Toward a corporate duty for lead companies to respect human rights in their global value chains?

Dr. Claire Bright,[1] Dr. Axel Marx[2], Nina Pineau,[3] and Prof. Dr Jan Wouters[4]

This is a pre-print version of a journal article published in Business and Politics. Suggested citation: C. Bright, A. Marx, N. Pineau and J. Wouters, "Towards a corporate duty for lead companies to respect human rights in their global value chains?". 22(4) *Business and Politics* (2020), 667-697

Abstract. The corporate responsibility to respect human rights was formally introduced in 2011 with the unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council. It is grounded in social expectations and forms part of the companies' "social license to operate." This paper argues that this *responsibility* is progressively turning into a legal *duty* for lead companies to respect human rights in those types of value chains which are characterised by a high level of control by a lead company over its business partners. Our argument rests on two recent legal developments. Firstly, the article analyses the judicialization of the corporate responsibility to respect in the case law on parent company liability in various jurisdictions, which, we argue, is highly likely to have some implications in relation to certain types of value chains so as to trigger the liability of lead companies for the human rights harms arising out of the activities of entities over which they exercise sufficient control. Secondly, the article delves into the legislative developments which increasingly require lead companies to exercise due diligence so as to prevent and address adverse human rights impacts in their own activities and global value chains.

[1] Dr Claire Bright is Assistant Professor at Nova School of Law in Lisbon, and Associate Research Fellow in Business and Human Rights at the British Institute of International and Comparative Law; claire.bright@novalaw.unl.pt.
[2] Dr Axel Marx is Deputy Director at the Leuven Centre for Global Governance Studies, University of Leuven; axel.marx@kuleuven.be.
[3] Nina Pineau is PhD Researcher at the Leuven Centre for Global Governance Studies, University of Leuven; nina.pineau@kuleuven.be.
[4] Prof. Dr. Jan Wouters is Professor of International Law and International Organizations, University of Leuven and Director of Leuven Centre for Global Governance Studies, University of Leuven; jan.wouters@ggs.kuleuven.be.

Introduction

The past decades have witnessed the transformation of the models of organization of production toward greater outsourcing of activities and increased geographical fragmentation. This trend has been based on the comparative advantage offered by the respective locations.[5] The new era of global production, which emerged after the Golden Sixties, led to the rise of global value chains (GVCs),[6] defined as "the series of stages in the production of a product or service for sale to consumers. Each stage adds value, and at least two stages are in different countries."[7] A significant feature of this new model of production is the ability, for lead companies (i.e., companies at the apex of the value chain), "to control production over large distances without exercising ownership."[8]

The rise of value chains accelerated from the 1990s onward.[9] Products were no longer made at one or two locations but all over the world. This has allowed companies[10] to reduce production costs significantly inter alia by sourcing from countries (host states) with less stringent regulatory frameworks in relation to human rights and environmental standards. Indeed, domestic regulatory frameworks are highly variable,[11] and host states can be unwilling to regulate the activities of companies on their territory for fear of discouraging foreign investors.[12] This has given rise to governance gaps creating the permissive environment for adverse human rights impacts to take place in various parts of the value chains.[13] Tragic examples of emblematic cases include the poor working conditions of workers in the Chinese factory producing iPhone and iPad parts, leading to many suicides amongst the workers;[14] the collapse of the Rana Plaza building in Bangladesh which took the lives of 1,134 workers of garment factories housed in the building that were supplying international brands;[15] the widespread use of child labor and issues of deforestation in cocoa

[5] Dixit and Norman (1980).
[6] The World Bank (2020).
[7] Ibid., 17.
[8] Jenkins (2001), 7.
[9] The World Bank (2020), 19; see also Elms and Low (2013).
[10] In the literature, one can find references to the terms companies, firms, corporations, enterprises and other terms to refer to economic actors. For consistency reasons we refer throughout this article to companies.
[11] Scherer and Palazzo (2018).
[12] Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises (2008), 11.
[13] SRSG (2008), 3.
[14] *The Economist* (2010).
[15] On this case, see for instance Comyns and Franklin-Johnson (2018); Ozkazanc-Pan (2018).

farms in West Africa, which supply major food, beverage, and chocolate companies;[16] or the issues of forced labor and human trafficking of migrant workers on the Thai fishing boats, which supply international supermarkets.[17] More recently, the COVID-19 pandemic has shone a light on the difficulties resulting from unregulated GVCs. It has also raised questions on the human rights compatibility of business responses to the pandemic. For instance, mass cancellation of orders have led to millions of workers being laid off in the GVCs of international fashion brands,[18] and a number or large companies have invoked the force majeure clause in their contracts with suppliers, preventing payment for produced orders, thereby leaving their value chain workers with no wages.[19]

Many such abuses have been documented by NGOs who have publicly called on companies to account for the human rights abuses in their value chains over the past few decades.[20] Protests against large, high-profile multinational companies have proliferated and heralded a wave of legal actions.[21] Protests and legal actions originally focused on human rights and labor rights issues, but have progressively evolved to include environmental issues, as awareness of the direct repercussions that they can have for the enjoyment of human rights has grown.[22] In an attempt to address their reputational risks, a growing number of companies started to adopt self-regulatory measures on a voluntary basis. In 1994, Bob Haas, then CEO of Levi Strauss, stated that: "In today's world a TV expose on working conditions can undo years of effort to build brand loyalty."[23] Levi Strauss was one of the first companies to establish a code of conduct.[24] Many companies followed suit, which resulted in a proliferation of voluntary codes of conduct.[25] Self-regulation was also perceived as a means to avoid more stringent regulatory actions by governments.[26] However, these codes of conducts were quickly criticized for being inadequate answers to human rights issues.[27] As a next step, companies started to engage with new types of auditing and certification systems to address human rights and environmental concerns.[28] All these approaches relied on voluntary undertakings on the part of companies, meaning that no legal consequences resulted from

[16] Fern (2019), 9.
[17] Bonfanti and Bordignon, (2017).
[18] Robinson and Bloomer (2020).
[19] Ibid..
[20] Jenkins (2001) , 10.
[21] Ibid., 8.
[22] Gereffi, Garcia-Johnson, and Sasser (2001), 64.
[23] Zeldenrust and Ascoly (1998), 14.
[24] Jenkins (2001), 5.
[25] Ramasastry, 168.
[26] Jenkins (2001), 9.
[27] Ibid., 26.
[28] Marx and Wouters (2015), 215.

noncompliance. At the international level, the choice of voluntary approaches to regulate the human rights responsibilities of companies was reinforced by the adoption of "soft law" instruments such as the UN Guiding Principles on Business and Human Rights (UNGPs). Soft law instruments do not create legally binding obligations and, as a result, noncompliance with soft law instruments does not normally give rise to legal consequences. They have been described as "as a transitional stage in the development of norms where their content is vague and their scope imprecise."[29] The over-reliance on voluntary measures and soft law instruments have been increasingly criticized as being insufficient to foster positive change in corporate behavior.[30] Many studies have highlighted the correlation between the soft law character of instruments seeking to regulate business activities, and the poor implementation by companies of their human rights responsibilities in practice.[31]

Simultaneously, the legal accountability of companies for adverse human rights impacts in their activities and GVCs has remained meagre, and access to effective remedies for victims of business-related human rights abuses largely inadequate.[32] In an attempt to bridge the resulting accountability gap,[33] various recent developments at the domestic, European, and international levels have sought to enhance corporate accountability in GVCs. This article analyses the incremental legal developments that increasingly recognize the existence of a legal duty (going beyond mere moral responsibility arising out of social expectations) for lead companies to respect human rights throughout their value chains. Our methodology rests on a comparative legal analysis on the basis of which we identify two recent, but significant, developments. The first development concerns the judicialization of the corporate responsibility to respect human rights in the case law on parent company liability in various jurisdictions, which, we argue, will have some implications for corporate liability in value chain cases as well. The second development refers to the recent legislative developments in various jurisdictions that increasingly tend to *require* (and not only *encourage*)[34] companies to undertake human rights due diligence as a means to identify, prevent, and address adverse human rights impacts in their GVCs.

This shift counters a long trend of neoliberal trade liberalization made possible by international economic and trade laws, which did not take social and/or environmental

[29] Olivier (2002), 289.
[30] Locke (2013); Bennett (2018); LeBaron, Lister ,and Dauvergne (2017); Bartley (2018); Ponte (2019)
[31] Vigeo Eiris, (2018); Corporate Human Rights Benchmark (CHRB), (2019); Lise Smit et al. (2020), 16.
[32] UNHCHR (2016), Marx, Bright, and Wouters (2019).
[33] Bernaz (2016).
[34] Augenstein and Kinley (2013).

concerns into account. As Slobodian[35] argues, international trade law, and the establishment of international trade organizations and trade agreements, emerged from a desire to insulate global markets from sovereign states and political demands for state control on economic activity. This insulation allows markets to disregard political claims for social, environmental, or human rights protection. The key focus of international trade law is to remove any barriers to trade, first focusing on the reduction and elimination of tariffs and now increasingly removing technical (regulatory) barriers to trade. The shift from a "soft law" (i.e., nonbinding) corporate *responsibility* to respect human rights to a "hard law" (i.e., legally binding) *duty* to respect human rights constitutes an attempt to adjust for the negative consequences of unregulated global trade.

The judicialization of the corporate responsibility to respect human rights

The corporate responsibility to respect human rights was formally introduced in 2011 with the unanimous endorsement of the UNGPs by the UN Human Rights Council. Guiding Principle 11 of the UNGPs provides that "business enterprises should respect human rights."[36] Commentary to Guiding Principle 11 clarifies that the corporate responsibility to respect human rights is not a legal norm but a social expectation; a "global standard of expected conduct for all business enterprises wherever they operate."[37] Such responsibility to respect human rights requires that companies avoid causing or contributing to adverse human rights impacts through their own activities, and that they address such impacts when they occur. It also requires companies to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships.[38] Business relationships are understood to include relationships with business partners and entities in its value chain.[39] Under the UNGPs, the corporate responsibility to respect human rights therefore extends throughout the value chains, which marks a difference with the approach that had been predominant previously, in which companies were not seen as being accountable for the adverse human rights harms arising out of the activities of business partners in their GVCs. One of the most emblematic examples of that previous approach dates back to the 1970s when Nike was targeted by numerous protests and boycotts

[35] Slobodian (2018).
[36] UNGPs, Guiding Principle 11.
[37] UNGPs, Commentary to Guiding Principle 11.
[38] UNGPs, Guiding Principle 15.
[39] UNGPs, Commentary to Guiding Principle 13.

concerning labor practices in its supplier factories in South Korea, China, and Taiwan.[40] The company's initial response was to distance itself from what was happening within its "sweatshops." Todd McKean, the then director of compliance of Nike reportedly stated in an interview in 2001: “Our initial attitude was, ‘Hey, we don’t own the factories. We don’t control what goes on there.”[41]

From a legal perspective, this disassociation was permitted by the fact that, traditionally, the various entities within a corporate group and throughout the value chain were generally (and still are to a large extent) considered as entirely independent and autonomous, and governed by the laws of different jurisdictions based on their country of incorporation. This led to a fragmentation of legal responsibility,[42] whereby each entity within aa value chain was accountable for the harms arising out of its own activities. However, since lead companies were legally construed as completely independent from their business partners, they were not considered to be accountable for the damage that resulted from the activities of the latter. However, such compartmentalization of the law ignored the interconnectedness that can exist between different entities within global value chains. In addition, it failed to take into consideration the significant differences that exist between the various types of value chains, and the varying degree of control that a lead company can exercise over its business partners.

Gereffi et al. (2005) identify five types of value chains based on the level of power asymmetry between buyers and suppliers. These are from the lowest to the highest degree of power asymmetry:

- *Markets*: characterized by market linkages, and where the cost of switching to new partners are low for both parties.[43]

- *Modular value chains*: in which suppliers typically make products or provide services to a customer's specifications, whilst retaining the full responsibility for process technology.[44] In this type of value chains, a buyer's need for direct monitoring and control is reduced.[45]

- *Relational value chains*: in which interactions between buyers and sellers are characterized by mutual dependence, [46] even though the lead firm controls the highest valued

[40] Soule (2009).
[41] Miller (2014).
[42] Leader (2017), 121.
[43] Gereffi, Humphrey, and Sturgeon (2005), 83.
[44] Ibid., 83.
[45] Ibid., 86.
[46] Ibid., 83.

activity in the chain, and thereby exercising control over the supplier.[47]

- *Captive value chains*: in which "small suppliers are transactionally dependent on much larger buyers" and face significant switching costs making them "captive." They are normally characterized by a high degree of monitoring and control by the lead firm.[48]

- *Hierarchy*: characterised by vertical integration where companies acquire a company operating in the production process of the same industry.[49]

In the case of hierarchy and captive value chains, one company (often a large multinational enterprise) has significant power and control over its business partners. In a relational or modular or market type of value chains, the power relations are more balanced.

The growing recognition of the power of influence of lead companies over their suppliers in certain types of value chains has triggered certain dynamics that aim to "discipline" large companies with regard to their adverse human rights impacts in their GVCs. This is the case in relation to the increasing use of judicial mechanisms to hold lead companies accountable in the home state jurisdiction.[50] In this respect, we analyse the progressive judicialization of the corporate responsibility to respect human rights in the case law on parent company liability, which increasingly acknowledges the existence of a duty of care on parent companies in relation to the harms arising out of the activities of their subsidiaries, and which, we argue, is highly likely to have some repercussions for lead companies in GVCs.[51]

The emergence of a duty of care of parent companies in case law

In recent years, a number of cases have started to emerge that seek to establish the liability of parent companies for the human rights harms arising out of the activities of their subsidiaries. The evolution of the case law has been incremental and has been marked by a "profound change emerging in the principles governing these situations."[52] This change has taken place through a progressive defragmentation of the liability of companies within a corporate group.

[47] Marketlinks.
[48] Gereffi, Humphrey, and Sturgeon (2005), 84.
[49] Tarver (2019).
[50] Marx, Bright, and Wouters (2019).
[51] In the next sections, we refer both to parent and lead companies. An important difference is that the relationship between parent companies and their subsidiaries is one of ownership, meaning that they form part of the same corporate group, whereas the relationship between lead companies and their business partners in their GVCs is purely contractual, and they do not form part of the same corporate group.
[52] Leader (2019), 113.

Under the company law principle of separate legal personality, parent companies and subsidiaries are considered as separate legal persons, each individually responsible for their own activities. As a result, a parent company will not normally be liable for the harms arising out of the activities of its subsidiary. As Turner explains:[53]

> [C]ompanies have a 'separate legal personality' to that of their owners or those that are involved in running them. This characteristic is endowed upon a business at the moment that it becomes incorporated. In practice this means that companies can enter into contracts in their own name, employ people in their own right, and continue to exist after the death of their founders and owners, and it also means that a company itself will assume ownership of the assets and liabilities of a business. This is helpful in facilitating investment and commerce. However, what it also means is that when a parent company sets up a subsidiary in another country (inevitably with its own 'separate legal personality'), it is not (except in certain highly specific circumstances) directly liable for the debts or liabilities of that subsidiary.

However, recently, the case law has started to recognize that a parent company may be accountable for its own acts or omissions in relation to the harms arising out of the activities of its subsidiaries. In particular, English and Dutch case law have recognized that parent companies may, in certain circumstances, owe a duty of care to those affected by the activities of a subsidiary.[54] A duty of care can be described as referring to "the circumstances and relationships giving rise to an obligation upon a defendant to take proper care to avoid causing some form of foreseeable harm to the claimant in all the circumstances of the case in question."[55] Breach of that duty of care is conducive of liability. Leader outlines two approaches that have been used in English case law to determine the existence of a duty owed by a parent company to take proper care to avoid causing foreseeable harm to the employees of its subsidiary and the local communities affected by the activities of the latter. In the first approach—"the classic approach"—the parent company can be liable for the damage arising out of the activities of its subsidiary because of the high degree of control exercised by the parent company over the subsidiary's corporate decisions.[56] Leader notes that "in such a

[53] Turner (2019), 377.
[54] Bright (2018), 212.
[55] Lexis Library, Glossary.
[56] Leader (2019), 114.

situation the subsidiary has in effect little to no discretion in making decisions."[57] However, in practice, in cases where this approach has been used, courts have often concluded that the degree of control was not sufficient, in the circumstances, to trigger the liability of the parent company. An illustration of this can be found in the case of *Okpabi v Royal Dutch Shell*[58] which concerned the civil proceedings filed in the United Kingdom by 42,500 Nigerian residents against the parent company (Royal Dutch Shell Plc [RDC]) and its Nigerian subsidiary (the Shell Petroleum Company of Nigeria Limited [SPDC]) in relation to oil leaks from pipelines and associated infrastructures operated by SPDC, which, they claimed, affected their lives, health, and livelihoods as well as the local environment. The English Court of Appeal found that the claimants had not demonstrated a sufficient degree of control by the parent company over the operations of the Nigerian subsidiary to give rise to a duty of care. Another example can be found in the case of *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*,[59] which concerned the civil proceedings brought by a group of Kenyan residents against the parent company (Unilever) and its Kenyan subsidiary (Unilever Tea Kenya Limited [UTKL]) in relation to the ethnical violence suffered by workers and local residents of tea plantations operated by UTKL following the 2007 presidential election in Kenya, when they were targeted by mobs that came onto the tea plantations and attacked them. In finding that the parent company was not subject to a duty of care, the English Court of Appeal highlighted the substantial autonomy that the Kenyan subsidiary enjoyed in relation to the safety of its employees.[60]

In the second approach identified by Leader—"the new approach" —what is relevant is the existence of a "special relationship" between the two entities, which creates the expectations that control *should* be exercised by the former over the activities of the latter.[61] This entails that, under certain circumstances, the parent company may be liable "for its failure to take measures that could have helped avoid the damage."[62] This approach has been more conducive to finding that a parent company may owe a duty of care to the persons affected by the activities of its subsidiary. An illustration of this can be found in the seminal case of *Chandler v Cape Plc*,[63] which concerned the civil claim filed by a former employee of the parent company's (domestic) subsidiary who had developed a chronic lung disease as a

[57] Ibid.
[58] *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, para. 127.
[59] AAA & Others v Unilever PLC and Unilever Tea Kenya Limited [2018] EWCA Civ 1532.
[60] Leader (2019), 115.
[61] Ibid.
[62] Ibid.
[63] Court of Appeal, *Chandler v Cape*, [2012] EWCA Civ 525, April 25, 2012.

result of exposure to asbestos during the course of his employment.[64] The court affirmed that the parent company owed a direct duty of care to the employees of its subsidiary.[65] This case is of particular importance as it was the first English case (and only so far) that resulted in finding a parent company liable for the harms caused by its subsidiary.

The varying approaches and outcomes of the above-mentioned case law underlines the difficulties for claimants to prove the relevant control de facto exercised, or which should have been exercised, by the parent company over its subsidiary.[66] This is exacerbated by the difficulties often encountered by claimants in corporate human rights cases in gaining access to the information required to substantiate their claim.[67]

In an attempt to circumvent these difficulties, claimants have increasingly relied on the public commitments and the group-wide policies devised by parent companies. Their argument being that such commitments and policies create legitimate expectations in terms of the degree of supervision and control that should have been exercised by the parent company over the activities of its subsidiary.[68] On this basis, the UK Supreme Court has recently confirmed in its ruling on the *Vedanta* case[69] that a parent company may, in certain circumstances, be liable for the harms caused by its subsidiaries. This case concerned civil proceedings brought in English courts by 1,826 Zambian citizens against the UK-domiciled company Vedanta Resources Plc (Vedanta) and its Zambian subsidiary (Kongola Copper Mines, Ltd [KCM]) in relation to the alleged toxic emissions from a copper mine operated by the subsidiary in Zambia, and resulting damage suffered by the claimants. In a unanimous decision delivered by Lord Briggs on 10 April 2019, the UK Supreme Court allowed the complaint to proceed in English courts. Although the UK Supreme Court formally ruled on the issue of jurisdiction only,[70] it made a number of critical assertions on the issue of the duty of care owed by parent companies vis-à-vis local communities adversely affected by the operations of its subsidiary. In particular, the court affirmed, inter alia, that a parent company may incur a duty of care to third parties, if, as part of its group-wide policies, it exercised a certain degree of supervision and control over the activities of its subsidiary or if it held itself out to exercise it in published materials, even if it did not actually do this in practice.[71] It

[64] McCorquodale et al. (2017), 203; Kaufmann (2016), 260.
[65] Court of Appeal, *Chandler v Cape*, para 78.
[66] Bright (2018), 218.
[67] Zerk (2014), 84.
[68] Bueno and Bright (2020).
[69] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.
[70] Cassel (2019).
[71] *Lungowe v Vedanta Resources plc* [2019] UKSC 20, at para 53: "Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely

results from this decision that group-wide policies and public commitments are a decisive factor in determining the degree of supervision that should have been exercised, based on the legitimate expectations created by such materials.

Similarly, in the case against Shell in the Netherlands,[72] which was brought by a group of Nigerian residents (a different group from the one who brought the case in the United Kingdom) against the parent company and its Nigerian subsidiary in relation to the oil spills arising out of the activities of its subsidiary in the Niger Delta and resulting human rights and environmental damage,[73] the Court of Appeal of the Hague also affirmed that a parent company may be liable for damages resulting from acts or omissions of a subsidiary. The Dutch Court of Appeal allowed the claim to proceed to trial in the Netherlands on the basis that "it cannot be ruled out from the outset that the parent company may be expected to take an interest in preventing spills (or in other words, that there is a *duty of care* [...])."[74] The Dutch Court of Appeal found that the group-wide policies adopted by the parent company were a key element in establishing the degree of control and supervision that *should* have been exercised by the parent company over the activities of its subsidiary.[75]

In recent years, various cases have sought to extend the duty of care of a parent company to lead companies in value chains on similar grounds. Although none of the value chain liability cases have so far been successful in establishing the liability of lead companies, we argue that the evolution of parent company liability cases is very likely to have implications in value chains settings as will be shown in the next section.

Toward a duty of care for lead companies in global value chains?

As civil proceedings against lead companies for the harms arising out of the activities of their business partners have been multiplying over the past few years, a number of home state

---

proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken."

[72] Bright (2018), 212.

[73] Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, 18 December 2015.

[74] Ibid., para 3.2.

[75] Ibid., para 3.2 in which the court affirmed that the possibility for a duty of care to be found to exist is even greater if the parent company had "made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies, which is not to say that without this attention and involvement a violation of the duty of care is unthinkable and that culpable negligence with regard to the said interests can never result in liability."

courts have shown signs of increased willingness to assume jurisdiction over such cases. The degree of control de facto exercised, or that *should* have been exercised by lead companies, over the activities of their business partners is becoming increasingly central in the discussions surrounding their potential liability for the adverse human rights impacts connected to their business partners. In particular, the central question is whether lead companies owe a duty of care to the workers of their business partners and the local communities affected by their activities. Group-wide policies and public commitments can play an important role in answering this question.

In the United States, civil proceedings were filed against US company Wal-Mart by the employees of its foreign suppliers, on the basis of the working conditions in their employers' factories located in countries including China, Bangladesh, Indonesia, Swaziland, and Nicaragua. The claimants relied primarily on a code of conduct ("Standards for Suppliers") that Wal-Mart incorporated into its supply contracts with foreign suppliers, requiring them to "adhere to local laws and local industry standards regarding minimum working conditions like pay, hours, forced labour, child labour and discrimination."[76] The claimants argued, inter alia, that Wal-Mart had a duty of care to monitor its suppliers' compliance with the Standards and to protect the labor rights of its suppliers' employees.[77] They also sustained that "the short deadlines and low prices in Wal-Mart's supply contracts force suppliers to violate the Standards in order to satisfy the terms of the contracts."[78] The Court of Appeals for the Ninth Circuit rejected their claims on the basis, inter alia, that Wal-Mart could not be held liable as the claimants' joint employer under the facts alleged as "Wal-Mart exercised minimal or no control over the day-to-day work of Plaintiffs in the suppliers' foreign factories."[79] The court found, as a result, that it did not owe the claimant a duty of care to ensure its suppliers' compliance with the Standards that it had set and to protect the working conditions of its suppliers' workers. This, however, suggests, *a contrario*, that such a duty of care could have been found had the lead company (Wal-Mart) exercised enough control and supervision over the activities of its suppliers. The approach adopted by the court is therefore similar to the "classic approach" used in parent liability cases according to which the existence of a duty of care is linked to the degree of control and supervision exercised by the parent company over the conduct of its subsidiary. By analogy, one might argue that, in certain circumstances, a lead company could be found liable in those types of

[76] Doe v Wal-Mart Stores Inc., 572 F.3d 677, 680 (9th Cir. 2009), at 8616.
[77] Ibid., at 8618.
[78] Ibid., at 8617.
[79] Doe v Wal-Mart Stores Inc., 572 F.3d 677, at 8623.

value chains that are characterized by a high degree of monitoring and control by the lead firm. This is notably the case of captive value chains in which small suppliers are deeply dependent on larger, dominant companies,[80] which (1) exercise significant control or influence over their suppliers, and their mode of operation entailing the latter have in effect little discretion in making decisions, and (2) make it difficult for suppliers to switch to other companies.

In Canada, legal proceedings were filed by garment factory workers and relatives of victims of the Rana Plaza building collapse against Canadian retailer Loblaws, which purchased clothes from a manufacturer whose factory was in the Rana Plaza building.[81] The claimants argued, inter alia, that Loblaws owed them a duty of care to protect them from injury and to warn them of the dangers of the building resulting from the poor health and safety conditions. The court found that the claimants' class action could not be certified since, in particular, the relationship between Loblaws and foreign garment workers was not sufficiently close to give rise to a duty of care.[82] The decision suggests, in turn, that had the relationship been sufficiently close, such a duty of care could have been found to exist. The approach adopted by the Canadian court corresponds to the "new approach" used in parent liability cases that relies on the existence of a special relationship between the two entities, creating the expectation that control should be exercised by the parent company over the subsidiary. As discussed above, public commitments and the group-wide policies devised by the parent company play a central role in the establishment of the duty of care insofar as they create legitimate expectations in terms of the degree of supervision and control that should have been exercised by the parent company over the activities of its subsidiary. Applied to value chain settings, this would entail that the liability of the lead company might be found to exist where different entities are "meticulously coordinated and controlled" within the value chain as a whole by the lead company.[83] This is particularly the case in captive value chains in which the "buyer ensures that the producers meet delivery dates, quality standards, design specifications and so on."[84] As a result, the lead company controls “many of the aspects of production carried out by the producer.” [85] The fact that many lead companies across sectors set themselves out in their public representations as exercising tight control “over the timing and quality of the goods and services they produce and which they also source from outside

[80] Lead companies can be buyers or producers, see Ponte (2019), 44.
[81] *Das v. George Weston Limited*, 2017 ONSC 4129
[82] Ibid., para 529.
[83] Leader (2017), 121.
[84] Jenkins (2001), 7.
[85] Ibid.

the company"[86] would be one element that would contribute to creating the expectation that control should be exercised by the lead company over its business partner.

In Germany, civil proceedings were filed against German retailer KiK by four Pakistani victims and relatives of victims of a fire that occurred in the garment factory of one of its suppliers (Ali Enterprises) in Pakistan, which took the lives of 262 workers and left dozens more injured.[87] The claimants sought to establish the liability of KiK as the main buyer of the (it purchased 75 percent of the factory's output)[88] for failure to provide a healthy and safe working environment and prevent the harm suffered by the victims.[89] An architectural analysis carried out after the tragedy revealed that inadequate fire safety measures, such as the lack of stairs, emergency exits, fire extinguishers, and fire alarms in the factory, contributed to the high number of victims.[90] The claimants therefore sustained that KiK "had controlled factory conditions and assumed responsibility for safety management,"[91] and thus had a duty of care to ensure a healthy and safe working environment.[92] In an attempt to demonstrate the control exercised by KiK over its supplier, the claimants highlighted in particular that KiK had established its own suppliers' Code of Conduct requiring compliance with certain standards in order to ensure safe working conditions.[93] In addition, KiK had systems in place to monitor and ensure compliance with its own Code of Conduct, which included the appointment of auditors to inspect the factory, the issuing of corrective actions plans, and the possibility to terminate the business relationship for failure to comply with the Code.[94] Moreover, KiK held itself out to exercising control over the working conditions in its value chain in its public representations.[95] In its defense, KiK sustained, inter alia, that the relationship it had with its supplier was not a sufficiently close one and that it was not aware of the safety defects in the factory, as compliance with the safety standards was verified by an independent third party.[96] In addition, the defendant argued that the codes of conduct between KiK and its suppliers were only voluntary and not enforceable.[97] The questions of the control exercised by KiK over its suppliers, and its potential resulting liability, were never fully

[86] Leader (2017), 121..
[87] ECCHR, (2019).
[88] W Wesche and Saage-Maaß (2016), 373.
[89] Marx, Bright, and Wouters (2019), 24.
[90] ECCHR (2019).
[91] Ibid., 373.
[92] Terwindt, Leader, Yilmaz-Vastaris, and Wright (2017), 276–77.
[93] Marx, Bright, and Wouters (2019), 63.
[94] Terwindt, Leader, Yilmaz-Vastaris, and Wright (2017), 274.
[95] Ibid., 282.
[96] Leader et al., (2015), 3.
[97] Marx, Bright, and Wouters (2019), 67.

explored by the German court since the case did not reach the merits stage. Indeed, after an initial decision from the Regional Court of Dortmund in 2016, in which the German court accepted jurisdiction over the case and granted legal aid to the claimants, the claim was finally rejected on 10 January 2019 on the basis that it was time-barred.[98]

The lack of decisions, to date, recognizing the liability of lead companies for the human rights harms caused by their suppliers highlights the many barriers (both procedural and legal) faced by claimants in cases concerning corporate-related human rights and environmental abuses.[99] Nevertheless, it is argued that the evolutions of the case law on parent liability detailed in the previous section are likely be to extended beyond the corporate group. Indications of the future judicialization of the corporate responsibility to respect human rights in relation to lead companies (as well as parent companies) have recently emerged from certain cases, such as the one of the Canadian Supreme Court in *Nevsun Resources Ltd. v Araya.*[100] This case involved the civil proceedings brought by three Eritrean citizens in Canada against Canadian company Nevsun Resources Ltd (Nevsun) who claimed that they were subjected to forced labor and to violent, cruel, inhuman, and degrading treatment at the hands of the Eritrean police forces, in a mine in Eritrea which was owned by Nevsun but operated by a subcontractor of its Eritrean subsidiary. The Canadian Supreme Court affirmed that the claim could proceed to trial, thereby impliedly acknowledging that Nevsun could be held civilly liable for the human rights harms linked to the activities of subcontractors.

In value chain settings, the degree of control and supervision exercised by a lead companies at the apex of the value chains can sometimes be comparable to the one exercised by parent companies over their subsidiaries. As a result, it is argued that the liability of lead companies may be triggered on the same basis—i.e., control and direction exercised de facto, or that *should* have been exercised, over the relevant activities—in those types of value chains that are characterized by a high level of power and control exercised by a lead company over its business partner, such as hierarchy and captive value chains. This would implicate to distinguish between the various types of value chains outlined above so that liability would not automatically fall on buyers in relation to all the adverse human rights harms arising out of the activities of each and every entity in their GVCs, but would instead be triggered in those types of value chains where the lead company has significant power, de

[98] BHHRC, "KiK Lawsuit (re Pakistan)."
[99] Marx, Bright, and Wouters (2019), 108.
[100] *Nevsun Resources Ltd. v Araya,* 220 SCC 5 (CanLII).

facto control, and economic control over its business partners.

In parallel to these case law developments, legislative initiatives have been multiplying at the domestic level in the past five years, fueled by a growing momentum[101] for the recognition of a corporate duty - going beyond a mere moral responsibility arising out of social expectations - to respect human rights in global supply or value chains.[102] This has translated into legislation on mandatory human rights due diligence, acknowledging the existence of a duty of care of lead companies vis-à-vis the workers and local communities of their business partners, and requiring them to put in place processes to avoid causing them harm, and to provide remedy for the harms when they have occurred.

The emergence of corporate due diligence expectations

The legal landscape has evolved significantly over the past decades, as attempts to regulate the adverse human rights and environmental impacts arising out of business activities have intensified.[103] At the international level, no binding international norm currently exists to specifically regulate companies with regards to human rights violations that occur in their GVCs. Negotiations on a Binding UN Treaty on Business and Human Rights are currently ongoing,[104] however, previous attempts to elaborate a legally binding instrument to regulate corporate behavior failed in the past. In 2003, the UN Sub-Commission on Human Rights produced a set of Norms (the UN Norms) which sought to impose human rights obligations on companies, by providing that:

> Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other

[101] Smit et al. (2020), 156.
[102] Throughout the literature as well as in legal texts and legislative initiatives, different terms are used, often interchangeably, in reference to a similar phenomenon. These terms include supply chains, value chains, commodity chains and value networks. Conceptually they are different, but in the context of current legal developments the terminology predominantly used is the one of supply chains. Since most legal texts and legislative initiatives refer to the term supply chains, this is the concept that we will be mostly using in the next part of this article. For an overview on the use of the current terminology and differences, see Hernández and Torben (2017), 137.
[103] Nolan (2013), 139.
[104] Human Rights Council (2014). See in particular Bilchitz (2016); De Schutter (2016); Cassel (2018).

vulnerable groups.[105]

The UN Norms were rejected by the Commission on Human Rights on the grounds that human rights instruments, which are addressed to states, did not impose binding obligations on companies.[106] Against this backdrop, a different path was pursued at the international level seeking to regulate companies through soft law instruments. In 2008, the SRSG on the issue of human rights and translational corporations and other business enterprises, John Ruggie, presented the "Protect, Respect, Remedy" Framework,[107] which rested on differentiated but complementary responsibilities with regards to adverse human rights impacts resulting from business activities.[108] States bear the primary responsibility to protect human rights through a legal obligation grounded in international human rights law, and companies have a responsibility to respect human rights grounded in social expectations, which forms part of their "social licence to operate."[109]

The UNGPs were subsequently developed, in order to operationalize the Framework.[110] They introduced the concept of "human rights due diligence," which is the means through which companies can fulfill their responsibility to respect human rights. It describes an ongoing process through which companies can "identify, prevent, mitigate and account for" the actual and potential adverse human rights impacts that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products, or services by their business relationships.[111]

The UNGPs have been extremely influential, and the concept of human rights due diligence is reflected in a number of international and regional standards and instruments,[112] such as the 2011-revised OECD guidelines for Multinational Enterprises,[113] and the 2017-revised ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[114] However, the soft law character of all of these instruments at the

[105] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (2003).
[106] Lopez (2013).
[107] SRSG (2008).
[108] Ibid., 4.
[109] SRSG (2008), 17.
[110] OHCHR(2011)
[111] United Nations (2011), Guiding Principle 17.
[112] Smit et al. (2020), 156.
[113] OECD Guidelines on Multinational Enterprises, 2011
[114] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

international level means that they do not create legally binding obligations for companies.[115] As a result, the decision on whether and how to respect human rights and to devise and implement human rights policies and practices, remains at the companies' discretion. In practice, many studies have highlighted the limitations of the over-reliance on soft law and voluntary approaches in terms of companies' implementations of their human rights responsibilities.[116]

Against this backdrop, a progressive hardening of the soft law is taking place at the domestic level as an increasing number of jurisdictions are implementing the UNGPs' human rights due diligence expectations.[117] In particular, there is a now a broad spectrum of domestic legislations or legislative initiatives encouraging or requiring companies to undertake due diligence in their operations and throughout their supply or value chains. In a first step, a series of regulations have been adopted so as to *encourage* companies to undertake human rights due diligence through mandatory reporting, requiring them to disclose their efforts to eradicate certain human rights issues in their global supply chains.[118] However, the concrete impact that reporting regulations have had on corporate behavior and practices has remained extremely limited.[119] More recently, the evolution of the legal landscape has been marked by the emergence of mandatory human rights due diligence regulations, creating a legal duty for corporations to exercise due diligence in their operations and throughout their supply chains.

The rise of mandatory human rights due diligence regulations

Two examples of mandatory human rights due diligence legislation have been adopted so far in Europe at the domestic level. First, in the Netherlands, the Dutch Child Labour Due Diligence Act adopted on 14 May 2019[120] requires companies providing goods and services to Dutch end-users to take positive steps in order to identify and address the risks of child labor in their supply chains. In particular, companies are required to investigate whether there is a reasonable suspicion that the goods or services they provide have been produced using

[115] Ramaasastry (2013), 162; López (2003), 58.
[116] Vigeo Eiris (2018); CHRB (2019); Smit et al. (2020), 16.
[117] Macchi and Bright (2020), 218.
[118] Examples include the California Transparency in Supply Chains Act of 2010, the UK Modern Slavery Act 2015, s. 54(4), and the Australia Modern Slavery Act 2018.
[119] LeBaron and Rümkorf (2017), 26; PricewaterhouseCoopers (2018), 59; Macchi and Bright (2020), 218.
[120] The Netherlands Child Labour Due Diligence Act 2019.

child labor, and, should that be the case, put in place an action plan in order to address it.[121] They must also issue a statement on the human rights due diligence that they exercised.[122] The legal duty on lead company to undertake human rights due diligence extends to the entire supply chain, and the law does not include any limitations based on the control exercised by the lead company over the relevant entity. Although failure to comply with the due diligence obligations may be sanctioned by a public authority, the law does not provide for a civil liability mechanism in case of harms. This is an importance difference with the second example of mandatory human rights due diligence legislation ,which is the French Duty of Vigilance Law.

Second, the French Duty of Vigilance Law, adopted in 2017, imposes a general legal duty on companies to undertake human rights due diligence across human rights and environmental issues. It was the first legislation of this type to be adopted worldwide.[123] It requires large French companies[124] not only to report on the steps that they are taking to identify and address their adverse human rights and environmental impacts but also to undertake substantive human rights due diligence in order to identify, prevent, and address human rights and environmental harms resulting from their own activities and their supply chains. The legal duty of vigilance created by the legislation entails a threefold obligation to put in place, effectively implement, and publicly disclose a vigilance plan (*plan de vigilance*). The legal duty covers companies' own operations as well as "the companies under their control," or "the activities of their subcontractors and suppliers with whom they have an established business relationship."[125] The concept of "controlled companies" is defined by reference to article L. 233-16 II of the French Commercial Code as requiring "exclusive control" in the sense that it "enables the company to have decision-making power, in particular over the financial and operational policies of another entity."[126] French law defines an "established commercial relationship" as "a stable, regular commercial relationship, taking place with or without contract, with a certain volume of business, and under a reasonable

[121] Ibid., Article 5(1).
[122] Ibid., Article 4.
[123] Evans (2019).
[124] The law applies to French companies employing at least 5,000 employees in France; or at least 10,000 employees worldwide. According to the estimates, between 200 and 250 companies would be eligible. See Duthilleul et M. de Jouvenel, 'Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', January 2020, available at: https://www.economie.gouv.fr/cge/devoir-vigilances-entreprises, 20.
[125] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id (last accessed on 15 October 2019).
[126] Brabant, Michon, and Savourey (2017), 1.

expectation that the relationship will last."[127] It is narrower that the concept of business relationships used by the UNGPs insofar as it excludes ad hoc relationships. However, the French Duty of Vigilance law does not distinguish between the various types of supply chains and the varying degrees of control exercised by the lead company over its "established business relationships." The legal duty of vigilance is coupled with a civil liability regime based on the general tort of negligence in case the company's failure to carry out appropriate human rights due diligence results in a damage.[128]

The French law has been greatly influential and other similar legislative initiatives have been under consideration across Europe and beyond. In Switzerland, a Swiss Popular Initiative seeking to require Swiss-based business enterprises to carry out "appropriate due diligence" in relation to their human rights and environmental impacts emerged as the French law is under discussion.[129] If adopted, it would create a legally binding duty on companies to respect internationally recognized human rights and international environmental standards and "to ensure that human rights and environmental standards are also respected by companies under their control."[130] The Swiss Initiative specifies that: "whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship."[131] As a result, the duty to respect human rights would not cover all business relationships within the supply chains but it would be limited to the entities in the supply chain over which the company exercises sufficient control, which includes the economic control that may be exercised by a lead company over its supplier.[132] This would be the case in captive value chains. In order to fulfill their legal duty to respect international human rights and environmental standards, companies would be required to carry out due diligence in order to "identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken."[133] The Swiss Responsible Business Initiative also contains a specific liability provision according to which Swiss companies are "liable for the damages caused by the

[127] Cossart, Chaplier, and Beau de Lomenie (2017), 320
[128] Bright (2020).
[129] Bueno (2019).
[130] Swiss Coalition for Corporate Justice (2018a).
[131] Ibid., Art. 101a 2.a.
[132] Proposal Art. 101(2)(a) Swiss Constitution. See Geisser (2017), 955.
[133] Ibid., Art. 101a 2.b.

companies under their control."[134] The text of the initiative also provides for a human rights due diligence defense whereby companies are not liable "if they can prove that they took all due care [...] to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken."[135] The Swiss Responsible Business Initiative will be subject to a popular vote on 29 November 2020. If it is approved by the Swiss citizens, the Swiss Responsible Business Initiative will enter into force, alternatively, it will be the parliamenty counter-proposal adopted in June 2020 which enters into force.

Various developments and legislative initiatives are being discussed in several other countries.[136] In Denmark, a parliamentary motion was put forward by three political parties calling on the government to introduce a bill on mandatory human rights due diligence for all large companies as well as companies in high-risk sectors.[137] In Italy, the government committed under its National Action Plan to assess existing laws and legislative reform introducing human rights due diligence,[138] and in Finland, the government committed to conduct a study with the goal of adopting a mandatory human rights due diligence legislation.[139] In the United Kingdom, a coalition of civil society organizations have prepared a proposal for a corporate duty to prevent adverse human rights and environmental impacts based on a 2017 recommendation from the UK Joint Committee on Human Rights for a legislation modelled on the UK Bribery Act 2010.[140] In Germany, the Key Points for a draft Due Diligence Act were recently leaked. The draft Act seeks to impose corporate due diligence obligations on German-based companies with more than 500 employees throughout their value chains.[141] In Norway, a draft Act relating to transparency in supply chains was also released in November 2019.[142]

At the European level, various instruments have also been adopted that introduce certain human rights due diligence obligations, but these are so far limited to certain sectors or commodities.[143] In addition, the EU Non-Financial Reporting Directive requires large

[134] Ibid., Art. 101a 2.c.
[135] Ibid.
[136] Bright et al. (2020)..
[137] Business & Human Rights Resource Centre (2019).
[138] Ibid.
[139] ECCJ (2019).
[140] UK Joint Committee on Human Rights (2017). On the legal feasibility of introducing such a mechanism with the UK context, see Pietropaoli, Smit, Hughes-Kennett, and Hood (2020).
[141] Federal Ministry of Labour and Social Affairs and Federal Ministry for Economic Cooperation and Development (2020).
[142] Ethics Information Committee (2019).
[143] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down the supply chain due

public-interest companies to disclose information on the policy they implement in relation to, inter alia, environmental, social, and employee matters and respect for human rights.[144] However, this remains a reporting requirement and eligible companies are not required to exercise substantive human rights due diligence. Nonetheless, the momentum for an EU-level legislation on human rights and environmental due diligence legislation is getting stronger.[145] In 2019, the European Commission (DG Justice and Consumers) commissioned a study on due diligence requirements through the supply chain.[146] According to the study, a large majority of stakeholders viewed the introduction of an EU-level regulation on mandatory human rights and environmental due diligence as beneficial for business as well as other stakeholders.[147] On 29 April 2020, on the basis of the findings of the study, European Commissioner for Justice Didier Reyders announced the commitment of the European Commission to introduce a legislative initiative on mandatory human rights and environmental due diligence in 2021 as part of the EU's COVID-19 recovery package.[148]

At the international level, evolutions toward the progressive recognition of a states' duty to *require* business companies to undertake human rights due diligence in their own activities and in their value chains are also taking place. In particular, the open-ended Intergovernmental Working Group (OEIWG) was established in 2014 with a mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." [149] The OEIWG released the first official draft (the "Zero Draft") of the Treaty on 16 July 2018,[150] a First Revised Draft on 16 July 2019,[151] and a Second Revised Draft on 6 August 2020.[152] Article 6(1) of the Second Revised Draft provides that "State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character." It also clarifies that, for this purpose, states shall take "all necessary legal and policy measures" to ensure that such business enterprises respect all internationally recognized human rights and prevent and mitigate human rights abuses

---

diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[145] ECCJ (2019).
[146] Smit et al. (2020).
[147] Ibid. at 142.
[148] https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/
[149] Human Rights Council (2014).
[150] OEIWG (2018). On the Zero Draft, see in particular, Ruggie (2018) and Lopez (2018).
[151] OEIWG (2019).
[152] OEIWG (2020).

throughout their operations.[153] Article 6(2) further specifies that "States Parties shall *require* business enterprises to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations" [italics added]. Human rights due diligence is defined in the Second Revised Draft as the means through which companies can identify, assess, prevent, and mitigate actual and potential adverse human rights abuses that may arise from their own business activities, or from their business relationships, as well as monitor the effectiveness of their processes and communicate externally about their responses, in line with the UNGPs. The Second Revised Draft also provides for a legal liability provision in case human rights harms occur in GVCs where the lead companies either (1) "legally or factually controls or supervises" their business partner or the relevant activity that caused or contributed to the human rights harm, or (2) "should have foreseen risks of human rights abuses in the conduct of their business relationships, but failed to put adequate measures to prevent the abuse."[154]

As illustrated throughout this section, the emerging legislation and legislative proposals are gravitating toward the recognition of a legally binding duty on lead companies to respect human rights, which can be fulfilled through the exercise human rights due diligence in order to prevent, mitigate, and address the adverse human rights and environmental impacts arising out of their own activities as well as from the entities of their business partners (or at least some of them) in their global supply or value chains. Although legislation and legislative initiatives do not normally distinguish between the different types of value chains, a number of them contain criteria of control which would effectively limit their application to captive value chains.

Conclusion

In 2011, when the UN Human Rights council endorsed the UNGPs, critics affirmed that: "the council endorsed the status quo: a world where companies are encouraged but not obliged to respect human rights."[155] Indeed, the UNGPs clarify that the corporate responsibility to respect human rights set out in the UNGPs is not a legal norm but a global standard of expected conduct that forms part of the companies' social licence to operate.[156]

[153] Ibid., Article 6(1).
[154] Ibid., Article 8(7).
[155] mc (2011).
[156] UNGPS, Commentary to Guiding Principle 11.

In recent years, various case law and legislative developments at the domestic, European, and international levels seeking to enhance corporate accountability have contributed to a progressive hardening of a soft law, turning the corporate *responsibility* to respect human rights into a legal *duty*.

The first series of development explored in this article concern the judicialization of the corporate responsibility to respect human rights in the case law on parent company liability in various jurisdictions. Indeed, in the case law concerning the corporate group itself, there has been a progressive defragmentation of the liability of parent companies in relations to the harms caused by their subsidiaries. In particular, a duty of care owed by parent companies to the employees of their subsidiaries and local communities affected by the activities of the latter has emerged over the past few years, on the basis of the control and direction exercised de facto, or that *should* have been exercised, by the parent company over the relevant activities of the subsidiary. In this respect, group-wide policies and public commitments have played a crucial role in determining the degree of supervision exercised de facto by a parent company but also at the degree of control that should have been exercised, based on the legitimate expectations created by such materials. This trend was recently reaffirmed by the UK Supreme Court in the *Vedanta* case. We have argued that it is highly likely to have some implications in relation to certain types of value chains so as to trigger the liability of lead companies for the entities over which they exercise control and supervision. This is particularly the case with captive value chains in which the degree of control and supervision exercised by lead companies is not dissimilar to the one exercised by parent companies over their subsidiaries.

In parallel, the legal landscape has changed dramatically over the past few years. Mandatory reporting regulations have started to emerge since the 2010s to *encourage* companies to undertake human rights due diligence. More recently, mandatory human rights due diligence legislations have started to gain traction, requiring lead companies to undertake human rights due diligence in order to identify, prevent, and address the adverse human rights in their own activities and in their global value chains. Such regulation of lead companies by their home states has been welcomed as a way to close the regulatory gap (Groulx Diggs and al. (2020), 311). Although in the UNGPs, the human rights due diligence requirements cover all of the entities within all types of value chains, in regulations seeking to implement it, it is not automatically accompanied by legal liability when harms do occur. Rather, legal liability in regulations tend to be limited to entities within the supply or value chains over which the lead company exercises effective control (either legal, factual, or

economic) and supervision. Accordingly, from a legal perspective, it is becoming more difficult for lead companies in captive value chains to disassociate themselves from the adverse human rights impacts arising out of the activities of controlled business partners in their global value chains.

These two (case law and legislative) developments are not taking place in silos. In fact, as detailed in this paper, the concepts of human rights due diligence and duty of care are two sides of the same coin since human rights due diligence is the means through which companies can discharge their duty of care, and thereby fulfill their (emerging) corporate duty to respect human rights by avoiding causing harms to the workers of local communities affected by the activities of their subsidiaries or business partners, and providing remedy for the harms when they have occurred. Ultimately, the adequate exercise of human rights due diligence (i.e., in line with the UNGPS requirements) may well constitute the strongest defense for a company accused of having breached their duty of care vis-à-vis the workers of a business partner or the local communities adversely affected by the activities of the latter.

References

Augenstein, Daniel, and David Kinley. 2013. "When human rights 'responsibilities' become 'duties': the extra-territorial obligations of states that bind corporations." In *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*?, edited by Surya Deva and David Bilchitz, 271–94. Cambridge: Cambridge University Press.

Bartley, Tim. 2018. *Rules without Rights: Land, Labor and Private Authority in the Global Economy*. Oxford: Oxford University Press.

Bennett, Elizabeth A. 2017 "Who Governs Socially-Oriented Voluntary Sustainability Standards? Not the Producers of Certified Products." *World Development* 91: 53–69.

Bernaz, Nadia. 2016. *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap*. London: Routledge.

Bilchitz, David. 2016. “The Necessity for a Business and Human Rights Treaty.” *Business and Human Rights Journal* 1 (2): 203–27.

Bonfanti, Angelica, and Marta Bordignon. 2017. "‘Seafood from Slaves’: The Pulitzer Prize in the Light of the UN Guiding Principles on Business and Human Rights." *Global Policy* 8 (4): 498–504.

Brabant, Stéphane, Charlotte Michon, and Elsa Savourey. 2017. "The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance." *Revue Internationale de la Compliance et de l'Ethique des Affaires* (50): 1–15.

Bright, Claire. 2018. “The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands.” In *Business and Human Rights in Europe: International Law Challenges*, edited by Angelica Bonfanti, 212–22. London: Routledge.

Bright, Claire. 2020. "Creating a Level-Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?" *EUI Working Paper*, MWP 2020/01.

Bright, Claire, Diana Lica, Marx Axel, and Van Calster, Geert. 2020. "Options for Mandatory Human Rights Due Diligence in Belgium." https://ghum.kuleuven.be/ggs/publications/research_reports/options-for-mandatory-human-rights-due-diligence.pdf.

Bueno, Nicolas, and Claire Bright. 2020. "Implementing Human Rights Due Diligence Through Corporate Civil Liability." 69(4) *International & Comparative Law Quarterly* (2020), 789-818.

Business & Human Rights Resource Centre. 2019. National Movements for Mandatory Human Rights Due Diligence in European Countries.” https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries.

Cassel, Doug. 2018. “The Third Session of the UN Intergovernmental Working Group on Business and Human Rights Treaty.” *Business and Human Rights Journal* 3 (2): 277–83.

Cassel, Doug. 2019. “Vedanta v. Lungowe Symposium: Beyond Vendanta – Reconciling Tort Law with International Human Rights Norms.” *Opinio Juris*. http://opiniojuris.org/2019/04/19/vedanta-v-lungowe-symposium-beyond-vedanta-reconciling-tort-law-with-international-human-rights-norms%EF%BB%BF/.

Comyns, Breeda, and Elizabeth Franklin-Johnson. 2018. “Corporate Reputation and Collective Crises: A Theoretical Development Using the Case of Rana Plaza.” *Journal of Business Ethics* 150 (1): 159–83.

Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. 2003. "Norms on the Responsibilities of Transnational Corporaitons and Other Business Enterprises with Regard to Human Rights." E/CN.4/Sub.2/2013/12/Rev.2 (26 AUgust 2003) (UN Norms).

Corporate Human Rights Benchmark. 2019. “2019 Key Finding - Across Sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing.” https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf.

Cossart, Sandra, Jérôme Chaplier, and Tiphaine Beau de Lomenie. 2017. "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All." *Business and Human Rights Journal* 2 (2): 317–23.

De Schutter, Olivier. 2016. “Towards a New Treaty on Business and Human Rights.” *Business and Human Rights Journal* 1 (1): 41–67.

Dixit, Avinash, and Victor Norman Victor. 1980. *Theory of International Trade* Cambridge: Cambridge University Press.

ECCJ. 2019. "Finnish Government commits to HRDD legislation." http://corporatejustice.org/news/15476-finnish-government-commits-to-hrdd-legislation.

ECCJ. 2019. "A call for human rights and environmental due diligence legislation." 2 December 2019. http://corporatejustice.org/news/final_cso_eu_due_diligence_statement_2.12.19.pdf.

ECCHR. 2019. “KiK: Paying the price for clothing production in South Asia: Pakistan factory fire victims sue German retailer KIK.” https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/.

ECCHR. 2019. "The KiK/Pakistan Case in Germany - 3D Simulation as Architectural Analysis." https://www.ecchr.eu/en/case/the-kikpakistan-case-in-germany-3d-simulation-as-architectural-analysis-for/.

The Economist. 2010. "Suicides at Foxconn: Light and death." 27 May 2010. https://www.economist.com/business/2010/05/27/light-and-death.

Elms, Deborah K., and Patrick Low. 2013. *Global value chains in a changing world.* Geneva: Fung Global Institute (FGI), Nanyang Technological University (NTU), and World Trade Organization (WTO).

Ethics Information Committee. 2019. "Draft translation from Norwegian of sections of Part I." Report by the EIC, appointed by the Norwegian government on 1 June 2018. 28 November 2019. https://www.business-humanrights.org/sites/default/files/documents/Norway%20Draft%20Transparency%20Act%20-%20draft%20translation_0.pdf.

Evans, Alice. 2019. “Hope for Reform.” *Review of International Political Economy*, forthcoming.

Federal Ministry of Labour and Social Affairs and Federal Ministry for Economic Cooperation and Development (Germany). 2020. "Key points of the draft German Due Diligence Act." https://www.rph1.rw.fau.de/files/2020/06/key-points-german-due-diligence-law.pdf.

Fern. 2019. “Towards sustainable cocoa value chains: Regulatory options for the EU.” https://www.fern.org/news-resources/towards-sustainable-cocoa-supply-chains-regulatory-options-for-the-eu-1978/.

Gereffi, Gary, John Humphrey, and Timothy Sturgeon. 2005. “The Governance of Global Value Chains.” *Review of International Political Economy* 12 (1): 78–104.

Gereffi, Gary, Ronie Garcia-Johnson, and Erika Sasser. 2001. “The NGO–Industrial Complex.” *Foreign Policy* 125: 56–65.

Groulx Diggs, Elise, Mitt Regan and Beatrice Parance. 2019. "Business and Human Rights as a Galaxy of Norms". Georgetown Journal of International Law 50: 309-362.

Hernández, Virginia, and Torben Pedersen. 2017. “Global value chain configuration: A review and research agenda.” *Business Research Quarterly* 20: 137–50.

Human Rights Council. 2014. “Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.” Resolution 26/9, UN Doc. A/HR/RES/26/9.

Jenkins Rhys. 2001. "Codes of Conduct: Self Regulation in a Global Economy." UN Research Institute for Social Development: Technology, Business and Society Programme, Paper No. 2, April. http://digitalcommons.ilr.cornell.edu/codes/10/.

Kaufmann, Christine. 2016. "Holding Multinational Corporations Accountable for Human Rights Violations: Litigation Outside the United States." In *Business and Human Rights: From Principles to Practice*, edited by Dorothée Baumann-Pauly and Justine Nolan, 253–65. Abingdon: Routledge.

Leader, Sheldon, Jane Wright, and Anil Yilmaz. 2015. “Legal Opinion on English Common Law Principles on Tort. Jabir and Others v. Textilien und Non-Food GMBH.” https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf.

Leader, Sheldon. 2017. “Enterprise-Network and Enterprise-Groups: Trends and National/International Experiences The Duty of Care.” In *Enterprise and Social Rights*, edited by Adalberto Perulli and Tiziano Treu. Alphen aan den Rijn: Wolters Kluwer.

Leader, Sheldon. 2019. “Parent Company Liability and Social Accountability: Innovation from the United Kingdom.” In *Groupes de Sociétés et Droit du Travail*, edited by Amine Ghenim, Charley Hannoun, Patrick Henriot, Elsa Peskine, Fiodor Rilov, and Stéphane Vernac. Paris : Dalloz.

LeBaron, Genevieve, and Andreas Rümkorf. 2017.”"Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Value Chain Governance.” *Global Policy* 8 (S3): 15–28.

LeBaron, Genevieve, Jane Lister, and Peter Dauvergne. 2017. "Governing Global Supply Chains Sustainability through the Ethical Audit Regime." Globalizations 14 (6): 958–75.

Lopez, Carlos. 2013. "The 'Ruggie process: from legal obligations to corporate social responsibility?" In *Human Rights Obligations of Business - Beyond the Corporate Responsibility to Respect?*, edited by Surya Deva and David Bilchitz, 58–77. Cambridge: Cambridge University Press.

Lopez, Carlos. 2018. “Towards an International Convention on Business and Human Rights (Part I) and (Part II).” *Opinio Juris*. https://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/

Locke, Richard. 2013. *The Promise and Limits of Private Power. Promoting Labor Standards in a Global Economy.* Cambridge: Cambridge University Press.

Macchi, Chiara, and Claire Bright. 2020. “Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation.” In *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* edited by M. Buscemi, N. Lazzerini, L. Magi, and D. Russo, 218–47. Leiden: Brill Nijhoff.

Macfarlanes. 2019. "Vedanta v Lungowe & Others: liability of a UK parent company." 12 June 2019. https://www.macfarlanes.com/what-we-think/in-depth/2019/vedanta-v-lungowe-others-liability-of-a-uk-parent-company/.

Marketlinks, “Types of Value Chain Governance.” https://www.marketlinks.org/good-practice-center/value-chain-wiki/types-value-chain-governance.

Marx, Axel, Claire Bright, and Jan Wouters. 2019. “Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.” Study requested by the European Parliament, DROI committee. http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf.

McCorquodale, Robert, Lise Smit, Stuart Neely, and Brooks Robin. 2017. "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises." *Business and Human Rights Journal* 2 (2): 195–214.

Miller, Dale T. 2014. “Sarah Soule: How Activism Can Fuel Corporate Social Responsibility.” *Stanford Business*. https://www.gsb.stanford.edu/insights/sarah-soule-how-activism-can-fuel-corporate-social-responsibility

Nolan, Justine. 2013. "The corporate responsibility to respect human rights: soft law or not law?" In *Human Rights Obligations of Business - Beyond the Corporate Responsibility to Respect?*, edited by Surya Deva and David Bilchitz, 138–61. Cambridge: Cambridge University Press.

OEIWG. 2018. “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Zero Draft.”https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf

OEIWG. 2019. “Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: Revised Draft.”

https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

OEIWG. 2020. "Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: Revised Draft: Second Revised Draft."
https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

OHCHR. 2011. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework."
https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

Olivier, Michèle. 2002. "The relevance of "soft law" as a source of international human rights." *The Comparative and International Law Journal of Southern Africa* 35 (3): 294–95.

Ozkazanc-Pan, Banu. 2018. "CSR as Gendered Neocoloniality in the Global South." *Journal of Business Ethics* 160 (4): 1–14.

Pietropaoli, Irene, Lise Smit, Julianne Hughes-Kennett, and Peter Hood. 2020. "A UK Failure to Prevent Mechanism for Corporate Human Rights Harms." 11 February 2020.
https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms.

Ponte, Stefano. 2019. *Business Power & Sustainability in a World of Global Value Chains*. London: Zed Books.

PricewaterhouseCoopers. 2018. "Strategies for Responsible Business Conduct, Report prepared at the request of the Ministry of Foreign Affairs of the Netherlands."
https://zoek.officielebekendmakingen.nl/blg-874902.pdf.

Ramaastry, Anita. 2013. "Closing the governance gap in the business and human rights arena: lessons from the anti-corruption movement." In *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect?*, edited by Surya Deva and David Bilchitz, 162–89. Cambridge: Cambridge University Press.

Robinson, Mary, and Phil Bloomer. 2020. "Shaping a new social contract through the pandemix." openDemocracy, 8 April 2020. https://www.opendemocracy.net/en/shaping-new-social-c-ontract-through-pandemic/.

Ruggie, John Gerard. 2018. "Comments on the 'Zero Draft' Treaty on Business and Human Rights." *Business & Human Rights Resource Centre*. https://www.business-humanrights.org/en/blog/comments-on-the-zero-draft-treaty-on-business-human-rights/

Scherer, Andreas Georg, and Guido Palazzo. 2018. "Globalization and Corporate Social Responsibility." In *The Oxford Handbook of Corporate Social Responsibility*, edited by Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald S. Siegel, 413–31. Oxford: Oxford University Press.

Slobodian, Quinn. 2018. *Globalists. The End of Empire and the Birth of Neoliberalism*. Cambridge, MA: Harvard University Press.

Smit, Lise, et al. *"Study on due diligence requirements through the supply chain*." Study for the European Commission DG Justice and Consumers, final report, 24 February 2020. https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

Soule, Sarah. 2009. *Contention and Corporate Social Responsibility*. Cambridge: Cambridge University Press.

Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. 2008. "Protect, Respect and Remedy: a Framework for Business and Human Rights." A/HRC/8/5, 7 April 2008.

Swiss Coalition for Corporate Justice. 2018. “The Initiative Text with Explanations.” https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf

Tarver, Evan. 2019. “Horizontal vs. Vertical Integration: What's the difference?” Investopedia. https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp.

Terwindt, Caroline, Seldon Leader, Anil Yilmaz-Vastardis, and Jane Wright. 2017. “Value Chain Liability: Pushing the Boundaries of the Common Law?” *Journal of European Tort Law* 8 (3): 261–96.

Turner, Stephen. 2019. "Business Practices, Human Rights and the Environment." In *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, edited by James R. May and Erin Daly, 376–86. London: Elgar Edward.

UK Joint Committee on Human Rights. 2017. "Human Rights and Business 2017: Promoting responsibility and ensuring accountability." Sixth Report of Session 2016–17, 5 April 2017. https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf.

UNHCHC. 2016. “Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance.” UN Doc. A/HRC/32/19/Add.1, 10 May 2016.

UNHCHC. 2018. "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises". A/73/163, 16 July 2018. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement

Wesche, Philipp, and Miriam Saage-Maaß. 2016. “Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*.” *Human Rights Law Review* 16 (2): 370–85.

The World Bank. 2020. "World Development Report: Trading for Development in the Age of Global Value Chains." https://www.worldbank.org/en/publication/wdr2020.

Vigeo Eiris. 2018. "Human rights in a globalised world: why do companies need to pay attention?" http://www.vigeo-eiris.com/wp-content/uploads/2018/11/2018_Human-rights-study_VFok.pdf.

Zeldenrust, Ineke, and Nina Ascoly. 1998. "Codes of Conduct for Transnational Corporations: an Overview," Tilberg: International Restructuring Education Network Europe.

Zerk, Jennifer. 2014. *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies.* A report prepared for the Office of the UN High Commissioner for Human Rights. https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf