The rationale for Human Rights Due Diligence Legislation and Regulatory Options for Dealing with the Issue of Liability

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This short note deals with two specific issues in respect of liability in Human Rights Due Diligence (HRDD). The first is why the time is right to introduce HRDD legislation and the second is how this can take place, i.e. the type of mechanisms that can be introduced to address effectively the question of corporate liability in respect of human rights violations.

1. Rationale for HRDD legislation

In terms of the rationale for supporting HRDD legislation, it is helpful to evaluate the main approaches that have been developed so far in the context of liability for human rights (including labour) violations. The first issue to note here is that the traditional response has been one that is characterised as a so-called harm-based regime. This implies that in cases of violations, liability is imposed in case of harm that the corporation has caused to some person. At the same time, the corporation is free to decide whether and how to prevent that harm in the future. Such an approach, predominantly reactive and traditionally found in tort and criminal law, has been met though with criticisms on two counts. The first is the challenges associated with the issue of access to justice, as claims are brought to courts where the parent or lead firm is established. In theory, this strategy is supposed to improve enforcement prospects by abandoning weak, as it is usually claimed, institutional environments for stronger ones. However, this gain is arguably offset by different enforcement challenges. These include among others the fact that there are complex jurisdictional hurdles that such claims entail on account of their 'foreign' nature and that basic principles of sovereignty often militate against exercising jurisdiction under these circumstances.[1] However, given the widespread persistence of human rights abuses in transnational contexts, it is clear that the existing availability of these tort-based strategies has done little to deter them.

The second argument in favour of HRDD legislation is centred on the direction of recent developments of civil litigation against parent and lead companies based on domestic tort law both in EU Member States and elsewhere.[2] For example, in the UK, it has been supported that a parent company may be directly liable for its own acts or omissions in relation to the harms resulting from the activities of its subsidiaries. In this respect, the decision in *Vedanta* suggests that both the positive steps undertaken by a parent company through group-wide corporate policies and the failure to take action in accordance with a parent company's public

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[1] See, among others, Zerk, J. 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

[2] For a recent review of the case-law, see Bueno, N. and Bright, C. Implementing Human Rights Due Diligence through Corporate Civil Liability, (2020) 69 *International & Comparative Law Quarterly*, 789.

commitments can give rise to a duty of care.[3] Researchers have warned against the potentially perverse effect of these developments.[4] This is on the basis that companies may have now a disincentive to devise such policies or commitments, for fear of exposing themselves to legal liability. Against this context, a second argument in favour of HRDD is that such intervention is necessary in order to counteract the risk that companies will have no longer any desire to be proactive in this area.

2. Regulatory options in terms of corporate liability for human rights violations

If one accepts the basic premise of this argument, i.e. that HRDD is now necessary for the reasons described earlier, the next issue to consider is the precise mechanisms for liability that can be integrated in the legislation to deal effectively with the issue of labour violations and more generally human rights violations in transnational contexts. The first issue to bear in mind here is that HRDD legislation is a so-called act-based regime (in comparison to the harm-based regime in tort/criminal law). Such regimes are frequently found in health and safety and require the corporation to perform certain acts that the state has itself determined will prevent harm. So, in principle, liability in such cases is not only triggered where there is harm caused but is also available where the corporation is failing to perform those acts to prevent harm, regardless of whether that failure has yet caused any harm.

Legislation of this kind can be divided into three broad categories.[5] A first category of laws requires that companies disclose information regarding their human rights impacts. Examples include the UK Modern Slavery Act,[6] the Australian Modern Slavery Act[7] and the EU Non-Financial Reporting Directive.[8] However, these initiatives are silent on liability as their remit is very narrow, i.e. they are only concerned with disclosure.[9] A second category requires a more comprehensive exercise of substantive HRDD in relation to a specific sector or issue. Examples include the EU Timber Regulation[10] and at national level the Dutch Child Labour Due Diligence Act.[11] However, such regimes do not clarify the liability conditions in case harm takes place. In simple terms, these initiatives rely on public authorities for the monitoring and enforcement of due diligence obligations defined in the legislation. In this context, the public supervisory authority may impose an administrative fine in case of failure to comply with these obligations or could go further and impose criminal sanctions (e.g. in the case of the Dutch Act). But these regulatory frameworks leave the issue of access to effective remedy for affected individuals unaddressed.[12]

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[3] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.
[4] Bueno and Bright, n 2 above.
[5] Bueno and Bright, n 2 above.
[6] UK Modern Slavery Act of 2015, c. 30, Part 6 on Transparency in Supply Chains, https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted
[7] Australian Modern Slavery Act of 2018, C2018A00153, https://www.legislation.gov.au/Details/C2018A00153
[8] EU Directive 2014/95 of 22 October 2014 on disclosure of non-financial and diversity information by certain large undertakings [2014] OJ 2014 L 330/1.
[9] See, among others, section 54 of the UK Modern Slavery Act of 2015.
[10] EU Reg 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23.
[11] Wet zorgplicht kinderarbeid of 7 February 2017 as adopted by the Senate on 17 May 2019.
Unofficial English translation: https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies
[12] See discussion in Bueno and Bright, n 5 above.

Finally, the third category of legislation and legislative proposals do not only mandate the exercise of HRDD but also provide for an associated civil liability regime in case of harm. The prime example is that of the French legislation. But even within this third category one may come across further variations in terms of the liability provisions. One variation is when regulation uses general fault liability to implement due diligence duties. This is the example of the French legislation, where the plaintiff has to prove that the company breached the due diligence obligation. However, causation is often difficult to prove in a claim of human rights abuse against corporations because the relevant information (and expertise to understand it) is in the hands of the corporate defendant.[13]

A second variation is a regime of strict liability with a due diligence defence mechanism. This approach is based on the idea of recognising the specific liability of a controlling company for the harm caused by a controlled company. The prime example here in terms of HRDD is the Swiss Responsible Business Initiative.[14] In the Swiss proposal, it is specified that companies are not liable if they can prove that they took all due care to avoid the damage or that the damage would have taken place even if all due care had been taken. It has been suggested that such an approach has a number of advantages.[15] First, it effectively reverses the burden of proof so that the burden falls on the company to prove that it exercised appropriate due diligence, rather than on the claimant to prove that the due diligence exercised was inadequate. Secondly, claimants are not required to show that the lack of due diligence of the controlling company caused the damage, as it is required in the French law. Thirdly, one can imagine that due diligence defence could incentivise companies to meaningfully engage in due diligence activities.

A third approach that could be even complementary to the two above, i.e. fault-based and strict liability, would be that of 'absolute liability' (i.e. no fault liability).[16] This does not require proof that the defendant intended to the relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence.[17] This would mean providing, in certain circumstances, for an automatic recourse to, or liability of (no defence), controlling companies for harm caused by subsidiaries or controlled companies. This may be for instance, where subsidiaries no longer exist or are underfunded (they cannot meet a damages' award) or in cases where subsidiaries operate in states affected by or emerging from armed conflict or where there is a total collapse of the rule of law. In these cases, home state laws can allow claims to be brought directly

[13] See Amnesty International and Business & Human Rights Resource Centre, *Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse* (Amnesty International and Business & Human Rights Resource Centre, 2017), https://www.amnesty.org/download/Documents/POL3070372017ENGLISH.PDF

[14] The initial proposal of the French Duty of Vigilance law had included a presumption of liability of the companies subject to a vigilance duty where damage resulted from their own activities or those of subsidiaries and subcontractors. Under its original terms, a company would have been able to rebut such presumption by proving that it had taken all necessary and reasonable measures to prevent the damage. However, this critical feature of the law was removed from subsequent drafts because of the strong opposition from some members of parliament.

[1515] See Bueno and Bright, n 2 above.

[16] This is the model used in many environment and health and safety laws.

[17] Office of the High Commissioner of Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance, 12 May, 2016, https://media.business-humanrights.org/media/documents/files/documents/A_HRC_32_19_Add_1_AEV_0.pdf

against the controlling company or against both the controlling company and its subsidiary. The due diligence of controlling companies is these cases would be irrelevant.[18]

Finally, corporate liability may still not deal effectively with all the challenges associated with transnational business. This can be, for example, where the care and effort with which an executive director performs her job exposes a corporation to civil liability. For the purpose of effective HRDD, it may be possible to envisage a combination of corporate civil liability with individual liability.[19] This type of individual liability is essentially aimed at executive officers whom the corporation cannot control on its own. The state can apply here a broader range of monetary and non-monetary sanctions to the corporation's executives. For regimes adopting individual liability, there are many forms this might take. The Dutch child labour law, for instance, threatens executives with jail time for repeated due diligence failures by their corporation. In a different context, the Sarbanes-Oxley Act in the United States offers yet another example. It requires certain executives to sign a quarterly statement, under penalty of fraud, declaring that they have designed and recently evaluated an effective system of internal controls for financial reporting. Similarly, the UK Bribery Act provides for criminal liability of individual directors of the company when one of the principal offences of bribery is committed. In addition, directors are also personally liable under the Senior Managers' Regime, a part of UK financial regulation aimed at increasing personal accountability in the financial services industry. If the failure to prevent mechanism provides for civil liability for human rights harms, there seems to be no reason why this could not be applied to individual or natural persons.[20]

[18] For proposals along these lines, see Amnesty International and Business & Human Rights Resource Centre, n 13 above.

[19] On this, see Friedman, N. Corporate Liability Design for Human Right Abuses: Individual and Entity Liability for Due Diligence, (2020) *Oxford Journal for Legal Studies*, https://doi.org/10.1093/ojls/gqaa052

[20] See discussion in Pietropaoli, I., Smit, L., Hughes-Jennett, J. and Hood, P. *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (British Institute of International and Comparative Law, 2020) https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf