as their indirect emissions – and then we need them to take action based on this. This means that we need them to stop the production of, and reliance on carbon intensive sources of energy and carbon intensive products and we need them to do something about the carbon intensive products, forest risk commodities and so on that are in their supply chains and value chains. We then need them to go through the steps of monitoring the effectiveness of the actions taken, publicly accounting for that and working to continuously improve it. In that sense human rights and environmental due diligence provides a useful framework for us in relation to, and in responding to climate change and the climate impacts.

I think that the idea of continuous improvement aligns quite well with the objectives of the Paris Agreement. The point is that we need companies to do more than produce voluntary zero deforestation policies and climate related sustainability policies without doing more and a mandatory due diligence requirement can help to make sure that companies are walking the talk on climate change. Alongside that, of course, we need mechanisms to provide remedy for those people and communities that suffer harm and we need accountability for companies when they get it wrong.

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Finally, in line with this central objective of due diligence – to prevent negative impacts – the action to address climate risks and impacts needs to focus much more on reducing our absolute emissions in the short term, instead of relying on offsetting emissions at some time in the future. There's a lot of talk about the latter today as we mark Earth Day, but the emphasis on prevention, on stopping this familiar cycle, needs to be front and centre when deciding what we require of companies and their climate response.

Can you explain the relationship between environmental dimension and the human rights dimension of due diligence in relation to the forthcoming legislative proposals?

It is important that both human rights impacts and environmental impacts – which include climate change, are covered in the forthcoming EU legislation and legislative proposals (on sustainable corporate governance and deforestation) as individual issues and as intersecting issues. There is no doubt that climate change has serious impacts on human rights and will affect the enjoyment of a range of rights. It will definitely also create setbacks in the progress that we have made to ensure the enjoyment of human rights. The same is true for harm to the environment more broadly since pollution, loss of biodiversity, deforestation and so on will also have negative impacts on human rights.

However it is also important that we recognise that the environment needs protection in and of itself. We need to consider environmental protection, not just when there's a harm to human health or property and not just because there's harm to human health or property. We need to stop flattening forests and end the loss of biodiversity that goes with that – we need to stop climate change. We need to acknowledge that climate change is the impact and see that there is an environmental impact of climate change, not just a human rights impact of climate change.

In terms of legislating on this, there may be differences between human rights due diligence and anything we could consider climate due diligence. Thanks to the UN Guiding Principles on Business and Human Rights and the work that has been done around those in the last decade, we know that an adverse human rights impact is one that reduces or removes a person's ability to enjoy any of their rights but one of the things that the Commission and the EU's legislative bodies more broadly will have to decide is, what constitutes an adverse environmental impact.

Global Witness has just [published a policy briefing](#) as well as a [joint NGO position paper](#) which sets out our position on a number of these issues. In relation to adverse environmental impacts in particular, what we are proposing is the inclusion of a non-exhaustive list of impacts that should be developed in consultation with stakeholders. In order for it to be effective, this needs to include actual and potential impacts. It needs to include impacts that have different magnitudes and frequencies – as appropriate in the context of environmental issues – and it needs to take both temporary and permanent impacts into account. There is precedent for such an approach in domestic legislation in Australia for example.

Admittedly, enforcement is quite another matter. However, we need to have strong regulation in place coupled with strong enforcement and one without the other – either one without the other – won't work well. As mentioned earlier, the directive should account for the individual elements of human rights issues and environmental issues and also needs to account for the extent to which they overlap, that overlap is quite well known, particularly in these (business and human rights) circles. What we hope to see in the European Commission's legislative proposals is an effort to account for these individual elements and the overlap between them that demonstrates an understanding of the complexity of the impacts that companies have through their operations and value chains.

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The final point that I will mention briefly is that of remedy and accountability. Companies need to be held accountable for their environmental and human rights impacts. In the case of environmental impacts, this is so even if these are not overly explicitly tied to human rights violations. Regarding access to remedy provisions – environmental claims can't prevent victims of human rights abuses from having recourse for those impacts, or vice versa. It is important that we see this in the legislation and its approach to this interplay between human rights and environmental issues. A finding of administrative liability by a competent national authority can't preclude victims from bringing civil claims against a company in relation to the same set of facts involving environmental or human right harms. In closing, I think that we need to anticipate these intersections and respond to them by really creating multiple avenues for responsibility and for accountability, and multiple avenues that are not mutually exclusive, that allow for recourse against the company when there are either or both types of harms happening.

Alongside due diligence, what role do you see for legal remedies and climate change litigation?

For affected people and communities around the world, the possibility of litigation – a mechanism through which they can approach the courts and can hold companies to account – is really important. Legal liability for companies is an essential component of both legislative proposals that we expect to get from the European Commission in the coming months. Part of the reason that it is important is because it creates consequences for companies where there are few, if any, right now. It also creates more meaningful opportunities for victims of human rights abuses and environmental harms, to hold companies to account. Hopefully, the new EU legislation will help to address the current challenge – which is a monumental one – of it being far too difficult and far too expensive to hold companies accountable, and that's speaking in absolute terms. It's worse still if you think about it in relative terms and when you consider the imbalance of power between victims and the companies that they are seeking recourse against.

Due diligence will require a change of course from companies. What we need the legislation to do alongside that is create a situation where, if they don't change course and don't change how they behave, that that can no longer be without consequence – and if they cause harm, to ensure that there are penalties. And climate change litigation, strategic litigation, test cases and so on are important mechanisms for accountability. We recognize that that's partly symbolic (it's called a test case for a reason), but it also has an important deterrent effect, and that too has value and can spur action in the direction that we need more companies to move in. So, human rights and environmental due diligence together with liability should cause companies to change course, and that should mean that if we get the enforcement right, if we get the liability mechanism right, that they can't just do what they like and quite frankly, continue to get away with it.

CLIMATE CHANGE: LOOKING BEYOND HUMAN RIGHTS DUE DILIGENCE?



SURYA DEVA

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Is climate change due diligence the same as human rights due diligence?

As a starting point, it is fairly well established now that climate change has an impact on virtually all human rights: civil, political, social, economic, and cultural human rights. So if we start with this premise, then businesses will not be able to prevent adverse impact on human rights if they do not integrate climate change considerations into their human rights due diligence processes.

However, I would like to highlight that we should also try to appreciate how climate change due diligence might be different from human rights due diligence, and I would like to propose four points for your consideration.

The first point is conceptual: most of the human rights, especially in the traditional understanding, are predominantly individual rights – of course in the more recent times we are looking at human rights in the collective sense as well. But when we talk about climate change, this is a global collective issue impacting the whole society, all of us together and the nature as such. We should consider this point of difference.

The second point is that when we talk about due diligence, businesses have to locate who are the rights holders that are going to be impacted. When it comes to due diligence for human rights, it should not be that difficult for businesses to do this identification if they really want to do so. But when it comes to climate change, I think the question is who is not impacted. Let us say if we have one company operating in country 'X', that activity could potentially impact almost all of us anywhere in the world directly or indirectly to some extent: how is the company going to consult these potentially affected stakeholders? I am highlighting this difference because everyone is just talking about applying human rights due diligence for climate change as if that is going to fix everything. Rather we should carefully understand these differences and then design a due diligence process which can take care of these differences. And what about consulting future generations? When we talk about human rights, we often are looking at the rights holders who are present now, but climate change is an issue which is going to be relevant even for future generations. So how are companies going to consult the generation of the people who are not even born yet?

My third point is that when it comes to human rights, adverse impacts identification is easier comparatively, as you can see tangible impacts. For instance, you can see pollution of the river with your naked eyes in many situations. When it comes to climate change, in many cases it could be uncertain to know the exact impact without scientific evidence. How many companies have resources, capacity or the will to use the scientific evidence? Those are again the differences that we should be aware of.

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The fourth and the last point is that of how do we attribute the contribution to climate change to specific companies? When we talk about human rights due diligence, now the typology under Principle 13 of the UN Guiding Principles is that a business may cause, contribute to or may be directly linked to an adverse impact. Of course we can apply this typology to the climate change as well. But how do we know that what is the contribution of this one particular business to climate change globally and how much it has to be accountable for that. So this issue of linkage with what it has caused and what it needs to do to prevent that causation or contribution is going to be different in my view than the typical human rights due diligence. I wanted to highlight these differences so that we do not put everything in this one basket of due diligence - without understanding that human rights due diligence is a different animal than climate change due diligence. Unless we appreciate these differences, we may not be able to design a regime which is good enough. Thank you.

What is the importance of legal remedies in the context of climate change?

There are two reasons why remedies are vital. The first point is that rights and remedies go hand in hand. If you do not have effective remedies, we can't really say that these are rights. So if we're talking about human rights, there have to be remedies and businesses - if they breach human rights - have to be held accountable. If a mandatory human rights due diligence law does not include an effective remediation element, if it does not include the possibility of effective accountability, then I think this is going to backfire for the communities on the ground.

The second point is that, however best companies try, prevention is never foolproof and some violations of human rights or some adverse impacts on climate are inevitable. If it is inevitable, then we need to find who has to be accountable for that: a government, a company or both of them. So accountability and remediation are absolutely vital for climate change.

In relation to climate change, in my view preventive remedies would be absolutely vital. Very often we talk about prevention, but we don't talk about preventive remedies, so I would like to highlight that sometimes remedies could be preventive in the sense that there could be an injunction. For instance, before a company starts a project (let us say a coal power plant) and if the plant has already started then it is too late, but can we prevent that coal power plant from starting in the first place. That would be a preventive remedy. Adding those kind of remedies would be absolutely vital in relation to climate change.

But we also need to think about how do we seek these remedies. Let's say we have a company in Europe it is possible that thousands of people could potentially file a case against this company. Let us take the example of a French company that has caused climate change impacts in Fiji, in Mauritius and in the Maldives. How are these victims going to access the forum? How many cases are going to be filed against this one company? These are complex questions which again differentiate climate change from human rights adverse impacts, and I think that is where the element of collective remediation may be relevant. We might need to create a global fund for instance that could take care of the adverse impact on climate anywhere globally. In other words, we need remedies of a different kind in relation to climate change. In terms of the standing, who can file a case for remedies and what remedies a non-judicial forum can award, for instance, the Human Rights Commission of the Philippines has conducted the carbon major inquiry. What implications the recommendations of this inquiry report would have for remedies is something that we should carefully consider.

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Will human rights due diligence be enough to overcome the looming climate crisis, or do we need more than due diligence?

I think human rights due diligence is an important step, but it will not be a sufficient step to achieve the goal that we want to achieve here, whether it is about respecting human rights or protecting the climate. We should not see due diligence, including the mandatory one, as a panacea, that it can fix everything. And that's why I would caution people against putting all eggs in one basket and think that mandatory due diligence law in Europe or globally is going to solve all challenges. We may need more than this in my view. Let me give three concrete examples.

We need incentives for businesses, both to respect human rights and also to ensure that they do not damage the climate. That is my first point.

At the same time, there should be certain 'red lines' in my view. The idea of human rights due diligence sometimes creates an illusion for businesses that everything is fine as long as they do due diligence, and I personally do not believe that is the right approach. Because let us say a tobacco company – can a tobacco company ever comply with UN Guiding Principles? I have my doubts. Of course, tobacco companies claim that they respect UN Guiding Principles, but I don't agree with this proposition. If a tobacco company merely removes child labour or forced labour from its supply chains, that is not respecting human rights, because the very product is contrary to idea of right to life and right to health. Similarly, in relation to climate change, should we allow, for instance, deep-sea mining? That can be justified because we need renewable energy, we need battery operated vehicles, we need more minerals, and that's why deep-sea mining should be allowed, right? But there should be certain red lines, where the due diligence is not going to be enough, in my view.

Finally, due diligence is operating within the current system, but perhaps we need fundamental structural changes to the current economic order. The COVID-19 pandemic has really exposed many problems with the current order – we need a radical shift in how we live and in our relationships with nature, and I don't think human rights due diligence is going to fix that. For instance, do we need to go back to bikes, or battery-operated cars? That is the question we should be asking. For example, plastic bags were introduced many years ago and we thought "Oh, very good!", and now we are trying to get rid of plastic bags. Are we creating another crisis in the process of solving this crisis? Companies promote unnecessary consumption in the market. How is due diligence going to fix it? At least I have my doubts. We definitely need due diligence, but I would say we need human rights due diligence 'plus', we need more than due diligence.

What role should trade and investment agreements play in mitigating against climate change?

I will make three observations about how investment agreements can contribute to mitigating climate change. First, most of the current international investment agreements confer rights on investors but they don't impose obligations on investors. So, going forward these investment agreements must impose human rights obligations, including the obligation to conduct human rights due diligence. This will fix the current imbalance in these investment agreements.

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Second, international investment agreements should preserve the regulatory space that governments would need to take steps to mitigate climate change. In fact, there has been a recent case, when a company, I will not name the company or the country, but both are from Europe – so, one country in Europe proposed that “Ok, we’re going to phase out coal power plants” and then another company from Europe said “Oh, then we’ll take you to the arbitration, because if you do that, then this is going to reduce our profits”. I think that we need to ensure that the states have plenty of regulatory space that they will need to take concrete actions and fast actions to manage climate change crisis.

And finally, science and technology is going to be very crucial to manage climate change, and I think investment agreements could facilitate investment into developing green technologies and also ensuring that the Global South has access to those technologies. Otherwise we will not be able to solve this global crisis.



CORPORATE DUE DILIGENCE AND SUSTAINABLE FINANCE

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THE LEGAL IMPLICATIONS OF HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR FINANCIAL INSTITUTIONS



ROBIN BROOKS

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Background

Financing comes in many forms and the legal nature (but note not necessarily the substance) of the link between the provider of finance and environment, social and human rights impacts can differ according to the type of finance being provided. Confusingly in terms of the relationship between a provider of finance and a human rights or environmental impact the form in which the finance is provided is not definitive so there may, for example, be close similarities between an equity issue where funds are intended for a specific purpose and, for example, a project financing in terms of their link to harm.

It is not possible to briefly describe the differing structures and the potentially different analyses of the legal impacts the provision of finance can have. This talk focuses on the link between Human Rights and Environmental Due Diligence (HRDD) and providers of finance and looks at the impact of HRDD on the potential liabilities of the financier in terms of the law. Other speakers have mentioned how this issue would be approached under the UNGPs and by a National Contact Point.

In a traditional legal analysis, the structure utilised to make the finance available could and historically would have had a significant effect on the liabilities of the financial institutions involved. Similarly analysing the form of corporate groups structures could determine many legal outcomes. Even before the recent English Supreme Court cases this should never have been the whole story as can be seen from the post 2008 restructuring and allocation of responsibilities for securitisation and similar structured finance structures. The recent English Supreme Court decisions culminating in *Opkabi v Shell* have shown that the UK courts will look at the underlying reality of who takes and implements what decisions for the purpose of determining potential liabilities for these acts rather more than the formal legal structures to which they have traditionally been attributed **(1)**.

Liability for harms resulting from purposes for which financing is provided

A good starting point when considering the legal position of financiers is to consider the well-known example involving the IFC—the Jam Case (*Jam v International Finance Corporation*) **(2)**. This case illustrates the link between HRDD (and also in this case supervision) as a basis for legal action and highlights the position of development banks such as IFC **(3)**. The application of the principles of Tort law (or delict) now needs to be considered against a background of the developing laws and regulations requiring HRDD **(4)**. **(5)** As regards project finance IFC's Performance Standards are given practical effect through a voluntary association of financing institutions in the Equator Principles Association.

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This is a voluntary “club” but includes some 108 institutions in 37 countries which are understood to be involved in more than 80% of project financings. The absence of clear standards and mechanisms to hold financial institutions to account are significant limitations but they have established the principle that HRDD as required by the UNGPs should now be conducted as part of any project financing. Legal documentation in many forms of finance will now build on the increasing practice of doing some form of HRDD and impose obligations in relation to the use of finance designed to protect the lender from responsibility for harms caused by or associated with the particular lending. In some cases, this will address the substance of avoiding harm and, if caused, impose mechanisms for redress.

This is the background against which recent legal developments need to be considered. Consideration of the position of a financial institution will now in all likelihood take place against a background where some form of HRDD may have identified the possibility or foreseeability of harm and the contractual documentation will seek to manage this risk while at the same time facilitating the purposes for which finance was sought. Provision of finance may facilitate a project or “purpose” in the clear knowledge of potential for harm caused by infringement of rights and the documentation may demonstrate a common purpose which may be sufficient to impose liability on a finance provider.

Whilst acknowledging that the development of legal principles is not necessarily consistent over time and this is shown by the contrasting attitudes of the judges in the Vedanta and pre-Supreme Court Shell cases, English law has shown a willingness to apply general principles in a number of areas to the benefit of claimants who have been harmed in situations where there would otherwise be no redress for these harms. This litigation has taken place at the pre-trial stage where the defendant has sought to strike out claims on the basis that they had no possibility of succeeding. This is significant in practice as if a case gets beyond this stage there is a strong impetus for a defendant to settle.

In these recent cases the English Supreme Court used basic Tort principles to establish that a UK parent company can be responsible for loss suffered by persons in addition to its employees for loss caused by a mine through environmental damage, pollution caused by leaks from pipelines but not yet for a failure to protect against rioting caused by elections. In addition, recently the English Court of Appeal in *Begum versus Maran* (2021) **(6)** specifically stated that contractual arrangements the implementation of which led to causing harm could be a basis for liability. In parallel to these developments there is scope for the principles of accessory torts to be applied against a provider of finance. This is an area of law where there is considerable debate, for example, should there even be a “conspiracy tort” but for all this debate it seems that assisting someone to commit a tort may give rise to a liability and there are some signs in legal commentary that the focus in this area could shift from “intent” (as in the criminal law) to the impact on rights as a basis for imposing responsibility. It is clear that tort principles are unlikely to form the basis of redress in situations of pure omission or where state authorities such as the police engage in wrongdoing. The Court of Appeal decision in the case of *Kadie Karma v African Minerals* (2020) limits the situations where a company can be held liable for harms caused by third parties. Whilst decisions on financier liability will turn on the facts there are good grounds for distinguishing the issues in *Kadie Karma* from the analysis applicable to a financier of a project which causes harm.

It also needs to be borne in mind that the actions causing harm can arise after the finance has been provided. The acts complained of could relate to inadequate supervision but if a financial institution is drawn into taking decisions which lead to harm there is ongoing potential for liability.

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Whilst there is an established practice that ESG due diligence is conducted during the establishment of a project or financing it is also clear from the UNGPs that there is a need for ongoing due diligence. Depending on the risks identified this may go beyond simply relying on monitoring and reporting clauses in documentation. If an FI exercises step in rights and proceeds to take control of a project or the assets of a borrower, the legal analysis will also change. Similarly, if a group of FIs restructure the financing or indeed sell it on then, assuming there are HR risks, further HRDD or assessment of these risks should also be made.

The more developed HRDD becomes and the more impact resulting contractual provisions have the more likely it is that the same principles as have held parent companies liable will be applied to providers of finance. These tort principles have the advantage that they focus on the underlying realities of corporate life imposing responsibility on relevant decision takers and implementers avoiding being side-tracked by complex notions of corporate control and legal personality with the related issues of corporate jurisdiction and presence. In addition, if in order to claim that particular finance is “sustainable”, a finance provider holds itself out as having done proper HRDD and taken suitable steps to ensure potential harms are avoided, we have seen that holding out that you comply with certain standards is capable of affecting how a court assesses your responsibility for harm. The jurisdictional implications of tort actions against parent companies, financiers and those responsible for contractual arrangements are potentially very significant but outside the scope of this talk.

Development in regulation of anti-money laundering, terrorism and Financial Institutions generally

The last 20 or so years has seen the development of significant regulatory jurisdiction over financial institutions in relation to money laundering, sanctions and terrorist financing. The cost to FIs of accepting money from criminals has included 10-digit fines, the imposition of monitors and mandatory interference with internal governance structures. Whilst these are all serious issues the provision of finance by FIs in connection with projects which do serious harm to “rights” and the environment is no less serious and ought to lead to the development of similarly rigorous regulation of FIs. The existence of voluntary standards applicable to project finance through membership of the Equator club is positive especially given its jurisdictional diversity (especially given its recent alignment with the UNGPs) but more general mandatory provisions applying to all forms of finance now need serious consideration.

A measure of the seriousness of any attempt to regulate multinational corporations and their impacts on the human rights of others will be the difference between the measures used generally to regulate financial institutions and any regulatory regime in this area. The general financial services regime in the UK includes many devices which could be adapted should a regulatory regime governing impacts on the environment and human rights be considered. These include a senior managers regime designed to ensure that responsibility for regulatory failures can be attributed to individuals and also to ensure that key functions within an institution are held by people of suitable experience. Whilst the complication and sophistication of financial regulatory structures exceeds what is necessary for commercial entities in relation to their HR and environmental impacts there seems to be no good reason why significant failures to avoid impacts which harm human rights and the environment should not be regulated within financial institutions in particular and separately within commercial organisations.

THE LEGAL IMPLICATIONS OF HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR FINANCIAL INSTITUTIONS

Conclusion: how should these experiences inform future efforts to mandate HRDD and broader sustainability due diligence?

Conducting an inadequate due diligence on environmental or human rights issues or failing to follow through contractual provisions in the implementation of a financing may increasingly give rise to issues of liability. The solution is to ensure that any HRDD conducted is meaningful and properly tailored to the risks involved. FIs may also not be able to avoid responsibility to those affected by the implementation of a project which means that the requirements of the UNGPS for ongoing due diligence need to be properly implemented. Turning a “blind eye” in the hope of avoiding responsibility is not going to lessen the potential for liability and may increase it. This affects all business enterprises but given the pivotal position of those providing finance and, in many situations, the fact that they are the only “deep pockets” means that financial institutions should expect greater scrutiny of their actions in the future.

Note: the views expressed in this talk do not constitute legal advice, should not be relied upon as such, are personal to Robin Brooks and should not be attributed to any organisation with which he is associated or connected.

THE LEGAL IMPLICATIONS OF HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR FINANCIAL INSTITUTIONS

Footnotes:

1. For an excellent study of differing finance structures and criticism of an FI in an environmental context your attention is drawn to the 2017 Greenpeace report into financings in Indonesia with an alleged consequential destruction of rain forest. The financings criticised included underwriting an equity issue by a company for the purpose of investing in palm oil through general corporate lending to a holding company and specific project financings. This report illustrates both the significance and irrelevance of different financing structures in terms of the attributing of moral and possibly legal responsibility for providing finance.
2. The facts: In 2008 a loan was provided by financiers including IFC to finance a coal power plant which polluted the nearby sea destroying the livelihood of a fishing community. A report in 2011 by IFC's internal ombudsman found that IFC had not adequately considered the potential harmful effects of the project. Legal proceedings commenced in the US and IFC claimed blanket immunity from suit. In a celebrated judgement in 2019 the US Supreme Court said that international organisations such as IFC and the World bank only enjoyed the same immunity as a Sovereign State under US law which is not blanket, importantly excluding from immunity issues arising connected with commercial or business activities. The case went back to the District Court for Columbia which decided that the "core" or gravamen" of the acts complained of was not the approval and disbursement of the loan which took place in the US but the failure to supervise the building of the power plant which took place in India. The court then upheld the IFC's immunity on the basis that the activities complained of did not constitute "commercial activities" falling within the exemption to immunity.
3. The decision to plead immunity appears "wrong" but there will be internal reasons why the staff of the IFC felt compelled to do so based on their constitution and their perceived risks in not doing so. It also illustrates how analysis of the basic components of a tort and its location can affect the result.
4. Of note the proposed EU directive on mandatory HRDD will be relevant to providers of finance and in particular project finance if its scope includes the full value chain but would not necessarily directly impact on financial institutions as regards their lending activities if it only regulated supply chains.
5. Caution: there is some confusion in the understanding of terms. "Duty of care" due diligence" "Impact assessment" "risk assessment". It is also often assumed but is not necessarily the case that liabilities for breach of a duty to conduct mandatory HR due diligence will be same as a breach of a direct duty of care to avoid adverse impacts in a group's supply chains. This needs further consideration especially in the light of experience gained in relation to the French law of Vigilance. There is also a necessary link between duties which arise in relation to group companies or suppliers and responsibilities for one's own direct acts (note, the attribution issue in a corporate context).
6. Begum v Maran is an interesting English Court of Appeal case and it may be significant. It involved a claim against a manager of ships who had sold the ship to a purchaser knowing that that purchaser would arrange for the ship to be broken in Bangladesh in a manner that posed both severe environmental and safety risks. The plaintiff was the widow of someone who had died in these unsafe conditions. As this was pre-trial the factual basis of the claim was assumed. This note is not intending to analyse the detail of how the English law of torts applies in this situation, but the approach of English Court of Appeal is striking in the way they refused to strike out what many would have thought was a far from straightforward claim, rightly. This ingenuity extended not only to the law of tort but also incidentally, to the law of time limitations. The difference in the analysis of the two Court of appeal judges is interesting on the link between contract and proximity. The harm in the Begum case was the death of a worker breaking a ship in Bangladesh. The ship was sold out of Singapore to a middleman who then sold it for breaking to a "yard" in Bangladesh. The contract under which it was sold included mandatory contractual provisions requiring the "safe" disposal for breaking of the ship, but it was inferred that the agent concerned (treated in these respects as the owner) knew that the ship would in fact be broken in the unsafe conditions of Bangladesh and that loss of life in this process was a likely outcome.

SUSTAINABLE FINANCE CHALLENGES AND OPPORTUNITIES



RODRIGO TAVARES

About the author: Rodrigo Tavares is founder and president of the Granito Group, a company that advances the sustainable economy through strategic consulting, financial advisory services and policy & research. Rodrigo is also a professor of Sustainable Finance at NOVA School of Business and Economics.

What are the implications of the rise of sustainable finance for financial actors. Is sustainable finance profitable?

There's a lot of questioning around the probability of sustainable finance and, actually, there is no 'yes' or 'no' answer for this. Just like I will not be able to say whether private equity or venture capital is profitable because it totally depends. It depends on geography, depends on asset classes, depends on investment styles, depends on timeframes, depends on whether you are investing in companies at the very beginning or at the plateau of their ESG journey. So, it depends. But I would like to say two things. Just this year there was a new meta study from New York University and Rockefeller Asset Management, which aggregated findings from more than a thousand research papers authored between 2015 and 2020. And this meta study concluded that 59% of these individual studies showed that ESG-related investments have similar or better performance relative to conventional investment approaches. Another illustration that I could make derives from comparing ESG indices with non-ESG indices. And I'm actually just looking at them right now. So, if we compare baskets of stocks with high pedigree on ESG relative to baskets of stocks with no ESG credentials we are going to realise that, in most situations, the performance of indices which bring together ESG companies is superior. A very quick example: if I compare MSCI Europe with the comparable ESG index in Europe, in three years, the performance is 3.48% higher and risk exposure is also much lower. In academia there is an inclination to believe that there are strong correlations between ESG and financial performance, but we still need more research.

What do you see as some of the main challenges or threats, right now, in terms of sustainable finance?

There are a few worth mentioning.

The first one is data. The data issue comes up over and over again. There's a reason why data is problematic within the frame of sustainable finance. There are more than 30 sustainability disclosure frameworks. As a comparison, if a company wants to report its financial data, there are only two disclosure frameworks: GAAP in the US, and IFRS in the rest of the world. But if a company wishes to disclose sustainability data, there are more than 30 different frameworks. At the same time, there are around 100 ESG rating agencies. Again, if we compare these with credit risk agencies, there are only three major ones. This leads to inconsistencies in data collection, data analyses and data reporting. So, data is a problem. Problem number 2 is related to materiality. We all know that not all ESG issues matter equally. The relevance of ESG issues varies according to industry, country, company, etc. And ESG asset managers still lack robust skills to identify the most material ESG indicators.

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The third challenge could be lack of products. Public markets are fairly well covered in terms of product offering, but options are still lacking for high yield and IG fixed income products. And options are still lacking in the alternative space. There are not a lot of ESG hedge funds, for example. Most of them are still not ESG. Sustainable investments would also benefit from the development of a fully-fledged derivatives market, which does not exist yet. So, it's not necessarily true that there is a wide range of impeccable, impressive, high quality ESG products in all geographies in all asset classes exposed to all sorts of risks. That is not necessarily reasonable to say.

The fourth challenge is probably the most problematic one. It's the whole issue of greenwashing. Unfortunately it is not uncommon for asset managers to rebrand funds for fundraising or for marketing purposes. Greenwashing might be involuntary, too. Sometimes it's not driven, sometimes it's involuntary. And this results from the fact that there is no global standard yet for responsible or sustainable investment funds. Funds can call themselves whatever they wish. If I'm a fund manager, I can just raise my hand and say that my fund is an ESG fund. There are very few guidelines on that. So greenwashing is problematic. Actually, there is a 2020 a study by the Two Degrees Investment Initiative, which found out that 85% of thematic funds, specifically sustainability-themed funds, have misleading marketing. Probably in 10 years we will not be talking about sustainable finance because it's going to be fully embedded into risk assessment strategies, profit seeking strategies. But while we are still talking about sustainable finance, I think we have to be cautious and refrain from being over optimistic. We need to look at reality with some critical thinking. There are still some challenges in the sustainable finance field that we still need to overcome.

How to incentivise improved data, for example, disclosure by companies. Can you share some insights with regard to any developments in this area, whether it's in relation to the British Standards Institute/ISO initiative?

On the British Standard, a little bit of context. In the sustainable finance field, we have moved away from an initial phase, about a decade ago or so, when there were virtually no guidelines or schemes on financial sustainability practices, to a phase, the present one, where there are too many of those guidelines. There is a myriad of standards, principles, disclosure frameworks, taxonomies, guidelines, codes, etc.. So, there is a need to streamline, to merge, to find synergies between the different guidelines. And there is a need to find a global and prescriptive standard for investment funds.

Recently, the British government, together with the British Standards Institution (BSI) and in partnership with a very large number of financial houses, have recently joined forces to tackle greenwashing by developing the first classification system for responsible and sustainable investment funds.

It is important to mention that this new standard, coming from the ISO family, is prescriptive and rules-based. It's not principle-based only. And the basic difference is that the new standard establishes minimum provisions that shall be complied with. It prescribes features a fund must have in order to comply with a responsible or sustainable investment system. So, in other words, the standard establishes the prerequisites that fund managers globally need to fulfil to be able to call their funds either "responsible investment funds" or "sustainable investment funds". And, once the standard is out there, it will provide reassurance to institutional and retail investors regarding the funds in which they are investing. Let me underline that the new standard covers all asset classes - private equity, venture capital, equities, fixed income, real estate infrastructure, hedge funds, etc. It also covers passive and active strategies. And it covers both responsible and sustainable investment practices.

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The process to launch a new global standard is very ritualistic, it's very formal and it's a collective exercise. Many players are involved. As the Technical Author of the standard I have submitted the first drafts and it is now in the process of being reviewed by a steering committee and later on it will also be subject to public consultation. We expect to launch it in early 2022. When the ISO family launches the standard, then the financial services community will finally have available a tool to guide them on whether investment funds are responsible, sustainable or whether funds are not related to ESG at all. I believe the sustainable finance markets needs this clarity and transparency to accelerate its expansion towards the mainstream.

TAKING STOCK OF INVESTOR IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS



PALOMA MUÑOZ QUICK

About the author: Paloma Muñoz Quick leads BSR's work at the intersection of finance and human rights. She advises financial institutions on embedding respect for human rights into corporate governance, across products and services, and at each stage of the investment lifecycle. Prior to joining BSR, Paloma was Advisor to the UN Working Group on Business and Human Rights and Senior Consultant of the UN B-Tech Project, where she developed an ambitious vision for promoting the uptake of the UN Guiding Principles on Business and Human Rights among investors and led work on responsible investment in digital technologies. Prior to the UN, Paloma launched and served as Director of the Investor Alliance for Human Rights, where she developed thought leadership on the investor responsibility to respect human rights and supported corporate engagements across sectors. She also worked as Senior Advisor at the Danish Institute for Human Rights, where she advised governments, companies, and civil society on business and human rights. Paloma is also Advisory Board member of First Peoples Worldwide, an organization that promotes collaboration between Indigenous Peoples and investors to address the impacts of companies on indigenous communities.



This blog post is an extract of the investor stocktaking report of the UN Working Group on Business and Human Rights "Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights". The full report can be accessed [here](#). The Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights) was established by the Human Rights Council in 2011 (resolution [17/4](#)). The Working Group is composed of five independent experts, of balanced geographical representation. The Council renewed the Working Group's mandate in 2014 (resolution [26/22](#)), 2017 (resolution [35/7](#)) and 2020 (resolution [44/15](#)).

In the run-up to the 10th anniversary of the UN Guiding Principles on Business and Human Rights (Guiding Principles), the UN Working Group on transnational corporations and other business enterprises (Working Group) launched the "Guiding Principles 10+ / Next Decade BHR Project." The Project assesses the first decade of implementation of the Guiding Principles by States and business enterprises and aims to develop a roadmap for meaningful action in the decade ahead.

In recognition of the need to promote the investor responsibility to respect human rights, including as a key means to speed and scale up business respect for human rights, the Guiding Principles 10+ project shines a brighter light on the role of institutional investors – asset owners and managers – in Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights.

This report provides a summary of what rights-respecting investment entails, based on the expectations of the Guiding Principles, the authoritative global framework for the respective duties and responsibilities of governments and business enterprises to prevent and address business-related human rights impact. It outlines how enabling environments have fostered greater investor respect for human rights over the past decade and summarises signs of progress as well as major gaps and barriers to future progress. It wraps up by providing a set of recommendations for increasing investor action over the course of the next ten years and beyond, concluding that a widespread and serious embrace of long-term thinking and decision-making within investment institutions and the full spectrum of actors they work with is an essential and core component of upholding the dignity and wellbeing of individuals and communities.

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Enabling environments for rights-respecting investment are emerging

The report highlights that progress in investor uptake of the Guiding Principles over the past decade has been bolstered by increased efforts from certain standard-setting bodies seeking to create an enabling environment for rights-respecting investment. These actors – including governments, multilateral organisations, reporting frameworks, industry associations, multi-stakeholder platforms, and stock exchanges – play a critical role in driving Guiding Principles implementation at scale and facilitating a level-playing field for investors. The European Union (EU), in particular, has taken on a leadership role in redefining the responsibilities of institutional investors by ensuring that environmental, social and governance (ESG) considerations, including human rights, are at the heart of the region's financial system. A wide range of research over the past decade has also documented the correlation between human rights risks, corporate financial performance and risks to investment and helped bolster investor engagement on human rights, while industry initiatives have started providing much needed collective action platforms to activate investor action to promote the uptake of the Guiding Principles.

Despite this progress, uptake of the Guiding Principles among governments and standard-setting bodies has at the same time been inconsistent and insufficient. There is widespread misalignment between legal frameworks for investment decision-making and the Guiding Principles, as well as weak enforcement of existing environmental and social requirements where these exist. There remains a capacity gap across State institutions and within multilateral entities, including the United Nations, when it comes to speaking out about investor responsibility and accountability in relation to human rights.

Progress and gaps of investor uptake

While engagement with human rights issues among socially responsible investors has a longstanding history, the shift in approach to aligning investment practices with international standards such as the Guiding Principles has only recently begun. Human rights policy commitments are growing in number among investors and human rights reporting frameworks and benchmarks are supporting their efforts to assess and engage companies on human rights. Investors are also activating their leverage to engage companies on the uptake of the Guiding Principles among portfolio companies. For example, investors representing \$5.8 trillion in assets have called on companies to improve their rankings on the Corporate Human Rights Benchmark. Shareholder resolutions increasingly call on companies to implement the Guiding Principles, and some of the world's largest asset managers have cast votes in favour of human rights due diligence in the past two years. While still exceedingly rare, some investors are making increased efforts to enable access to effective remedy for victims of business-related human rights abuse.

Despite progress, human rights are still rarely addressed in a systematic or principled way among the institutional investor community. The vast majority of investors have yet to meaningfully engage with their human rights responsibilities. Most investors have significant capacity challenges with regard to business and human rights. As a result, knowledge of human rights, including how human rights are defined, how they are relevant across ESG factors, and what meaningful human rights due diligence looks like, remains limited throughout the institutional investor community. Even areas of investor activity where consideration of social impacts are seemingly embedded have been largely detached from efforts to align investment activities with the expectations laid out by the Guiding Principles. This includes in the context of impact investing, which seeks to generate positive social and environmental impacts alongside financial returns and investing toward achievement of the Sustainable Development Goals (SDGs).

TAKING STOCK OF INVESTOR IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The ability of investors to meaningfully assess and prioritise human rights risks connected with their investment activities has also been challenged by the fact that meaningful corporate human rights disclosure has been the exception, not the norm, over the past decade. A root cause of this has been the inconsistent integration of the Guiding Principles across the myriad reporting frameworks, benchmarks and other data and research products used by investors to assess companies.

A culture of corporate short-termism, therefore, still prevails in financial markets with devastating impacts on human rights and the environment. Increased shareholder pay-outs and compensation for executives and directors tied to short-term financial performance has been coupled with cost-cutting and wage stagnation for workers. Investor pressure, especially from hedge funds and private equity firms underlies this trend, though pension funds, sovereign wealth funds, and even union funds are participating in riskier forms of investment in order to meet their commitments to beneficiaries **(1)**.

The report concludes that efforts to achieve the widespread implementation of the Guiding Principles throughout the economy will continue to be stymied unless investor respect for human rights is sped and scaled up. The following list is an excerpt of recommendations for (1) States, (2) institutional investors and (3) other actors in the investment ecosystem to advance the investor responsibility to respect human rights over the course of the next decade, and beyond.

The Working Group is thankful to its Secretariat, UNGPs 10+ project supporters and partners and everyone who contributed to consultations and written inputs. The Working Group would like to thank UNGPs 10+ advisors Paloma Muñoz Quick and Sara Blackwell for their contributions to this report and the project.

Footnote:

1.Source: <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/EU%20mHRDD.pdf>

EU APRIL 2021 PACKAGE ON SUSTAINABLE FINANCE: GREEN STEWARDSHIP OR 'CHRONICLES OF A DEATH FORETOLD'?



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Policy makers and researchers have, by and large, welcomed the adoption by the European Union (EU) of the [European Green Deal](#) and its much-needed objectives: to achieve a reduction of greenhouse emissions of at least 55% by 2030 compared to 1990 levels, and EU climate neutrality by 2050. The various measures envisaged to implement the European Green Deal will have significant implications for states, business enterprises and financial institutions alike, as clearly demonstrated by the release of the [EU April Package on Sustainable Finance on 21 April 2021](#) and its subsequent updates. The April package aims at re-orientating investment towards sustainable economic activities in order to realize the objectives of the European Green Deal. Our research, carried out as part of the [Just Transition project at Lund University](#), indicates however that some of the measures enshrined in the April Package on Sustainable Finance will exacerbate, rather than alleviate, the challenges we face in order to achieve climate neutrality. In this contribution, we examine three key problematic aspects of the April package, by way of shedding light on the changes that will be needed to successfully achieve the objectives of the European Green Deal, while we still can.

First, to contextualize and justify our claims on the dissonance between the objectives of the European Green Deals and the measures of the April package, it is important to note that, at this stage, any climate policy adopted will have to be science-based. In other words, as the [science is clear](#) that if we want the planet to stay within a warming of 1.5° C, what is required is a decrease in fossil fuel production by 6% every year in the period 2020-2030. Governments, however (and the measures enshrined in the April package unfortunately confirm this trend) are planning to increase fossil fuel production by 2% every year. This will double, rather than drastically reduce, the levels of fossil fuel production needed by 2030 in order to be on track for a consistent limitation of warming to 1.5° C. With its aim of reorienting investment towards sustainable economic activities, the April Package is strictly linked to the [EU Taxonomy Regulation](#) (EU Taxonomy) which in turns provides the criteria to identify 'sustainable' economic activities. The [Climate Delegated Act](#), released as part of the April Package, is important because it includes the technical screening criteria for activities which are 'sustainable' in terms of climate change mitigation and climate change adaptation.

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Various scientists and civil society's organizations have been very vocal about the risk of greenwashing posed by some of the EU Taxonomy measures, both in terms of (lack of) effective climate action and human rights protection. As identified in our research, the three key problems presented by the April Package are posed by the fact that (1) the Climate Delegated Act paves the way to accepting natural gas a transitional fuel; and that (2) bioenergy and (3) forest management are considered sustainable activities, despite their known adverse impacts on other planetary boundaries, such as biodiversity. The greater risk, of course, is that instead of effectively reducing fossil fuel production, we are locking in longer-term reliance on them for the next 10 to 30 years. Furthermore, the identification of controversial economic activities as 'sustainable' to appease the concerns of certain EU member states will not help achieve the objectives of the European Green Deal, let alone a truly Just Transition.

Although the implications of the April Package for the financial sector might not be immediately obvious, they are significantly far-reaching. As we all know, the EU Taxonomy and its technical screening criteria are hailed as a benchmark for Environmental, Social and Governance (ESG) standards worldwide. The Climate Delegated Act, and the other EU Taxonomy delegated acts that will follow, are of fundamental importance for the way in which business will be reporting on corporate sustainability (see the April package proposal for the Corporate Sustainability Reporting Directive). In turn, under the Sustainable Financial Disclosure Regulation which came into effect on 10 March 2021, disclosure information based on the screening criteria will also feed into financial sector's disclosure.

What we see, therefore, is the creation of a very complex governance infrastructure, or rather, a technology of governance which sets out a longer-term framing of non-protection. Thus, whilst it is true that the EU is taking the lead on climate action and sustainable finance, it is also true that it is setting the bar far too low for effective climate action and human rights protection to be achieved. Science-based policy making is now our only tool to ensure that we limit the catastrophic consequences of climate change; and, although the EU Taxonomy delegated acts can be amended, every year spent without pursuing effective climate action is a year too late to save this planet, the species inhabiting it and future generations.

CONCLUDING REMARKS



ANA SANTOS DUARTE

About the author: Ana Santos Duarte is a student of the Master in Law and Management from the NOVA Law School and NOVA SBE. She has a bachelor's degree from the Faculty of Law from the University of Lisbon, and a post-graduate degree in Corporate Law from CIDP. Additionally, Ana has conducted research in the areas of Corporate Social Responsibility and Sustainable Corporate Finance, which are her main areas of interest. She is currently a trainee lawyer at Vieira de Almeida (VdA) in the Social Economy & Human Rights area of practice.

The fifth episode of the webinar series “Business, Human Rights and the Environment in Europe: Connecting the Dots” took place on the 27th of May 2021 and addressed the relationship between corporate due diligence and sustainable finance. The panel was composed by Celine Tan (Warwick Law School), Daria Davitti (Lund University), Phil Bloomer (Business and Human Rights Resource Center), Robin Brooks (Norton Rose Fulbright), Rodrigo Tavares (NOVA SBE and Granito Group), Tara Van Ho (Essex University), Tyler Gillard (OECD), and it was chaired by Paloma Muñoz Quick (UN Working Group on Business & Human Rights – UNGPs 10+ / Next Decade BHR).

Paloma Muñoz Quick started the discussion outlining the unparalleled global challenges we are facing with growing inequalities and the climate crisis and how financial institutions have a systemic influence to achieve a sustainable path, as they fuel economies. She explained how sustainable finance is “a process by which financial institutions take into account Environmental, Social and Governance (ESG) considerations, when it comes to their investment decisions”. In particular, one of the key questions that remains is how to practically scale sustainability to ensure that sustainable finance is effective. Paloma mentioned how the UN Guiding Principles on Business and Human Rights (UNGPs) clarify that the responsibility to respect human rights applies to the entire spectrum of the financial institutions, including commercial banks, institutional investors, assets management firms, pension funds, insurance companies, that is why the responsibility to respect human rights must always be a core element of the sustainable finance.

Phil Bloomer addressed the issue of what is currently driving the ESG trend and highlighted the most recent successes, like the Dutch Court ruling on Shell, which demonstrated the growing scale of the ESG investors and their cooperation, increased assertiveness, and influence in markets. He explained that since the global economic crisis of 2008, global finance has been associated with rising inequalities, precarious work, climate breakdown, and systematic tax avoidance and evasion, and at the same time there is a sense of “financialization of everything” including health and education services. In reacting to these unfairness and inequalities, Phil indicated that it was left to a collection of civil society organizations, multilateral institutions and a cluster of more responsible businesses and investors to call for a more sustainable future and for political parties to understand the need for “economies and financial markets that deliver shared prosperity and shared security rather than a winner takes it all and race to the bottom on workers’ rights and environmental standards”. All this has led to a change in the behaviour of governments, which became more attentive to human rights and the environment and started regulating both companies and the financial sector.

CONCLUDING REMARKS

Phil gave some examples of this regulation, such as the upcoming EU directive on human rights and environmental due diligence, the UK Modern Slavery Act, the bans from the United States (US) on goods suspected of forced labour and the Green Taxonomy, alongside with the European sustainable finance initiatives. As he explained, it is necessary to respond to current changes, especially the concerns of asset owners and asset managers who fear the risks of their assets impacts on the environment and on workers but also the lack of preparation for possible legislative changes.

Tyler Gillard talked about the work of the OECD around sustainable finance and its connection with the recent developments in Europe. According to Tyler, when dealing with standards on ESG investing there seems to be a conflict, because, on the one hand, there is a significant number of standards, mostly private ones not aligned with global benchmarks, and, on the other hand, a “vacuum” in global authoritative government-backed standards that are developed with different stakeholders, communities, and businesses. He clarified that the financial institutions have the same responsibilities as other businesses, to respect human rights and the environment. The OECD’s work on Responsible Business Conduct is anchored in the implementation of the OECD Guidelines for Multinational Enterprises, which are aligned with the UNGPs since its revision in 2011 and the introduction of a Human Rights Chapter. Regarding the work of the OECD, he mentioned the work of the National Contact Points, which are national bodies that promote the OECD Guidelines and respond to complaints, and how they have received more cases regarding financial institutions because of the knowledge brought by the UNGPs. Moreover, he also referred to the standards created, since 2015, for different types of financial services, to adapt due diligence in this sector to the different nuances of each financial service: the publication in 2017 of a due diligence framework for institutional investors, including asset owners and asset managers, given the growth of debt finance; the launch, in 2019, of due diligence guidance for responsible corporate lending and securities underwritings; and, lastly their current work on a new standard related to project and asset finance. Tyle concluded by saying that there are still some massive blind spots on sustainable finance and corporate lending is where we need to look at.

Then the discussion centred around two essential questions about sustainable finance, profitability and its challenges, which were answered by Rodrigo Tavares. Regarding the first issue, Rodrigo considered that the answer would depend on different factors, although there have been recent studies by the New York University and Rockefeller Asset Management from 2015 and 2020 which concluded that “59% of these individual studies showed that ESG-related investments have similar or better performance relative to conventional investment approaches”. So, as indicated by Rodrigo, in academia there is an inclination to believe that there are strong correlations between ESG and financial performance. As for the second question, he explained that the challenges presented are related to (1) data collection, analysis and reporting, given the number of frameworks and rating agencies; (2) assessing materiality, because there are ESG asset managers lacking the capacity to identify the relevant ESG indicators; (3) the lack of products, especially “high yield and IG fixed income products”; and (4) the issue of greenwashing, which can be voluntary or involuntary, as there is no global standard or framework to prevent unwittingly wrong classifications from being made. The speaker also addressed the new initiative of the British Standards Institute (BSI) and ISO which aims to be a classification system for responsible and sustainable investment funds and emerges as a joining of forces between the British Government, BSI, and financial houses to combat greenwashing. As he mentioned, this standard will be “prescriptive and rules based”, therefore it would establish minimum provisions/features for an investment to be considered a responsible or sustainable one and covers all asset classes, as well as both sustainable and responsible investment practices.

CONCLUDING REMARKS

Afterwards, Daria Davitti discussed the current EU process and how it could promote coherent action on financial investments. Daria explained that on the 21st of April 2021 the EU presented a sustainable financing package that targets economic activities on this path and includes a key factor in the taxonomy – it contains screening criteria. This allows us to understand which activities can be selected as sustainable in terms of climate change mitigation and adaptation. However, as she emphasised, there are three key aspects of the April package which will be problematic for the financial sector or for corporations when it comes to disclosure. The three problems relate to the fact that natural gas is considered a transitional activity, and that bioenergy and forestry are considered sustainable activities, which is problematic in terms of reducing or not reducing greenhouse gas emissions. Thus, Daria believes that the EU seems to have missed an opportunity to take the lead in a proper way and from the legal point of view it will create great difficulties. Regarding the just transition issue, she explained that it should take into consideration the gradual elimination in the sorting sector and that this is possible without a continued need for the use of fossil fuels. As she indicates, this process is relevant for the financial sector because of what they will have to declare will be linked to the screening criteria, which in turn is linked to the data from the regulations that the financial sector and its various institutions will collect. The speaker explained that there is a threat of non-protection because there are differences between a limited and a reasonable assurance in terms of the audit requirements and in the EU proposal, they have accommodated limited assurance which means that there will not be many requirements for a more detailed reporting. Therefore, according to Daria, the EU is setting the bar too low.

Phil Bloomer also added that it is essential to insist with the regulators to have a “high quality level playing field” with standardized and harmonized frameworks and ensure that the “green taxonomy does not mean greenwashing”.

Celine Tan described the current trends in the investment markets sector, where there is “a shift away from development financiers as direct funders of development projects and programs” to “brokers of development financing”. As she explained, the narrative is of de-risking private investment to “encourage financial markets to move into traditionally public sector areas”, so a lot of development financing is going to improve the risk-return profile of projects to catalyst private investment, which is problematic for several reasons. Celine considers the issue of sustainability of financial markets as a source of development finance and the fact that there is not enough discussion about the risks of using financial markets. For instance, as she argues, at the beginning of the pandemic, there was a massive outflow of finance from emerging markets which created a lot of instability, especially in developing countries which are still subject to these unstable capital flows. Celine clarified that what we have today are existing financial instruments which already have their own problems, being used for sustainable development investment, without often safeguarding the communities. She stated that there are still many problems regarding the sustainability and stability of financial markets, highlighting the regulatory gaps that arise from the lack of control over inflows and outflows from developing countries. Celine concluded that despite the trends we have been seeing, we are still far from having the necessary regulatory architecture.

Tara Van Ho then elaborated on the responsibilities of the financial sector, she distinguished between those that concern State actors and those that concern businesses. Those of the former are more wide-reaching, referring to the duty to respect, protect and fulfil human rights. It is in this set of responsibilities that the obligation to create regulations on human rights for financial actors is inserted. Unfortunately, as Tara explained, we are still far from the ideal in most countries, although the French Corporate Duty of Vigilance Law can be mentioned as a positive example which applies to investors not just to companies, but most investors will not be covered by the law because they do not have a sufficient number of employees. However, when enforcing obligations through mandatory due diligence this will apply to financial investors.

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Regarding the responsibility of businesses to undertake human rights due diligence, she explained the factors that help us understand if a company or investor has caused or contributed to human rights adverse impacts, which are: (a) the power and independence they have to influence the realisation of the harm, in other words, if they directly caused the harm or if they could stop their involvement; (b) the severity and the predictability of the harm, because the greater these are the more likely they are to be contributing or causing harm and the greater the responsibility to adopt mitigation measures; (c) the adoption or not of standard mitigation measures. Tara concluded by commenting on the enforceability of the obligation to provide reparations at the domestic level, for instance, at the Okpabi case where it was shown that when a company publicly assumes certain responsibilities and publicly promotes that it has worked on them, then this constitutes an assumption of responsibilities, meaning they can be held accountable.

Robin Brooks focused on the legal implications of human rights and environmental due diligence for financial institutions, particularly looking at project finance. He clarified that over the last 20 years there has been some form of human rights due diligence and in several projects that would identify the risk of harm and the risk of infringement of rights, making these risks potentially foreseeable. He highlighted the approach of the English courts under the English Tort Law which would look at the question of “Who was responsible for instigating what action and who assumed what responsibility?”, although not focusing on the complexities of the corporate structure. He then mentioned two recent English court cases, Begum v. Maran (2021), and Fish v. Shepherd ‘Operation Blue Range’ (2015), dealing with the issue of liability through contractual relationship instigating harm and accessory liability. He also commented on the fact that investors’ responsibilities do not end once the investment is made, it continues beyond that. Robin argued that some lessons can be learned from the regulation of financial institutions, especially anti-money laundering and terrorism, because its global reach and accountability. He concluded by saying that the correct approach for a financial institution is to do proper financial due diligence on human rights and environmental matters and carry out the necessary processes to manage and/or avoid risks.

CORPORATE DUE DILIGENCE AND GENDER EQUALITY



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A PLEA FOR INTERSECTIONAL APPROACHES



NADIA BERNAZ

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Why is intersectionality and interdisciplinary approaches important in the context of gender equality?

I may have been asked the easiest question – why is intersectionality important? The answer is clear, it is important because there are intersecting and multiple factors of discrimination. And if we focus only on one aspect, for example gender, then we are missing the whole picture. What I find interesting is to look at how women – because this is the topic of today, gender equality – can be affected differently in different contexts. One example is one’s marital status, and whether women have children or not. So if you are unmarried and do not have children in certain contexts that actually can be a positive thing. If you are a high flying lawyer in a magic circle law firm in London or New York or Hong Kong, not having children, not having care responsibilities, is a good thing. But in different contexts, not being married, not having a family can be seen as weird and lead to all sorts of biases. This is a really simple example, but it is telling and I suspect many of us here have personal experience of such bias. This example works also in other contexts, whether we talk about other potential discriminating factors such as caste or religion or ethnicity, or any other. Without an intersectional approach, gender equality cannot be achieved.

The key message I want to convey about gender equality in the context of business and human rights is something I am sure a lot of people have heard before but is worth repeating here: a truly feminist agenda cannot stop at empowering white university-educated women, because not only is this not enough but it is a damaging strategy because it sends the wrong message that something is being done when in fact by doing this we are only scratching the surface. Unfortunately, this is often the strategy adopted in Europe, and I am speaking here in the context of a webinar series focused on the European context, at a Portuguese institution. Particularly in the European Union, a lot of the debate on gender issues has centred around things like equal pay for equal work, and the focus has been on measures asking for example for more women in the boardroom. All of this is of course important, but just like in academia, gender and intersecting forms of discrimination will not be magically addressed when more white women become professors.

So it is important to be aware of intersectional issues, also in the context of Portugal developing its national action plan on business and human rights. When designing a national action plan, it is not enough to ask yourself: “Okay, how do we include women? Or even what is going to be the impact on women?”. What is needed is to look at the intersectional forms of discrimination and include all sorts of women in the process. Not just the women you are perhaps more comfortable with, because they are the women you will most likely encounter in your job but, for example, migrant women. We’ve heard from Salil about the impact of the pandemic on frontline workers etc.

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I do not know the situation in Portugal but in many countries many of those jobs are held by a migrant worker workforce. I think we'll have a second round of questions, in which I will get an opportunity to talk about the due diligence process as such, so as an introduction to intersectional issues I'll stop here.

Does the concept of human rights due diligence accommodate taking into consideration these different right holders, and their multiple realities, in your opinion?

Yes, I definitely think that the concept of human rights due diligence can accommodate different groups. That's what it's for! Due diligence as a concept should do what it says on the tin. If one undertakes to identify, prevent, mitigate and account for possible human rights impacts of corporations, then that means looking at various rights-holders taking into account their diversity.

To come back to what Penelope was saying, it is clear that the UNGPs are insufficient, from a gender perspective and that they are indeed erasing multiple realities and experiences. But on the other hand, they do use language that, if not explicitly inclusive, can at least be read in a way that can advance the rights of various subgroups. I would argue there is nothing in the Guiding Principles that prevents companies from taking the human rights due diligence process seriously and actually doing it properly by engaging, by trying to address all forms of discrimination and bias. So maybe we can discuss further, but I do not see anything in the UNGPs standing in the way of carrying out truly inclusive due diligence. In that sense we need to make the most of what we have.

The notion of human rights due diligence calls for mapping the possible human rights impact of certain activities and certain businesses, and then finding ways to prevent or mitigate that impact, or remedy it if the risk has materialized into actual impact. Corporate due diligence holds truly transformative potential.

I want to make a point here: companies carrying out human rights due diligence should identify potential issues and design strategies to address them. But, importantly, gender transformative approaches should inform the very first stage which is framing the problem. A feminist approach to human rights due diligence is not just about finding solutions that include women, but it is also about how you frame the problem in the first place. I've seen that error being made in a number of contexts, also coming back to what Penelope was saying about extractive industries. If you look at mining developments in certain communities, you cannot just yourself "how can we make sure women benefit as well?". Rather, the question may be "what impact is this mining project going to have on women?" And if women are going to be disproportionately affected, how can this be prevented?. So, looking at due diligence from a feminist perspective, gender sensitive approaches, taking into consideration solutions that could include women are not enough. Gender transformative approaches will lead to framing problems differently and that's how due diligence should be interpreted.

To come back to the question I was asked, the concept of human rights due diligence can accommodate, I think, a gender perspective, but it needs to be done really from the start and not just as an after thought for example when coming up with remedies that will be "good for women" in the end.

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And on this, I'm not sure I'll have the opportunity to make this point so I will take a couple more minutes to make it, I often hear discussions on human rights due diligence about how we should not adopt a ticking box or checklist approach, because all contexts are different, etc. But I disagree with this. It's a criticism of human rights due diligence that I don't really understand, or let's say that I don't agree with. It really depends on what you put on the list and on the kind of boxes you're checking. And, you know, for many of us to do lists is the way to get things done. More seriously, I think that's the kind of alienating language we should avoid. Business function in a certain way, they know how to get things done so if the strategy is one that embraces intersectionality I see nothing wrong with ticking boxes to address true gender equality.

GENDER EQUALITY AND BUSINESS AND HUMAN RIGHTS



PENELOPE SIMONS

About the author: Penelope Simons is an Associate Professor at the Faculty of Law (Common Law Section) at the University of Ottawa. Her research focuses on business and human rights and in particular on: the human rights implications of domestic and transnational extractive sector activity; state responsibility for corporate complicity in human rights violations; the regulation of transnational corporations; gender and resource extraction; as well as the intersections between transnational corporate activity, human rights and international economic law. She is the co-author with Audrey Macklin of *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge 2014). She also co-author with Tony VanDuzer and Graham Mayeda of *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, 2013). Penelope is a member of the Human Rights Research and Education Centre, the Interdisciplinary Research Group on the Territories of Extractivism (GRITE) and the Center for Environmental Law and Global Sustainability, all at the University of Ottawa, as well as the SSHRC-funded Canadian Partnership on Strengthening Justice for International Crimes. In 2018, Penelope was awarded the Walter S. Tarnoplosky Award, recognizing her as “an individual who has made a significant contribution to human rights.”



Why is it important to talk about gender equality as a business and human rights issue?

My comments draw on work I have done with my colleagues [Sara Seck](#) and [Melisa Handl](#). I will confine my remarks to women’s equality rather than gender equality more generally. Neither business activity itself nor its impacts on society are gender-neutral. We live in a patriarchal world. Despite the apparent advancements in international and domestic law on equality issues, women continue to be the subject of significant discrimination and violence in their everyday lives, including in the context of business activity.

Consider the example of resource extraction. As with any type of business activity, women’s relationship with resource extraction is not straightforward. In other words, they are neither simply beneficiaries of such activity nor victims of harm caused by such activity. Women may be members of boards of directors of mining or oil and gas companies, they may be managers or employees, lawyers representing resource extraction corporations, clerical workers, miners, members of a community where resource extraction takes place, human rights or environmental land defenders, or other civil society activists who oppose extractive activity or a combination of some of the above.

Resource extraction can have differentiated impacts on women than on men. These impacts have been discussed by Professor [Katie Jenkins](#). They include an increased workload for women, caused by environmental contamination of land and water supplies, where those women have the family responsibility for sourcing food and collecting clean water; and the effect of toxic chemical contamination on the health of communities, and increased burdens on women who may have to care for sick family members. Jenkins also points to the increased risk of violence against women, whether or not working within the industry, as well as the impacts of voluntary or involuntary displacement of communities and shifts from an agrarian to a cash-based economy, both of which can destabilize gender roles.

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Let me say a few words about violence against women, because sexual harassment and other violence against women is a pervasive global phenomenon and it is widespread across all business sectors. Women's experiences of violence in the context of resource extraction differ from country to country and as between women, depending on a range of intersecting factors from race to socio-economic status, among myriad others. Nonetheless, there is growing evidence that large scale mining and resource extraction can pose significant risks of violence for women.

The extractive industries continue to be male-dominated despite the fact that women are increasingly entering the workforce. Women are often employed in undervalued and underpaid jobs, such as clerical work or as cleaners, cooks, housekeepers, laundry services. Although as mentioned above, they may be employed as managers or miners or in other higher-paying positions. Nonetheless, it does not seem to matter whether they are managers or cleaners, reports suggest that women in the extractive industries face daily sexual harassment, including expectation of sex from co-workers, and are at the risk of sexual assault. This is true whether the extractive activity is taking place in the global north or global south.

Domestic violence also appears to increase in proximity to largescale extractive activity. This is the result of many factors, including the disruption of traditional property ownership that can lead to changes in gender roles, employment for men in the community giving the latter more money in their pocket which can lead to increased alcohol consumption and increased incidents of domestic violence. Additionally, large-scale resource extraction may also create a "rigger culture" where a mainly male workforce flies in and out of industrial camps to perform high stress shift work. On their way home they may consume alcohol and imbibe drugs as a way of releasing stress and then, once home, engage in domestic violence.

Additionally, women in the local communities near extractive sites are often subjected to violence by members of the male workforce or by security forces that use such violence (including rape) as an intimidation tactic against local women to prevent artisanal mining, to dissuade land or human rights defenders from opposing such activity, or to terrorize local communities in situations of armed conflict or conflict over land.

Let me conclude by saying that it is important to recognize that no matter the industry, discrimination and violence against women do not take place in a vacuum. Jacqui True points out, acts of gender-based violence in the context of business activity are "the direct results of what women face" in their communities and larger society. Such violence is linked to and perpetuates existing "structural gender inequalities that manifest themselves in the subordination of women in society". Therefore, women's inequality, and the violence that it entails, is something that all businesses and governments need to address proactively.

Is the current regulatory framework, when it comes to human rights due diligence, adequate to tackle issues of gender equality and intersectionality?

The short answer is, unfortunately, no. If we look at the United Nations Guiding Principles on Business and Human Rights, for example, and even the draft treaty on business and human rights which is currently being negotiated at the United Nations, we see that the drafters of both of these important instruments have taken the "add and stir" approach to including consideration of women's human rights and women's interests. In other words, these instruments have been conceptualized and developed from a particular perspective and references to women and provisions that deal with women's interests and aimed at protecting women's human rights have been added as an afterthought.

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The UNGPs are particularly problematic. They marginalize women's rights and interests in a number of ways. Melisa Handl and I examine this issue in depth in our [feminist critique of the UNGPs](#). But one salient example of this is the fact that Guiding Principle 12, which is one of several principles that elaborate the business responsibility to respect human rights, appears to create a hierarchy of rights relevant to the business responsibility to respect human rights. Businesses are directed to respect the human rights set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The rights in these instruments are referred to as an "authoritative list" of human rights that are applicable to business activity in all circumstances. Women's human rights, Indigenous peoples' rights, the rights persons with disabilities and the rights of children, among others, are mentioned only in the commentary and are referred to as "additional standards" that corporations may need to consider in particular circumstances. This sends the erroneous message to businesses that this second category of human rights may not be relevant to their everyday operations or to meeting their responsibility to respect human rights, including by undertaking human rights due diligence (HRDD). This bifurcation of rights is incompatible with the doctrine of the indivisibility, interrelatedness, and interdependence of all human rights, set out in the 1993 Vienna Declaration and Programme of Action.

The current version draft treaty is a little better. [Feminist advocacy groups](#) have been able to convince the drafters to include more provisions that deal women's interests and women's human rights. For example, the preamble of the second revised zero draft recognizes the "distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, [I]ndigenous peoples, persons with disabilities, migrants, refugees, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders". It also emphasizes "the need for States and business enterprises to integrate a gender perspective in all their measures consistent with the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Declaration and Platform for Action and other relevant international standards". Regarding HRDD, the current version of the draft text would impose an obligation on states to require businesses to undertake HRDD and integrate a gender perspective throughout that process "in consultation with potentially impacted women and women's organizations [in order to] to identify and address the differentiated risks and impacts experience by women and girls". There are other provisions relating to women and women's human rights. But again, the text was conceptualized from a particular perspective. Rather than taking a [holistic approach](#), women's rights and interests have been added to the text here and there.

Given the deficiencies of the normative framework, it is important for states to look beyond these texts in determining their human rights obligations and in developing HRDD and other laws, and for businesses to look beyond these texts in determining their human rights responsibilities.

What type of concrete realistic and intersectional policies can governments and corporations adopt?

We are still at the very early stages of grappling with the issue of gender equality in the context of business activity but there are some good documents providing guidance for states and businesses in developing their policies and practices. A good place for governments and corporations to start is the United Nations Working Group on Business and Human Rights' report on the [Gender Dimensions of the UNGPs](#). In this document, the Working Group sets out a gender framework for states and businesses to help them understand their obligations and responsibilities under the UNGPs. The Working Group also provides a set of concrete recommendations with illustrative actions for each Guiding Principle.

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Joanna Bourke-Martignoni and Elizabeth Ulmas have produced a really helpful report on gender-responsive human rights due diligence in which they provide examples of what such due diligence would entail in the context of global supply chains, land-based agricultural investments, and conflict-affected zones. There are also a variety of other tools that may be useful such as the Women Win's Gender Responsive Due Diligence Platform developed in partnership with other actors.

In developing laws, policies, and practices that are gender responsive and gender transformative, it is crucial for states and businesses to engage with women and women's organizations and to seek and implement the latter's ideas. These laws, policies, and practices should also recognize that women are not a homogenous group and may experience multiple and intersecting forms of discrimination. Women's rights and interests and those of marginalized groups must be mainstreamed and states and businesses must also introduce specific provisions and/or practices that address the inequality that women and other groups face, whether in states' National Action Plans for implementing the UNGPs, the development of mandatory human rights due diligence laws or the development by businesses of business and human rights policies, procedures, and practices, including with respect to HRDD.

Beyond the business and human rights sphere, we need to imagine the world differently and states and businesses need to take concrete steps to address women's inequality more generally. This means that states and businesses need to challenge, disrupt, and dismantle the structures that oppress and marginalize women and others in society and not simply tinker with the causes of gender and other inequality, changing a few things here and there.

ACTIVISTS AND ADVANCING INCLUSIVE BUSINESS CULTURES: WOMEN WORKING FOR CHANGE



ERIKA GEORGE

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"We never know how our small activities will affect others through the invisible fabric of our connectedness. In this exquisitely connected world, it's never a question of 'critical mass.' It's always about critical connections."—Grace Lee Boggs

What is the role of gender activism and in which ways can activists help improve business culture in relation to diversity and gender equality?

I've been thinking about the too often overlooked women's rights activists and women's labor rights activists, who preceded our conversations about business and human rights. The women workers who paved the way for the women to be in the c-suites by making way for women in the workforce. Increasing the number of women in leadership and executive roles recently has been at the center of current conversation on diversity and inclusion and these are the women we focused on when we think about gender equity and equality in business.

So, I wanted to take us back to look at early organizing and earlier activism by women. I am speaking from the context of the United States, where clearly intersectionality (race and gender identity) had a significant influence on who was doing what labor and who was organizing. If we look at who the women are, who are doing the kinds of work that place a woman at risk: women in factories, women on farms; we can learn a great deal about the role of women in bringing about the conditions necessary to improve business culture with respect to gender equity. Initially, I will start with a woman who was very active in creating labor policy for the United States. I will conclude with women labor activists and organizers who demanded stronger protections and more inclusive policies.

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Frances Perkins, was the Department of Labor Secretary for Franklin Delano Roosevelt – FDR, who was President of the United States during World War II. His wife Eleanor Roosevelt was instrumental in the drafting of the Universal Declaration of Human Rights. Frances Perkins was influenced by the industrial disaster of the Triangle Shirtwaist fire, where women textile workers were burned alive because management locked them into the factory during the work day. The tragedy was demonstrated the need for a major labor rights reform because profits were made from exploiting unprotected women workers. There are groups of women who still continued to be unprotected – these are largely migrant women and Black women trapped into doing low wage service labor and care work. Black women descended from formerly enslaved people in the US continue to experience the adverse impacts of being undervalued and vulnerable. The COVID-19 pandemic has demonstrated that despite the essential work women of color do they can be treated as expendable.

Dolores Huerta helped to organize farmworkers in California in forming one of the largest agricultural labor unions. She started as a teacher who was observing what was happening to the children of farmworkers. She also saw what was happening to women in the field in terms of sexual harassment, sexual violence. So, her position as a migrant woman and a woman of color in the role of being in proximity to people working on factory farms gave her a perspective that a top-down due diligence lens might not have. So, to points made previously by my colleagues Nadia Bernaz and Penelope Simons that nothing is entirely gender neutral (or for that matter race neutral), including the global policies and business practices. If we start from the perspective of women workers, I think we would look very differently at business and workplace cultures.

A woman who is perhaps little known but did a tremendous amount of work that is worthy of reference as we think about how activists are advancing ethical business cultures is Velma Hopkins. She was an organizer in North Carolina employed by the RJ Reynolds Tobacco Factory. So, her activism engaged with both women on farms and women in factories. As a Black woman she was excluded from unions that were racially segregated at the time, still she did a tremendous amount of work to stage walkouts and strikes, leading over 10,000 people out on a strike and ultimately establishing the right to organize labor. Both of Huerta and Hopkins were also active in voting rights movements in the United States. I imagine this is because they both appreciated that understanding and participating in governance, whether it's participating as a labor organizer to influence the practices of a private firm or political organizing to ensure representation in the government that is going to regulate the firms is critically important.

Grace Lee Boggs, an Asian American woman became active in labor organizing when she married a Detroit factory worker in the auto mobile sector. They founded Detroit Summer, after noticing that the people of Detroit didn't have the same resources as people elsewhere. Acknowledging the intersectionalities of different isms – racism, sexism as well as persistent problems of inequality and poverty – through activism and organizing to demand better wages and create space for people to have these conversations.

By way of contrast and comparison, I also note Sheryl Sandberg because of her work to increase women's representation and to elevate women in the digital economy. Reasonable people can disagree about whether it is "leaning in" that is necessary to advance equitable and inclusive business cultures; or whether or not the burden should be on women to insert themselves into male dominated workplaces more aggressively. Shoshana Zuboff, a scholar whose work I very much admire, has called Sheryl Sandberg the "Typhoid Mary of surveillance capitalism." But, putting that critique aside, the lack of women in technology is likely leading to problems and human rights risks we aren't detecting. Consider the types of issues that Dolores Huerta saw because of her proximity to farmworkers in the fields.

ACTIVISTS AND ADVANCING INCLUSIVE BUSINESS CULTURES: WOMEN WORKING FOR CHANGE

If we don't have women in these leading global companies, at multiple levels in within these companies, working on a status equal with men, whatever that level may be, I believe we will be missing out on opportunities to make progress. The diligence that needs to be done becomes more difficult when we don't have the voices of rights activists. I believe we need to look at why these spaces are difficult for women to enter and to remain. Throughout the commercial value chain, whether at the top of the corporate structure or at the very bottom, inequality exists and persists for women.

There are a growing number of women activists and academic researchers working to reform in the in the tech sector. Rebecca MacKinnon has done some really interesting work designing indicators and ranking for digital rights to protect privacy and expression. What if we were to have more indicators devoted to detecting gender inequality? I think that could be fundamentally feminist and very constructive for efforts to create more inclusive business cultures.

So, it is important to acknowledge the women's rights and labor rights activists that preceded us and have helped progress our field by setting precedent to expect respect for women workers. They are paving the way for women up the corporate ladder, and ultimately what they all have in common, whether they're in agriculture or industrial labor, is the courage to demand respect for their rights and to demand access to remedy for labor rights violations when they have been wronged. So, this is a long conversation. We are on a continuum, and I do think we're moving forward, but businesses can and must do more.

How can we identify the indicators that give relevant information about gender equality, because we heard that it's very important to have concrete measures, you know, it inside concrete measures in these naps of course to be monitored but how can we identify the indicators?

As countries are constructing their National Action Plans (NAPs) to ensure businesses respect human rights, I think it's important to determine what kind of information will be collected and how that information will be used to advance gender equality. I'm very encouraged about the World Benchmarking Alliance's new 2021 gender equality and empowerment benchmark.

Having some sort of standard against which businesses will be measured will give competitors in different industry sectors something to strive—leadership on an issue of increasing importance in the culture generally, equity. Having information and benchmarks will give shareholders and stakeholders grounds to call for more concrete and meaningful measures to promote gender equality. There has been more activity on the part of shareholders to assess the social and environmental impacts of particular business enterprises. Asset managers and investors are asking different questions of business. There is more interested in investing in human rights or "investing in the rights way." More and more retail investors and consumers, in the United States and perhaps even more so in Europe are concerned about the conditions under which products are produced.

The World Business Alliance Benchmark is taking a holistic approach to assessing gender equality and empowerment. While the UN Sustainable Development Goals, and the Millennium Development Goals before them were purely or primarily quantitative, the Benchmark seeks to measure a mix of data. Whenever we are talking about the kind of relevant information, we need with respect to gender equality and gender empowerment evaluations we also need a qualitative understanding of what the challenges are women are facing in accessing and enjoying opportunity. So, it's not enough to say that X number of women are CEOs or Y number of women occupy leadership roles, rather it is also important to seek insight into cultures and conditions that create or remove barriers for women's full participation.

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The Benchmark intends to bringing relevant data points together in a manner that is integrated, holistic and also balanced. It is integrated in the sense that it seeks to identify gaps, by looking to those who have the information—women workers. It is also intended to be flexible and industry specific. The scope of the methodology looks to understanding different stakeholder groups in the workplace the marketplace, in the supply chain and in the community. It will look to hard numbers for compensation and promotion and recruitment, but it also looks to things like agency and influence in the workplace. In my view this is the right direction to be looking. Do women have agency when they are in their workplaces and workspaces. A holistic understanding will be important as we see to crafting was to measure concrete progress to assess NAP performance.

How is it possible to overcome networking bias, and to include more women so again, on the company side?

Networks must be reworked to work for more women. The incentive structures have to be aligned in such a way that those who would be inclined but not make the time or have the time for it can make it a priority to include women. Given the neoliberal business culture that we have presently, if there are ways to reward people, either in currency or some other kind of currency for cooperation I think that perhaps we will start to see a shift.

The other thing is that often women do a really good job lifting up other women. As a practical matter, for women who want to network finding the communities within your area of practice or your field of research and networking among women actually gets more women further. Networking across difference may require getting people to overcome bias. First, this means you have to identify the bias. Many people have unconscious bias or even conscious biases that they're not willing to admit to.

Managing difference in the workplace will mean creating a culture of psychological safety where people can admit what it is they don't know and then be encouraged to get to know more—about women and gender equity and gender empowerment. Greater knowledge can lead to a greater appreciation of the value of including women in work networks.

COMPANIES AS DRIVERS OF POSITIVE CHANGES TO PROMOTE GENDER EQUALITY



OLENA UVAROVA

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How can companies be the drivers of positive changes in local contexts where the legislation is not protective of gender equality?

To start I would say that I hope that companies could be the drivers of positive changes, especially when legislation is not protective of gender equality. It’s extremely important to have businesses on the side of gender equality in societies that have a long tradition of paternalistic regulation. Especially in labour relations. As a key result of such regulation, an employee does not act as an independent and equal party in relations; all the conditions of an employee’s work are formally determined by the state. In such a system of coordinates, women are considered primarily as an object of protection by the state in connection with the reproductive function: excessive protection by the state makes them less competitive in the labour market.

There is one more reason why the readiness of businesses to be such drivers plays a crucial role. It’s not just for gender equality, but for the social contract in society as a whole. I will explain this point. Last week in Ukraine we conducted the webinar on good corporate practices within the Business and Human Rights Week initiated by the Ukrainian Parliamentary Commissioner for Human Rights on the 10th Anniversary of the UN Guiding Principles on Business and Human Rights discussed the changes in corporate culture and corporate responsibility to respect human rights over the past 10 years.

We need to understand the local context and to adapt general tools and standards to the local context. It’s not new, but it’s not our reality still. And one of the biggest Ukrainian business associations said that global companies that come to Ukraine with their human rights policies realize soon that these policies don’t work in Ukraine, they are not effective. Because of many reasons. And Ukrainian companies if they try to implement responsible business conduct standards by translating human rights policies of the Western companies or just duplicate the human rights due diligence procedure they have not any success with that. It doesn’t work. Because it was not adapted to the local context. What we should understand about Ukrainian and all other post-Soviet societies in the context of gender equality and business and human rights framework? To my view, it’s important to keep two things in mind.

The first is that private businesses weren’t an actor of social life for a very long period. Private business has emerged in the territory of the former USSR only since 1991, with the beginning of privatization. Up to this moment, private entrepreneurship was banned (under the threat of criminal liability), the idea of private property was denied, and all enterprises were state-owned.

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The economy was centralized and administered by command methods. I believe that the key difference of Eastern Europe is due to the fact that business here was not a subject of relations between the state and society. It just didn't exist here. There was no discussion about what is the role of business in society. Businesses did not oppose the state if it did wrong things. Society did not address its expectations towards business. The only subject responsible for everything that happens in society, good and bad, was the state. But today businesses claim to be a part of the social contract, to play an active role in determining what is happening in society, to influence the development of society. This is an important moment. Businesses must be aware that having influence in society is inevitably linked to responsibility for that influence.

The second thing that I would like to mention is connected to the first and its about gender equality in Ukraine. Ukraine as a state has ratified all key international human rights treaties, in particular those aimed at ensuring gender equality. The principle of equality is enshrined in the Constitution of Ukraine. Ukraine has also ratified all key ILO conventions. However, gender discrimination and gender inequality at work remain typical for Ukraine. One of the reasons: the Labor Code, adopted back in the days of the USSR, in 1971, continues to operate. This fact explains why the current legal regulation of women's labour in a number of provisions contradicts recognized international standards, including ILO standards. Thus, according to the Labor Code it is prohibited to allow pregnant women and women with children under the age of three, regardless of their will, to work at night (Article 55), to work on weekends (Article 176), to be sent on business trips (Article 176), and to overtime work (Article 63). All women are not allowed to work at night, regardless of their will, except in those sectors of the economy where there is a special need and is allowed as a temporary measure. A man can claim similar guarantees only if he is raising a child without a mother, including in the case of a long stay of the mother in a medical institution (Article 186-1).

Such regulation, aimed at protecting reproductive health at the workplace, has a number of negative consequences. For example, mandatory requirements prohibiting women from working in heavy work or at night denies women the possibility of making an independent conscious decision (informed consent). Such regulation proceeds from the presumption that the function of caring for the child rests entirely with women, this serves as an appropriate signal to society. Such regulation also significantly reduces the competitiveness of women in the labour market, since their employment is associated with a number of significant restrictions for employers. The employer sees the need for women to combine work with family responsibilities as a less useful workforce. Every year in Ukraine up to 50,000 women cannot return to work after maternity leave due to discrimination from employers. Such cases raise the question, can businesses refuse to apply the norms of national legislation, which are based on a paternalistic approach to legal regulation and lead to discrimination and be such driver of positive changes? Does corporate responsibility to respect human rights imply a duty of business to apply international human rights standards directly, contrary to national law? Should a human rights due diligence procedure include an assessment of national legislation for compliance with international human rights standards? If we combine the first statement that we have made about connections between pretending to impact on developments in society and this statement about the assessment of national legislation for compliance with international human rights standards, we could see how business could be a driver of positive changes.

How can companies contribute to changing general culture relating to gender equality?

Pillar II expects that if the state's regulation is paternalistic and prohibits some activities for women to protect their reproductive health, businesses should give the priority to the international human rights standards. It also means that businesses are ready to challenge the actions of the state if it encroaches on the company's autonomous self-regulation space.

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Wherever they operate, corporations are part of the social fabric, they influence politics, economics, legal, social and cultural rules and practices. Culture can influence gender equality. Having such power, businesses are vested with an obligation to ensure, at the least, that human rights are not harmed, not to engage in direct or indirect discrimination, including on the grounds of sex, etc. It is not enough merely to declare one's commitment to human rights, and it would be odd to deny one's obvious impact on human rights, especially those of vulnerable individuals. Corporate policies and practices "must fully integrate gender-responsive practices within each area of their business operations".

Today, corporate observance of human rights requires more than formal compliance with the law.

In doing this, "wearing gender glasses", i.e., merely filtering out the existing mechanisms of human rights due diligence, would not be enough. A key problem in the field of corporate activities is to recognize the existence of gender norms embedded in our daily life, of complex cultural stereotypes, power imbalances in public and private relations. And while the company itself cannot change the context, it should be aware of and recognize the situations that increase the vulnerability of women or their specific groups, compared to other participants in the same sector of relations. The company should ensure that its operation does not advance the existing negative practices and that the company does benefit from stereotypes or gender inequality. This is why the integration of a gender component cannot be achieved by merely adding it to the human rights due diligence procedures.

The lack of capacities of business, especially SMEs, calls companies to cooperate with the CSOs and academia. Civil society has special importance in our region. These institutions have appropriate human rights knowledge and experience of human rights protection.

CONCLUDING REMARKS



DUSSU DJABULA

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The webinar series “Business and Human Rights in Europe: Connecting the Dots” closed with its sixth and last episode focused on the interconnectedness between corporate due diligence and gender equality in light of the legislative developments at the European level.

The panel was comprised by Nadia Bernaz (Wageningen University), Erika George (University of Utah), Harpreet Kaur (UNDP’s Regional Bureau of Asia and the Pacific), Salil Tripathi (Institute for Human Rights and Business), Penelope Simons (University of Ottawa) and Olena Uvarova (Yaroslav Mudriy National Law University), and chaired by Teresa Anjinho (Provedora Adjunta na Provedoria da Justiça/Deputy Ombudsman).

As part of the introductory remarks, Teresa Anjinho emphasized how the Ombudsperson Office in Portugal has been following the discussions regarding business and human rights issues. She highlighted the existence of huge governance gaps that need to be tackled, especially at the level of awareness, and at the same time how important is to look at the positive and negative impacts of companies’ activities in order to effectively implement the SDGs.

During the first intervention, Penelope Simons explained how gender equality is connected with business and human rights. She started by acknowledging that no business activity or its impact on broader society is gender-neutral. Taking the example of resource extraction, she considered the gender dynamics and gender expectations in this field. In particular, one of the consequence that resource extraction had on women was the increasing burden to care for sick family members due to toxic chemical contamination. In addition, other concerns related to domestic violence and violence committed by male workers and security forces. Penelope also commented on the insufficiency of the current regulatory framework on human rights due diligence, particularly the UNGPs, where there is still no proper recognition of how structural gender equality is, although the situation seems to be slightly better in the case of the draft treaty on business and human rights.

Salil Tripathi focused on the impact digital transition and teleworking had on women during the covid-19 pandemic and how gender inequality is intrinsically linked to women leaving work. In this regard, Salil discussed how working from home has increased the burden put on women when it comes to domestic chores and even has made women more vulnerable to domestic violence, an unfortunate reality that has not been sufficiently addressed by companies for a variety of reasons, including cultural or historical reasons. Additionally, Salil pointed out that in the services sectors, such as banking or stockbroking, working from home has impacted women also at a professional level since they are more prone to be left out of the networking, and due to this phenomenon, they are more likely to miss certain opportunities that they would legitimately be entitled to because they are just not part of the loop. At the same time, frontline operating jobs, such as supermarket counters, hospital staff, have been prominently undertaken by women, without actually dealing with their specific needs or pondering how to address them.

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Then, Nadia Bernaz referred to the question of intersectionality and interdisciplinary approaches, and how human rights due diligence can accommodate different right holders. She explained how an intersectional approach is relevant to identify multiple factors of discrimination, see clearly how women can be affected differently in different contexts, and discuss the fact that we need to be more inclusive in policy-making processes, including the context of Portugal developing its National Action Plan on Business and Human Rights. In her view, the concept of human rights due diligence can accommodate different right holders, which can start by changing the way the problem is being framed, that is, by identifying potential issues and designing strategies to address them. According to Nadia, it is necessary to use a gender perspective from the beginning and not only when discussing remedies, which would in turn enable a different approach towards human rights due diligence.

After the discussion on human rights due diligence, intersectionality and the domestic burden put on women, Erika George spoke about the role of women activists in enhancing business culture and on the indicators that provide important information on gender equality. Although women in C-suite positions have been at the centre of the discussions about gender equality, she pointed out how women's rights and women's labour activists paved the way for our modern discussions on gender equality and its interconnectivity to business and human rights. Frances Perkins, Dolores Huerta, Velma Hopkins, Grace Lee Boggs, Rebecca MacKinnon and Sheryl Sandberg are examples of women activists who have contributed to helping women climb up the corporate ladder, and demanding respect for their rights and access to remedy. In relation to the indicators that give us information on gender equality, Erika proposed a holistic balanced and integrated approach to clearly identify gaps.

Harpreet Kaur tackled the question of including equality in the governmental agendas and on how providing practical guidance to companies can help shift the paradigm. As to the first issue, Harpreet considered what Governments should not be doing and this is taking a mere tick-box exercise. Secondly, she emphasized that women cannot be considered a homogenous group, and, therefore, when developing a National Action Plan (NAP), Governments should acknowledge the different realities of different women in law and policy instruments. Going further into the NAP developing processes, Harpreet mentioned that one key aspect would be to make sure inter-ministerial committees have adequate representation of women and bring gender experts. Another important element is to consider gender disaggregated data in their assessment processes. With regard to practical guidance to companies, she discussed the tools available that can be used by companies to be better equipped to tackle gender and human rights related issues.

Finally, Olena Uvarova spoke about the power and influence companies can have on pushing for positive changes in local contexts. In particular, she highlighted how important was to have businesses on the side of gender equality in societies that have had a paternalistic regulation for a long time. The role in the construction of a more equal society also represents the adoption of a different understanding of the social contract. In this sense, she mentioned the necessity to adapt general tools and standards to the local context, and referred to the example of private companies in Ukraine which have not been considered as actors of social life in its recent past. As Olena argued, one important element for companies is to go beyond the formal compliance with the law and recognize the situations that increase the vulnerability of women and other groups.

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