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ENFORCING INTERNATIONAL HUMAN RIGHTS LAW AGAINST CORPORATIONS

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Abstract

International human rights law is generally thought to apply directly to states, not to corporations since the latter is not a subject of international law. Some domestic courts are, however, enforcing these norms against corporations in domestic settings. Canadian courts have, for instance, recognized that corporations can be liable for breach of customary international law norms while UK courts have enforced international human rights norms indirectly against corporations relying on a combination of domestic corporate and tort law.

At the same time, some states are choosing to enforce international human rights norms against corporations using regulatory initiatives. These initiatives, known as due diligence initiatives, vary in scope, but generally prescribe obligations for corporations in the respect of human rights. These initiatives offer greater promise than court enforcement of international human rights norms as states are often able to *ex ante* legislate the issues with which courts enforcing international human rights norms are struggling.

Nevertheless, while due diligence initiatives offer greater promise than court enforcement of international human rights norms, they are far from a panacea. The initiatives often lack the necessary elements to make them a superior tool – that is, their scope, reach or enforcement possibilities may be limited – and they tend to focus on risks to business rather than risks to human rights, among other limitations.

Given the complexities in addressing corporate abuses, adopting a plurality of approaches to mitigate corporate abuse of human rights is likely necessary. Court enforcement and due diligence initiatives are but two approaches, the latter more promising than the first, but neither offers an antidote to the malignancy of corporate abuse. For that, there is a need for greater transformation of the economy such that corporate harms of human rights and the environment are no longer business as usual.

ENFORCING INTERNATIONAL HUMAN RIGHTS LAW AGAINST CORPORATIONS

Barnali Choudhury

Introduction

Obligations stemming from international human rights law are usually thought to apply to states but not to corporations. After all, states are subjects of international law, whereas many would argue, corporations are not. Norms for corporate responsibility for human rights have been developed at the international level, most notably the United Nations Guiding Principles on Business and Human Rights (UNGPs). Yet even the UNGPs did not outline binding obligations for corporations vis-à-vis human rights.

Progress has been more forthcoming at the domestic level. In particular, a number of courts in different jurisdictions have begun to pave the way toward enforcing international human rights norms against corporations.

For awhile, much of this path development was occurring in US courts under the Alien Tort Claims Act. Several lower courts had already recognized the possibility of US corporations being liable for *jus cogens* violations committed overseas.¹ However, the US Supreme Court closed the door to further development in this area in two decisions, *Kiobel*² and *Jesner*³, by holding that the ATCA could not be used extraterritorially for disputes that occurred outside of the US and that foreign corporations could not be sued in US courts under the Act.

Canadian courts have taken up the path closed by the US courts and formally recognized the possibility of corporations being liable for *jus cogens* violations. In *Nevsun*,⁴ the Supreme Court of Canada held that human rights victims can bring a claim against corporations for violations of customary international law. The court created, what appears to be, a new cause of action: breach of customary international law norms. While this is certainly a novel approach, and one that could facilitate the enforcement of human rights violations by corporations, the decision leaves many unanswered questions which may plague future litigants.

Conversely, the UK courts, which have been very active in seeking to hold corporations liable for human rights violations, have taken a very different approach than the US and Canadian courts. They have focused on developing a duty of care between parent corporations and human rights victims, which implicitly enables them to enforce international human rights norms. The jurisprudence in the area is rich and several of the cases have found the corporation liable for international human rights violations or prompted favourable settlements for human rights victims.

¹ *Doe v Unocal* (2002) 395 F3d 932 (United States, Court of Appeals, 9th Circuit); *Presbyterian Church of Sudan v Talisman Energy* (2009) 582 F3d 244 (United States, Court of Appeals, Second Circuit) at 48, fn 12.

² *Kiobel v Royal Dutch Petroleum Co* (2013)133 S Ct 1659 (United States Supreme Court).

³ *Jesner v Arab Bank* (2018) 138 S. Ct. 1386 (United States Supreme Court).

⁴ *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (Supreme Court of Canada).

At the same time, while the US, UK, and Canada focus on providing remedies for corporate human rights victims in their domestic courts, several other states have sought to introduce legislative or regulatory initiatives which directly address corporate abuse of both human rights and environmental harms. Known as due diligence initiatives, these regulatory vehicles vary from state to state, but may act as a more efficient enforcement mechanism for international human rights norms than relying only on courts developing novel causes of action.

This chapter takes a deeper look at these developments in an attempt to define a path forward for enforcing international human rights norms against corporations. It begins by examining the Supreme Court of Canada's decision in *Nevsun* and analyzes the viability of the new tort of breach of customary international law. The chapter then moves to discuss the jurisprudence in the UK and examines the court's multiple paths to imposing liability on corporations for human rights harms. It then explores the potential for due diligence initiatives to fill in the gaps left by domestic court actions against corporations. By comparing and contrasting due diligence initiatives in several states along common elements, the chapter finds that many of the initiatives remain lacking and are unlikely to adequately improve efforts to constrain corporate harms. However, it finds limited promise in well-developed due diligence initiatives.

I. Enforcing International Human Rights Norms in Court

Corporate violations of human rights are, unfortunately, a pervasive and well-known practice. High profile examples include the Rana Plaza disaster, where a garment factory in Bangladesh producing clothing for numerous Western fashion companies collapsed, killing and injuring hundreds of workers. Another instance is Foxconn, Apple's primary supplier for iPhones, in which employees committed suicide due to onerous working conditions, prompted by Apple's commercial model of offering Foxconn only a very small profit margin.⁵ Yet despite these well-known examples, international law has been unable to hold corporations accountable for human rights violations.

In 2011, the United Nations endorsed the UNGPs, which outlined non-binding responsibilities for corporations in this regard.⁶ The UNGPs expect that corporations will respect human rights and that they will engage in human rights due diligence as a means of identifying, mitigating and remedying human rights harm in their practices.⁷ However, the UNGPs do not provide for an enforcement mechanism, meaning that corporations that fail to align their practices with the UNGPs likely will not be held accountable.

⁵ Jenny Chan, Mark Selden and Pun Ngai, *Dying for an iPhone: Apple, Foxconn, and The Lives of China's Workers*, (Haymarket Books, 2020).

⁶ Human Rights Council, 'Human rights and transnational corporations and other business enterprises', A/HRC/RES/17/4 (6 July 2011).

⁷ United Nations, "United Nations Guiding Principles on Business and Human Rights" (2011) HR/PUB/11/04 ["UNGPs"].

For that reason, human rights victims have resorted to domestic courts to seek remedies for harms inflicted upon them by corporations. These have led to varying results, although two jurisdictions offer some examples of promise.

A. Canada

There have been several known attempts by human rights victims to enforce international human rights norms in Canadian courts. In *Choc v. Hudbay Minerals*, the Ontario Superior Court of Justice allowed a claim to be brought against a mining corporation for alleged human rights violations, including rape and murder, in Guatemala.⁸ The case is still ongoing. Similarly, in *Garcia v. Tahoe Resources*, the British Columbia Court of Appeal, held that it had jurisdiction over a claim for injuries the victims had suffered during a shooting outside a mine owned by the defendant corporation in Guatemala. After the court's decision on jurisdiction, the parties settled out of court before the claim could be tried on its merits.⁹ However, the strongest pronouncement of corporate liability for human rights harms has likely been made by the Supreme Court in *Nevsun v. Araya*.

1. *Nevsun v. Araya*

In *Nevsun*, three workers brought a claim against Canadian corporation, Nevsun Resources Ltd., which operated a mine in Eritrea through a subsidiary. The workers alleged that they were conscripted through the local military service and forced to work on the construction of the mine. The plaintiffs claimed that their work at the mine involved “harsh and dangerous” working conditions, cruel punishment, and forced confinement, among other ill treatment.¹⁰ In their lawsuit, the plaintiffs argued that they were entitled to damages in tort and for breach of customary international law, including the use of forced labour, torture, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

As part of a preliminary motion, the defendant corporation moved to strike the plaintiffs' claims arguing that they did not have a reasonable prospect of success. Both the trial court and appellate court rejected the defendant's motion.¹¹ At the Supreme Court, Nevsun argued that the Court should strike the plaintiffs' claim, first, because the act of state doctrine prevented domestic courts from evaluating the sovereign acts of the Eritrean government, and, second, because the plaintiffs' claims based on customary international law did not have a reasonable prospect of success.¹²

The Court summarily dismissed Nevsun's argument based on the act of state doctrine. It held that while Canadian courts could defer to foreign laws, such deference was only to the extent that the

⁸ *Choc v. Hudbay Minerals* (2013) 2013 OSC 1414 (Ont. SCJ).

⁹ *Garcia v. Tahoe Resources Inc.*, (2017) 2017 BCCA 39 (British Columbia CA).

¹⁰ *Nevsun*, supra note 4, at para. 11-13.

¹¹ *Araya v. Nevsun Resources Ltd.* (2016) 408 DLR (4th) 383 (British Columbia Superior Court); *Araya v. Nevsun Resources Ltd* (2017), 419 DLR (4th) 631 (British Columbia CA).

¹² *Nevsun*, supra note 4, at para. 5.

laws were not contrary to public policy, including respect for fundamental rights. As a result, the Court found that the act of state doctrine did not bar the plaintiffs' claims.¹³

With regards to the second argument, the majority of the Court found that the plaintiffs' claims based on customary international law had a reasonable prospect of success. First, the majority determined whether the plaintiffs' claims – namely, those relating to forced labour, slavery; cruel, inhuman or degrading treatment; and crimes against humanity – were part of customary international law. This, they found easily.¹⁴ As they noted, the plaintiffs' claim alleged “breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.”¹⁵

The majority then turned to examine whether customary international law was part of Canadian law. They found that, through the operation of the doctrine of adoption, customary international law norms “are directly and automatically incorporated into Canadian law absent legislation to the contrary.”¹⁶ The court's conclusion on this point was buttressed by its finding that direct application of customary international law is a common practice among states.¹⁷

The defendant corporation then argued that even if customary international law was part of the law of Canada, it did not apply to corporations. Relying only on scholarly authorities, the majority disagreed. They found that international law had evolved from its state-centric focus such that corporations could be liable for violations of international human rights norms.¹⁸ As such, they concluded that it was not “plain and obvious” that corporations today enjoy a blanket exclusion under customary international law from direct liability” for human rights violations.¹⁹

The majority then turned to explore whether the law in Canada could develop remedies for breaches of adopted customary international law norms. They observed that courts, “when faced with a situation where a right recognised by law is not adequately protected,” are enabled to find a remedy to rectify that injustice.²⁰ On this basis, the majority held that nothing would preclude Canadian courts from developing “a civil remedy in domestic law for corporate violations of ...customary international law norms”.²¹ The majority also found that the plaintiffs' claims could not be captured by existing domestic torts, since they were a shock to the conscience of humanity, and this further reinforced their desire to have the courts develop remedies for their claims.

2. Analysis of the Decision

A quick read of the majority's decision in *Nevsun* appears to signal a promising sign toward increased corporate accountability. However, a deeper examination of the decision suggests that

¹³ *Nevsun*, supra note 4, at para. 27-59.

¹⁴ *Nevsun*, supra note 4, at para. 75.

¹⁵ *Nevsun*, supra note 4, at para. 99. See also para.100-102.

¹⁶ *Nevsun*, supra note 4, at para. 128.

¹⁷ *Nevsun*, supra note 4, at para. 88.

¹⁸ *Nevsun*, supra note 4, at para. 105-112.

¹⁹ *Nevsun*, supra note 4, at para. 113.

²⁰ *Nevsun*, supra note 4, at para. 118.

²¹ *Nevsun*, supra note 4, at para. 122.

any steps forward are likely to be fraught with uncertainty, something the majority itself observed. For one, the majority noted that it was not clear which norms of customary international law would be applicable to corporations, as some norms are of an interstate nature. Second, they noted it was not clear whether the common law should evolve to hold a corporation liable for violations of these interstate norms.²² Third, they queried what mechanism should be used to determine how a violation of adopted norms of customary international law could be compensable under domestic law.²³ Fourth, the majority noted that in creating a new tort of breach of customary international law, it was not clear what evidence would be needed to demonstrate the existence of this norm.²⁴ Finally, they considered that the facts of this case, when fully laid out, might not even justify a breach of customary international law.²⁵

Yet beyond these limitations, the majority's decision, while laudable in helping to potentially provide another avenue for remedies for human rights victim, is otherwise problematic. Most notably, the majority's conclusion that customary international law supports the idea that corporations should be held liable for human rights violations is not ably supported. The majority relied only on academic writings, observing that several authors have argued that international law has evolved such that corporations could be liable under international law. However, as the dissent noted, these writings did not argue that international law had evolved to the point where corporations were now liable under it, but that the law *could* evolve to this point.²⁶ Moreover, the majority did not cite to any cases or any other examples of state practice in which corporations were held liable for human rights violations under international law, further diminishing its customary international law findings. Ironically, the majority did reference the Canadian government's creation of an ombudsperson for corporate responsibility but this entity has a strict mandate not to hold corporations liable and indeed has been purposely given limited investigative powers for the government to ensure this result.²⁷

Rather, it is more likely that customary international law does not support corporate liability for human rights violations. As the UN Special Representative on Business and Human Rights has noted, there is no "uniform and consistent state practice establishing corporate responsibilities under customary international law".²⁸ Indeed, the most established norm under international law defining the relationship between corporations and human rights is the UNGPs and they stipulate that corporations have responsibilities, not legally binding obligations, for respecting human rights.²⁹ In addition, the notion of corporate responsibilities, not obligations, for human rights has become a well accepted norm in international law and has been adopted by a number of international initiatives including the OECD Guidelines for Multinational Enterprises, the UN

²² Nevsun, supra note 4, at para. 113.

²³ Nevsun, supra note 4, at Para. 127.

²⁴ Nevsun, supra note 4, at Para. 99.

²⁵ Nevsun, supra note 4, at Para. 131.

²⁶ Nevsun, supra note 4, at Para. 200.

²⁷ International Justice and Human Rights Clinic – Allard Law, "CORE Powers: Requirements for an Effective Canadian Ombudsperson for Responsible Enterprise" (December 2020).

²⁸ United Nations General Assembly's *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007, para. 34).

²⁹ UNGPs, supra note 7, Principle 11.

Global Compact and others. There are other markers of this reluctance to recognize corporate liability as well. For instance, the International Criminal Court does not recognize corporate liability³⁰ and efforts to create a treaty to mandate human rights obligations on corporations has been stalled for many years, in part, due to state reluctance to recognize corporate liability.³¹

Moreover, even if customary international law recognized a norm of corporate liability for human rights, there is scant evidence that domestic courts are required to provide a remedy for breach of that norm. As the dissent in *Nevsun* observed, there is no well-established practice of states providing a civil remedy for corporate violations of human rights or that they believe there is a legal obligation to do so.³²

3. Jus Cogens

The discussion as to whether there is a requirement to provide a remedy for a breach of customary international law also prompts questions surrounding the Court's failure to distinguish *jus cogens* from customary international law, given that the former could arguably justify greater support for the provision of a remedy than the latter.³³ While *jus cogens* is part of customary international law, what distinguishes it from customary international law is its non-derogable nature.³⁴ This would suggest that if the plaintiffs' claims in *Nevsun* were justified as *jus cogens*, this could, in certain situations, trigger a duty for the state to exercise jurisdiction over the matter.³⁵

There is widespread practice of states exercising jurisdiction over *jus cogens* crimes. In particular, states have often prosecuted genocide and crimes against humanity. There may even be a duty to prosecute war crimes under international law.³⁶ The Special Rapporteur on peremptory norms has further concluded that:

States have a duty to exercise jurisdiction over crimes prohibited by peremptory norms of international law (*jus cogens*) where the offences are committed by the nationals of that State or on the territory under its jurisdiction.³⁷

Moreover, this “does not preclude the establishment of jurisdiction on any other ground as permitted under its national law, in accordance with international law”.³⁸

³⁰ United Nations, *Diplomatic Conference of Plenipotentiaries On The Establishment Of An International Criminal Court, Rome Statute Of The International Criminal Court*, U.N. Doc. A/Conf.183/9 (1998), Art. 25(1).

³¹ Radu Mares, “Regulating transnational corporations at the United Nations – the negotiations of a treaty on business and human rights” (2022) 26:9 *The International Journal of Human Rights* 1522.

³² *Nevsun*, supra note 4, at para. 196.

³³ Dinah Shelton, *Jus Cogens – Elements of International Law* (OUP, 2021), 91 (noting that “*jus cogens* imposes a duty on all states” to act to respect these norms).

³⁴ Vienna Convention on the Law of Treaties (1969), art. 53 (“a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”).

³⁵ International Law Commission, “Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur” (2018) A/CN.4/714, at 44.

³⁶ *Ibid.* at 44-46.

³⁷ *Ibid.* at 68.

³⁸ *Ibid.*

In the *Nevsun* context, if the plaintiffs were to demonstrate violations of *jus cogens*, Canada would likely be obliged to exercise criminal jurisdiction over those that committed these offences if they were committed by Canadian nationals. That being said, the state would not have a duty to exercise *civil* jurisdiction over these violations, although it could do so if desired.

Yet even if Canada was willing to exercise civil jurisdiction, a second problem remains. That is that the acts in question were not committed by a Canadian national since the entity that committed the alleged crimes against the *Nevsun* plaintiffs was an Eritrean company.³⁹ *Nevsun*'s involvement was, allegedly, only as a controlling shareholder of that company. International law does not make provision for states to exercise jurisdiction over *jus cogens* violations that were committed by individuals who were effectively controlled by third parties.

The complexities in applying *jus cogens* norms to corporations have discouraged other courts from following this practice. For instance, where the plaintiffs alleged that two French companies had entered into a contract that violated *jus cogens* norms, the French court held that *jus cogens* norms could not be applied against the companies as they were not subjects of international law.⁴⁰

Overall, characterizing the plaintiffs' allegations as *jus cogens*, rather than just customary international law, provides more support for the majority's decision in *Nevsun*, although it does not substantially support a civil claim, but rather a criminal prosecution. Still, accepting *jus cogens* claims against corporations, whether civil or criminal, remains problematic as international law in this area does not adequately address problems of corporate nationality that are likely to impede claims against companies that operate as group companies.⁴¹

B. The United Kingdom

There has been a long line of cases in the UK where claimants have sought to hold parent companies liable for the breach of torts committed by their subsidiaries. In many of these cases, although the claims were framed as tort breaches they were better described as human rights violations.⁴² The UK courts have taken a gradual approach to enabling the enforcement of corporate violations of human rights. In particular, two recent cases stand out in this regard: *Vedanta*⁴³ and *Okpabi*.⁴⁴

1. Vedanta v. Lungowe (2019)

³⁹ *Nevsun*, supra note 4, at para. 17.

⁴⁰ *Association France-Palestine Solidarité (AFPS) and Palestine Liberation Organization (PLO) v Société Alstom transport SA and ors* (2013) Appeal judgment, No 11/05331, ILDC 2036 (FR 2013), 22 March 2013 (Versailles - Administrative Court of Appeal)

⁴¹ See e.g. Martin Petrin and Barnali Choudhury, "Group Company Liability" (2018) 19 *Eur Bus Org Law Rev* 771.

⁴² See e.g. *Vilca & Ors v Xstrata Ltd & Anor* [2018] EWHC 27 (QB); *Connelly v RTZ Corporation plc* [1997] UKHL 30 (House of Lords); *Lubbe v Cape Plc* [2000] UKHL 41 (House of Lords); *Chandler v Cape plc* [2012] EWCA Civ 525 (Court of Appeal); *AA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532 (Court of Appeal).

⁴³ *Vedanta Resources Plc and another v Lungowe and others* [2019] UKSC 20 (UK Supreme Court).

⁴⁴ *Okpabi and others v Royal Dutch Shell* [2021] UKSC 3 (UK Supreme Court).

In this case, Zambian plaintiffs brought a case in the English courts alleging that the Nchanga Copper Mine discharged toxic materials into local watercourses over the course of 15 years resulting in harms to their health, livelihood and land.⁴⁵ The copper mine was owned by a Zambian subsidiary of Vedanta Resources plc, a UK corporation. The plaintiffs sued both the subsidiary and Vedanta for negligence, claiming a breach of the duty of care.⁴⁶

The defendant corporation argued that the English courts did not have jurisdiction over the case. This argument was rejected by both the trial and appellate courts.⁴⁷ The appeal concerning jurisdiction was then brought to the Supreme Court, which similarly rejected the argument on the basis, among other reasons, that the claimants would not receive substantial justice in Zambian courts due to the scale and complexity of the case and the limited funding and legal resources in Zambia.⁴⁸ While the Court's analytical focus was on procedural matters, it also specified some of the circumstances under which a parent company *could* be held to have breached its duty of care to affected individuals.

The Supreme Court noted that the liability of parent companies “depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary”.⁴⁹ The Court referenced two scenarios in which the Court of Appeals had found that parent companies could be liable. These are where “the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management” and “where the parent has given relevant advice to the subsidiary about how it should manage a particular risk”.⁵⁰ The Court noted that these were “helpful” to the analysis although it was reluctant to “shoehorn” all instances of parent liability into these two categories.⁵¹

It then went on to note three scenarios in which group wide policies promulgated by the parent company could give rise to a breach of the duty of care. These are where the policies contain systemic errors, which, when implemented by a subsidiary, cause harm to third parties; where the parent takes “active steps, by training, supervision and enforcement” to ensure that the subsidiary implements the policy; and where the parent “holds itself out as exercising...supervision and control of its subsidiaries” in its published materials.⁵²

The Court therefore dismissed the case on procedural grounds, paving the way for it to proceed to trial to determine the substantive issues. However, the parties settled for an undisclosed amount out of court before the trial.⁵³

⁴⁵ Vedanta, supra note 43, at para. 1.

⁴⁶ Vedanta, supra note 43, at para. 3.

⁴⁷ [2016] EWHC 975 (TCC); [2018] 1 WLR 3575 (CA).

⁴⁸ Vedanta, supra note 43, at para. 95.

⁴⁹ Vedanta, supra note 43, at para. 49.

⁵⁰ Vedanta, supra note 43, at para. 51.

⁵¹ Ibid.

⁵² Ibid. at para. 52-53.

⁵³ Leigh Day, “Vedanta” (2020), <https://www.leighday.co.uk/news/cases-and-testimonials/cases/vedanta/>.

2. Okpabi v Royal Dutch Shell (2021)

This case was brought by Nigerian claimants against Shell in the UK courts. The claimants alleged that oil spills caused by the Nigerian subsidiary of Shell caused widespread environmental damage and contaminated water sources impacting drinking water and water used for fishing and agricultural purposes.⁵⁴

Shell applied to the court to have the plaintiffs' claims struck for not having a real prospect of success. The High Court and Court of Appeal agreed with Shell and dismissed the case, but the plaintiffs appealed the dismissal to the Supreme Court.⁵⁵

The Supreme Court, first, noted that in determining whether a case should be dismissed for not having a triable issue, the inquiry should not involve a mini-trial as the Court of Appeal had done in this case.⁵⁶ Rather, courts should accept facts as alleged unless they are “demonstrably untrue or unsupportable”.⁵⁷

It then went on to clarify the circumstances which may give rise to a parent company's duty of care. While the Court of Appeal had focused on whether the parent company controlled the subsidiary in delineating the duty of care, the Supreme Court held that “control is just a starting point”.⁵⁸ The Court noted that the focus should be on “the extent to which the parent did take over or share with the subsidiary the management of the relevant activity” that gave rise to the harm, which could, but need not be, “demonstrated by the parent controlling the subsidiary”.⁵⁹ Essentially, the Court accepted the ruling in *Vedanta* noting that there are four routes which could give rise to a parent company's liability. These are:

- (1) Where the parent company takes over the management or joint management of the relevant activity of the subsidiary;
- (2) Where the parent company provides “defective advice and/or promulgat[es] defective groupwide safety/environmental policies which were implemented as of course” by the subsidiary;
- (3) Where the parent company “promulgat[es] group-wide safety/environmental policies and tak[es] active steps to ensure their implementation” by the subsidiary;
- (4) Where the parent company “hold[s] out that it exercises a particular degree of supervision and control” of the subsidiary.⁶⁰

⁵⁴ Okpabi, *supra* note 44, at para. 4.

⁵⁵ [2017] EWHC 89 (TCC); [2018] EWCA Civ 191 (CA).

⁵⁶ Okpabi, *supra* note 44, at para. 21.

⁵⁷ Okpabi, *supra* note 44, at para. 22.

⁵⁸ Okpabi, *supra* note 44, at para 147.

⁵⁹ Okpabi, *supra* note 44, at para. 147.

⁶⁰ Okpabi, *supra* note 44, at para. 26. See also reference to the four *Vedanta* routes at paras. 27, 153.

However, the Court makes clear that these are convenient headings to group the potential ways in which the duty of care arises, but they are not special or separate duty of care tests.⁶¹

In the end, having concluded that there was a real issue to be tried, the Court allowed the plaintiffs' appeal. The case is currently proceeding to trial.

3. Analysis

The UK cases suggest a greater willingness by courts to hold corporations accountable for human rights violations. The cases make plain that corporations headquartered in the UK can be held responsible for international human rights violations that occur in their subsidiaries abroad. The corporate veil is therefore no longer a shield against human right violations.

The *Vedanta* and *Okpabi* decisions also move away from some of the jurisdictional issues that have prevented similar cases from being litigated in the UK courts. Problems associated with piercing the corporate veil, wherein claimants must show that the corporate body is being used as a façade or as a way to evade legal responsibility, have often proved difficult for affected individuals.⁶² The *Vedanta/Okpabi* approach of focusing on a tortious duty of care and jurisdictional issues, such as whether there is real issue to be tried or whether substantial justice would be compromised by dismissing the claim, has proved to be easier hurdles for claimants to overcome.

The *Okpabi* decision, in particular, has facilitated the bringing of human rights claims to the UK courts by rejecting the need for a mini-trial at the interlocutory stage, thereby lowering the initial evidentiary burden required by claimants and preventing the ability for corporations to dismiss claims at the outset. In addition, by downplaying the importance of whether the parent company controls the subsidiary, the decisions ease the means by which claimants can demonstrate parent company involvement in the subsidiary since the cases recognize assistance, supervision and/or advice by the parent company as giving rise to the duty of care.

However, these cases are not without potential downsides. For one, since the court has made clear that there are at least four routes that give rise to a parent company's duty of care, parent companies may react by not engaging in any of the acts in those four routes as a way to minimize their liability. For example, a parent company could choose not to promulgate a group wide health and safety policy, and force subsidiaries to develop their own policies, in an effort to minimize its liability. Yet since parent companies are often better equipped than their subsidiaries to promulgate group wide policies, the overall consequence of these decisions might result in a lowering of human right standards for affected individuals. This could be the result, for instance, if a subsidiary's health and safety policy is not as robust as that of the parent company.

A second issue is with the court's insistence on the parent company only being liable if it controls the subsidiary. Although the *Okpabi* decision softened this requirement by holding that control is

⁶¹ *Okpabi*, supra note 44, at para. 27.

⁶² *Pest v. Petrodel* [2013] UKSC 34 (UK Supreme Court). For more on veil piercing see Petrin and Choudhury, supra note 41, at 774-75.

only the starting point, it did not obliterate this requirement entirely. In many instances, demonstrating parental control of the subsidiary will be difficult as this evidence will be obscured in internal corporate documents. It is also not clear why such a requirement is necessary. Parent companies benefit from their subsidiaries in many ways: they can be used to limit liability, to establish domestic corporate residence, to facilitate asset purchases or obtaining finance, and to avoid tax.⁶³ It seems therefore fair that as a consequence of obtaining all of these benefits, parent companies should be liable for any harms these subsidiaries cause regardless of their level of control.

Despite these shortcomings, the UK approach has already been used by courts in other jurisdictions. For instance, in *Milieudefensie v Shell*,⁶⁴ the Dutch court relied on *Vedanta* to support a finding of parent company liability.⁶⁵ This suggests that the UK approach may have broad scale appeal to courts beyond the UK.

II. Moving Away from a Court-Based Approach to a Legislated Approach

Both *Nevsun* and the approach in the UK courts suggest different paths towards enforcing human rights norms in courts. The *Nevsun* approach enables the judiciary to create new domestic torts based on customary international law norms but subjects corporations to norms that states do not have to follow and that are unsupported by international law. The UK approach is better grounded in the law, but still requires rightsholders to jump through myriad hurdles before they can access a remedy. They must pass jurisdictional thresholds as well as demonstrate the parent company's control or otherwise assistance or support of the subsidiary in the activity that causes harm. This complicates the case and requires a high level of legal assistance.

A better approach would be to move away from courts determining whether parent companies should be liable for harms caused by their subsidiaries and relying on a more legislated approach. Under such an approach, regulations would specify that parent companies are liable for harms caused by their subsidiaries. Indeed, this could be a condition of incorporation.

To some extent, this is the preferred approach in an increasing number of jurisdictions. Known as due diligence laws, these regulations require corporations to engage in human rights and environmental due diligence, as a way “to identify, prevent, mitigate and account for how they address... adverse human rights impacts”.⁶⁶ Moreover, the due diligence requirements generally extend to the corporations' subsidiaries and to companies within their supply chain. As a result, introduction of a due diligence law can move discussions about jurisdictions, control, or whether a new tort is needed away from the judiciary. Instead, a well-thought-out due diligence law can provide answers to these issues before any harms occur. This would prevent the case-by-case

⁶³ Petrin and Choudhury, *supra* note 41, at 772, 774.

⁶⁴ *Milieudefensie et al. v Royal Dutch Shell Plc* (2021) C/09/571932/HA ZA 19-379 (District Court of The Hague (26 May 2021)).

⁶⁵ See e.g., *Oguru et al. v. Shell Petroleum and Royal Dutch Shell* (2021) ECLI:NL:GHDHA:2021:132 Hague Court of Appeal; *Dooch et al. v. Shell Petroleum and Royal Dutch Shell* (2021) ECLI:NL:GHDHA:2021:133 Hague Court of Appeal.

⁶⁶ UNGPs, *supra* note 7, at Principle 17.

approach that is currently prevalent in jurisdictions, like Canada and the UK, that are relying on courts to enforce international human rights norms.

1. Due Diligence Laws

There are now several variants of due diligence laws. This section canvasses some of the different approaches found in France, Switzerland, Norway, the UK, Germany, Canada, Japan, and the proposed EU directive. While more than just this selection of countries have adopted or are in the process of adopting due diligence initiatives, the ones discussed below showcase a variety of the approaches available and being used throughout the world.

For instance, one of the most established due diligence laws is France's *Duty of Vigilance*.⁶⁷ The law was introduced in 2017, the first of its kind, and was the result of a long struggle by NGOs and trade unions, public outrage at the Rana Plaza disaster and a favourable political climate in France.⁶⁸ The law requires large French companies to establish vigilance plans. The plans must establish measures "to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls ... as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship."⁶⁹ Companies that fail to produce a vigilance plan or fail to comply with its obligations under the law that result in a preventable harm can be held liable in court.⁷⁰

At the same time that France was in the process of introducing its Duty of Vigilance, various Swiss civil society organizations and politicians attempted to introduce a similar piece of legislation in Switzerland as well.⁷¹ Known as the "Responsible Business Initiative", the Initiative contained due diligence provisions and also provided liability for harm that could have been prevented through due diligence. However, following the Swiss democratic process in which Swiss citizens

⁶⁷ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> [in French]. For unofficial English translation, see https://www.business-humanrights.org/documents/7492/Texte_PPL_EN-US.docx ["France Duty of vigilance"].

⁶⁸ Almut Schilling-Vacaflor "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?" (2021) 22 *Hum Rights Rev* 109; Claire Bright, "Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?" (August 8, 2018), EUI Working Paper MWP 2020/01, <https://ssrn.com/abstract=3262787> at 9.

⁶⁹ France Duty of Vigilance, *supra* note 67, at Art. 1.

⁷⁰ *Ibid.* at art. 2. For a good overview of the law see Stephane Brabant and Elsa Savourey, "France's corporate duty of vigilance law: A closer look at the penalties faced by companies" (2017) *Revue Internationale De La Compliance Et De L'éthique Des Affaires* 50.

⁷¹ For a good history of the Swiss Responsible Business Initiative, see Nicolas Bueno and Christine Kauffmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics" (2021) 6 *Business & Human Rights Journal* 542.

were allowed to vote on the introduction of the Initiative, the Initiative failed to garner the necessary support, and this version of it failed.⁷²

Instead, the government introduced non-financial reporting obligations and limited due diligence obligations. In 2020, the Swiss Code of Obligations was amended requiring large Swiss companies to report on human rights, environmental, social, anti-corruption and labour issues.⁷³ It also introduced due diligence obligations, albeit only for Swiss companies that source minerals from conflict or high risk areas or offer products or services for which there is a “reasonable suspicion” that they have manufactured or provided using child labour.⁷⁴ Swiss companies that fail to comply with the reporting obligations can face fines under criminal law.⁷⁵

While the Swiss government, and citizenry, were reluctant to follow France’s lead, Norway took the opposite approach and embraced the French law. The government enacted the *Act relating to enterprises’ transparency and work on fundamental human rights and decent working conditions*, also known as the Transparency Act, in 2021 and it came into force in 2022.⁷⁶ As in France, the initiative was spearheaded by civil society organizations and given a push by public recognition of the importance of such an initiative post the Rana Plaza disaster.⁷⁷ The Act requires large Norwegian companies to “identify and assess actual and potential adverse impacts on fundamental human rights and decent working conditions that the enterprise has either caused or contributed toward, or that are directly linked with the enterprise’s operations, products or services via the supply chain or business partners”.⁷⁸ The Act also contemplates penalties for non-compliance.⁷⁹

On the same day that the Norwegian Act was passed in Norway, the German government passed similar legislation in Germany. The *Act on Corporate Due Diligence Obligations in Supply Chains*,⁸⁰ was passed in 2021 and became effective in 2023. It requires companies with a main seat, headquarters or a branch in Germany to engage in human rights and environment-related due diligence in their supply chains with the aim of preventing or minimizing human rights or environment-related risks or violations.⁸¹ Companies must report annually on how they have

⁷² See Bueno and Kaufmann, supra note 71.

⁷³ Swiss Code of Obligations, art 964. English translation at: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en [“Swiss Code”]

⁷⁴ Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour of 3 December 2021 (Status as of 1 January 2022) based on Articles 964j paragraphs 2–4 and 964k paragraph 4 of the Code of Obligations. [“Swiss Ordinance”]

⁷⁵ Swiss Criminal Code, art 325ter.

⁷⁶ *Act relating to enterprises’ transparency and work on fundamental human rights and decent working conditions* (2021), <https://lovdata.no/dokument/NL/lov/2021-06-18-99>. Unofficial English translation, available at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> [“Norway Act”]

⁷⁷ Markus Krajewski, Kristel Tonstad and Fransizka Wohltmann, “Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?” (2021) 6(3) *Business and Human Rights Journal* 550

⁷⁸ Norway Act, supra note 76, at s. 4.

⁷⁹ Ibid at ss. 11-14.

⁸⁰ *Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LKSG* (2021). Official English translation at: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4 [“German Law”]

⁸¹ Ibid at s. 3.

fulfilled their due diligence obligations⁸² and the Federal Office for Economic Affairs and Export Control will assess company reports.⁸³ They can also impose fines for violations of the law of up to EUR 500,000 or a percentage of the companies annual turnover.⁸⁴

Other countries have taken a more restrictive approach to the idea of due diligence. These countries have focused more on reporting obligations, akin to the model ultimately adopted by Switzerland, rather than due diligence. The most long-standing example of this is the UK's Modern Slavery Act. Introduced in 2015, the Modern Slavery Act requires companies to report on the steps the business has taken to ensure that slavery and human trafficking is not taking place in either its business or its supply chains. Alternatively, it can also report that it has not taken any such steps.⁸⁵ Any business, even if not a UK incorporated corporation, must adhere to the requirements if it supplies goods or services and carries on a business in the UK and has an annual turnover of 36 million pounds.⁸⁶ Failure to adhere to the reporting requirements can result in the Secretary of State bringing an injunction against the company.⁸⁷

Following the lead of the UK, Canada recently adopted supply chain legislation limited to labour issues. Canada's *Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff*, enacted in 2023, focuses on forced labour and child labour issues only. It requires companies listed on a stock exchange in Canada or large companies that do business in Canada or have a place of business or significant assets in Canada⁸⁸ to report on the steps taken to prevent and reduce the risk that forced labour or child labour is used in imports or in the production of goods.⁸⁹ Failure to report or inclusion of misleading information in the report can subject the corporation to penalties.⁹⁰

Japan has recently entered the foray of due diligence as well albeit with a non-mandatory approach. After the conclusion of its National Action Plan on Business and Human rights, the government noted that only a small number of Japanese companies were engaging in any form of due diligence and that many did not know how to implement due diligence measures.⁹¹ In response, the government promulgated *Guidelines on Respecting Human Rights in Responsible Supply Chains*⁹² in September 2022. These non-binding guidelines encourage companies "to formulate their human

⁸² Ibid at s. 10.

⁸³ Krajewski et al, supra note 78.

⁸⁴ Ibid.

⁸⁵ Modern Slavery Act (2015), s. 54.

⁸⁶ UK Government, "Transparency in Supply Chains etc. - A practical guide" (2015), s. 2.2., https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040283/Transparency_in_Supply_Chains_A_Practical_Guide_2017_final.pdf.

⁸⁷ Modern Slavery Act, supra note 85, s. 54(11).

⁸⁸ *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* (2023), s. 2, <https://www.parl.ca/legisinfo/en/bill/44-1/s-211> ["Canada Law"]

⁸⁹ Ibid at s. 11.

⁹⁰ Ibid at s. 19.

⁹¹ Sam Eastwood et al, "Business and Human Rights: Japan publish Guidelines on Respect for Human Rights in Responsible Supply Chains" (Oct 26, 2022), <https://www.eyonesg.com/2022/10/business-and-human-rights-japan-publish-guidelines-on-respect-for-human-rights-in-responsible-supply-chains/>

⁹² *Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions* (2022). English translation available at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> ["Japan Guidelines"]

rights policy, conduct human rights due diligence, and provide remedy when business enterprises cause or contribute to adverse human rights impacts”. While currently the Guidelines are not mandatory, commentators have suggested that there is an expectation that companies will follow the Guidelines, despite their non-binding status, and that they are likely to form the basis for the uptake of mandatory obligations in this area in the near future.⁹³

One final example of a due diligence law is the EU’s proposed Corporate Sustainability Due Diligence Directive.⁹⁴ Initially proposed in April 2020 by the EU Commissioner for Justice, both the EU Parliament and the Council called on the Commission to present a proposal for a legal framework on sustainable corporate governance including due diligence.⁹⁵ The latest version of the proposal⁹⁶ was approved by the EU Parliament in June 2023⁹⁷ and is now subject to “trilogue” negotiations with the Commission and Council.⁹⁸ While the proposed legislation is still subject to change, generally it provides that large EU companies as well as foreign companies that generate significant turnovers in the EU will be required to conduct human rights and environmental due diligence by implementing due diligence policies and monitoring their effectiveness, identifying, preventing and mitigating adverse impacts, and establishing and maintaining a complaints procedure.⁹⁹ In some circumstances, the proposal also provides for civil liability for companies that do not comply with the law.¹⁰⁰

2. Comparing the Due Diligence Initiatives

What exactly are the differences in approaches of the due diligence initiatives? This part compares and contrasts the different approaches, looking for dominant or common approaches and well as deviations or innovations. More specifically, it examines the subjects of the initiatives; to whom

⁹³ Antony Crockett et al., “Japan Publishes Guidelines on Corporate Human Rights Due Diligence “ (Oct. 20, 2022), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/japan-guidelines-corporate-human-rights-due-diligence.aspx>; Sam Eastwood et al, *supra* note 92.

⁹⁴ EU Commission, “Proposal for a Directive Of The European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937”, COM/2022/71 final (23 Feb 2022).[EU Commission Proposal]

⁹⁵ EU Commission, “Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains” (Feb 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1145.

⁹⁶ EU Parliament, “Draft Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937”, COM(2022)0071 – C9-0050/2022 – 2022/0051(COD) (2022), https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.pdf

⁹⁷ EU Parliament, “Corporate Sustainability Due Diligence Directive” (Jun 1, 2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html

⁹⁸ Oliver Williams et al., “Human Rights and the Environment – European Parliament adopts amendments to draft Corporate Sustainability Due Diligence Directive” (June 6, 2023), <https://www.eyonesg.com/2023/06/human-rights-and-the-environment-european-parliament-adopts-amendments-to-draft-corporate-sustainability-due-diligence-directive/>.

⁹⁹ EU Commission Proposal, *supra* note 94, at arts. 2 and 4.

¹⁰⁰ EU Commission Proposal, *supra* note 94, at art. 22(1).

the initiatives apply; the nature of the obligations it places on corporations; and the enforcement mechanisms.

a) Scope of Subjects

Although the UNGPs only stipulate that businesses are expected to respect human rights, today there is widespread recognition of the links between human rights and the environment, supported by the UN General Assembly's declaration of the human right to a healthy environment.¹⁰¹ In 2023, the Working Group on Business and Human Rights also noted that the UNGPs must include businesses' responsibilities with respect to climate change.¹⁰² As a result, due diligence laws should be broad in scope and include both human rights and environmental and climate change issues.

However, the scope of due diligence laws, in terms of what rights are included in the laws, varies considerably between initiatives. The Japanese initiative, for instance, only refers to human rights and labour rights;¹⁰³ Canada's law focuses only on forced and child labour;¹⁰⁴ Norway's law relates only to fundamental human rights and decent working conditions; and the UK's law pertains only to forced labour and human trafficking.¹⁰⁵ Conversely, Switzerland's initiative encompasses human rights, environmental, social, anti-corruption and labour issues;¹⁰⁶ France's law relates to human rights, the environment and health;¹⁰⁷ while both Germany and the EU's proposed initiative encompass both human rights and environmental issues.¹⁰⁸

b) Application

The UNGPs provide that businesses should carry out due diligence for adverse impacts that it causes or contributes to through its own activities as well as those that can be linked to it through its "business relationships".¹⁰⁹ The Commentary to the UNGPs defines "business relationships" as "relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or service".¹¹⁰ Therefore, it is clear that at a minimum, due diligence initiatives must relate both to the company's own business as well as its business partners, including its suppliers.

¹⁰¹ UN General Assembly, *Resolution 48/13 - The human right to a clean, healthy and sustainable environment*, A/HRC/RES/48/13 (18 Oct 2021).

¹⁰² UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "Information Note on Climate Change and the Guiding Principles on Business and Human Rights" (June 2023), <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>.

¹⁰³ Japan Guidelines, *supra* note 92, at section 2.1.

¹⁰⁴ The Canadian law only encompasses issues related to forced and child labour.

¹⁰⁵ The Modern Slavery Act only encompasses issues of forced labour and human trafficking.

¹⁰⁶ Swiss Code, *supra* note 73, at art 964.

¹⁰⁷ France Duty of Vigilance, *supra* note 67, at art. L225-102-4.

¹⁰⁸ German Law, *supra* note 81, at s. 1; EU Commission Proposal, *supra* note 94, at art. 4.

¹⁰⁹ UNGP, *supra* note 7, at Principle 19

¹¹⁰ UNGP, *supra* note 7, at Commentary to Principle 13.

The broad scope of application contemplated by the UNGPs can be found in Germany. The German due diligence requirements apply to “all products and services of an enterprise” from “the extraction of the raw materials to ... delivery to the end customer.”¹¹¹ This includes the business’ own actions, meaning:

...every activity of the enterprise to achieve the business objective...include[ing] any activity for the creation and exploitation of products and services, regardless of whether it is carried out at a location in Germany or abroad.¹¹²

Moreover, in affiliated companies, group companies are also included within the scope of the legislation if the “parent company exercises a decisive influence on the group company”.¹¹³

The German law further applies to both direct and indirect suppliers.¹¹⁴ Direct suppliers are defined as companies that are contractual partners for the supply of goods or services that are “necessary” for the production or provision of the business’ good or service whereas indirect suppliers are non-contractual partners but their supplies are also necessary for the production or provision of the business’ good or service.¹¹⁵

Another jurisdiction that has embraced the UNGP requirements heartily is Japan. Japan’s base due diligence provision provides that it applies to business enterprises, including sole proprietors; group companies; suppliers; and business partners.¹¹⁶ The provision also defines the terms “business partners” and “supply chains”. The former is defined as:

...business enterprises other than those within the supply chain that are related to the business enterprise’s operations, products, and services. More specifically, for example, these are investment and lending locations, partners of joint enterprises, business operators providing equipment maintenance and inspection, and business operators providing security services, etc.¹¹⁷

It defines supply chain as “upstream” in relation to the procurement and securing, etc. of raw materials and resources for a business enterprise’s products and services, facilities, and software, and ... “downstream” in relation to the sale, consumption, and disposal etc. of its products and services”.¹¹⁸ However, Japan might have been more prescriptive in this area specifically because its requirements are voluntary.

Other jurisdictions have been less specific in defining to whom the initiative applies, although the scope of application in these jurisdictions remains broad. For instance, the French due diligence provision applies to the company’s activities, the activities of the companies it controls – directly or indirectly – and the activities of subcontractors or suppliers with whom an established

¹¹¹ German Law, supra note 81, at s. 5.

¹¹² German Law, supra note 81, at s.6.

¹¹³ German Law, supra note 81, at s.6

¹¹⁴ German Law, supra note 81, at s. 5.

¹¹⁵ German Law, supra note 81, at ss. 7-8.

¹¹⁶ Japan Guidelines, supra note 92, at 1.3.

¹¹⁷ Japan Guidelines, supra note 92, at 1.3.

¹¹⁸ Japan Guidelines, supra note 92, at 1.3

commercial relationship is maintained.¹¹⁹ The latest proposal from the EU also stipulates that the due diligence requirements cover:

...activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream business relationships of the company.¹²⁰

In Norway, the due diligence provision applies to “any party in the chain of suppliers and sub-contractors that supplies or produces goods, services or other input factors” from “the raw material stage to a finished product.” However, the provision applies only to direct, and not indirect, suppliers.¹²¹

Some of the other jurisdictions have been less willing to specify the scope of the application of their due diligence provisions. For instance, Switzerland defines supply chain as including only “upstream economic operators”¹²² whereas the UK does not define supply chain at all in its Act. Canada’s law is also rather narrow in scope. It requires companies to report on forced or child labour used “at any step of the production of goods”¹²³ and defines production of goods as the “manufacturing, growing, extracting and processing of goods”.¹²⁴ Under this definition, it is not clear whether suppliers, particularly indirect suppliers, are included in the scope of this legislation. Moreover, the definition of production of goods appears to be underinclusive as certain business activities such as development, disposal, transport, and storage of goods, among others, are not included in the definition.

c) *Obligations*

To meet their corporate responsibility to respect human rights, the UNGPs prescribe that businesses should enact a human rights policy commitment; have in place a “human rights due diligence process to identify, prevent, mitigate and account” for how the business addresses human rights impact; and a process to enable remediation for adverse human rights impacts caused.¹²⁵ Thus, a due diligence initiative, should, at a minimum contain these three requirements.

Germany’s law ably provides for these three elements and more. Under the German law, companies must: enact a policy statement; create a risk management system; perform regular risk

¹¹⁹ France Duty of Vigilance, supra note 67, at s. 1.

¹²⁰ EU Parliament, supra note 97, at Amendment 54, art. 3(1)(g). See also Amendment 18 which specifies that: The value chain should cover activities related to the production, distribution and sale of a good or provision of services by a company, including the development of the product or the service and waste management of the product as well as the related activities of business relationships of the company. It should encompass the activities of a company’s business relationships related to the design, extraction, manufacture, transport, storage and supply of raw material, products, parts of products, as well as the sale or distribution of goods or the provision or development of services, including waste management, transport and storage, excluding the waste management of the product by individual consumers.

¹²¹ Norway Act, supra note 76, at ss. 3(d), 3(e).

¹²² Swiss Ordinance, supra note 74, at art. 2(b).

¹²³ Canada Law, supra note 88, at s. 11.

¹²⁴ Canada Law, supra note 88, at s. 2

¹²⁵ UNGPs, supra note 7, at Principle 15.

analyses; implement preventive measures for its own business and its direct suppliers; implement measures for risks resulting from its indirect suppliers; provide remedial action; and establish a complaints procedure, among other obligations.¹²⁶

Norway similarly incorporates the UNGP obligations. Specifically, it requires companies to: “embed responsible business conduct” into corporate policies; identify and assess human rights impacts; put in place measures to prevent or mitigate adverse impacts; track the results of the measures; and provide remediation and compensation, among other requirements.¹²⁷

France’s due diligence law also incorporates the UNGP obligations although less ably than Germany or Norway. It requires companies to develop a “vigilance plan” which contains measures to identify human rights and environmental risks and prevent violations. More specifically, these measures are: “a mapping that identifies, analyses and ranks risks”; procedures to assess the situation in suppliers and business partners; actions to mitigate risks or prevent violations; “an alert mechanism that collects reporting of existing or actual risks”; and a monitoring scheme to assess the measures, among other measures.¹²⁸ The law also provides for state-sanctioned remediation.¹²⁹

The Swiss law also mandates that corporations engage in due diligence albeit only in relation to issues of child labour or imports of minerals.¹³⁰ They are mandated to identify and assess the risks of adverse impacts of minerals and metals originating from conflict-affected and high-risk areas in the supply chain, follow up on child labour indications, take measures to mitigate the impacts, evaluate the results of the measures and then communicate the results.¹³¹ They are also required to establish a reporting system that allows interested parties to raise concerns about conflict minerals or child labour impacts.¹³² However, for all non-conflict mineral or child labour human rights or environmental issues, companies are only required to report on mandated issues, including human rights and environmental policies and their implementation and a description of the risks in relation to these issues and how the corporation is dealing with these risks.¹³³

Similar to the reporting structure found in the Swiss law for non-child labour or conflict mineral matters, the Canadian law also focuses on reporting. Specifically, it requires companies to *report* on the corporate process of preventing and reducing the risk of forced or child labour. Thus, it requires companies to report on: its corporate policies and due diligence processes in relation to forced and child labour; the areas of its business and supply chains at risk of forced or child labour violations and how it has assessed and managed that risk; if it has taken any remediation measures; and it assesses its measures in relation to this issue, among other issues.¹³⁴ The law itself does not require the company to provide remediation for rightsholders; nor does it provide state-sanctioned remediation.

¹²⁶ German Law, *supra* note 81, at s. 3(1).

¹²⁷ Norway Act, *supra* note 76, at s. 4.

¹²⁸ France Duty of Vigilance, *supra* note 67, at s. 1

¹²⁹ France Duty of Vigilance, *supra* note 67, at art. L225-102-5.

¹³⁰ Swiss Ordinance, *supra* note 74, at ss. 2, 3, 10, 11.

¹³¹ Swiss Ordinance, *supra* note 74, at ss. 10, 11.

¹³² Swiss Ordinance, *supra* note 74, at s. 14.

¹³³ Swiss Code, *supra* note 73, at art 964b.

¹³⁴ Canada Law, *supra* note 88, at art. 11(3).

An even more permissive approach is taken by the UK's Modern Slavery Act and Japan's Guidelines. For instance, the Modern Slavery Act suggests – but does not mandate – that companies include in their modern slavery statements: its policies on slavery and human trafficking; information about its due diligence processes relating to slavery and human trafficking; information about areas in its supply chain where slavery and human trafficking poses risks and steps to mitigate that risk; whether it has been effective in ensuring slavery and human trafficking is not taking place in its business or supply chain; and any staff training on these areas that it has made available.¹³⁵

Similarly, Japan “requests” that companies establish a human rights policy, engage in human rights due diligence, and provide remedies.¹³⁶ However, unlike the Canadian and UK approach, the Japanese Guidelines draw directly from and reference the UNGPs. The Guidelines, although voluntary, are therefore much more detailed and specific in content.

d) Enforcement

There is a wide range of approaches relating to the enforcement of due diligence laws. Some states have appointed government agencies to oversee their enforcement. For instance, in Norway and Germany, a governmental body is tasked with ensuring companies follow the due diligence requirements. Norway's Consumer Authority, for instance, monitors compliance with the Act and is tasked with influencing businesses to comply with the Act.¹³⁷ Moreover, if it finds a breach of the Act it can prohibit the business from engaging in the harmful act or impose penalties.¹³⁸

In Germany, the law is monitored and enforced by the Federal Office for Economic Affairs and Export Control, with two other agencies also working with the Federal Office.¹³⁹ The Federal Office receives and assesses the company's reports,¹⁴⁰ has the power to request information or witnesses,¹⁴¹ and can impose penalties for a wide variety of breaches of the law. For example, penalties can be imposed if the company fails to report, fails to engage in a risk analysis, fails to take a preventative measure, or fails to take a remedial measure, among other things.¹⁴² Fines can be up to 800,000 euros or up to two percent of the company's annual turnover¹⁴³ and companies may also be excluded from participating in the process for public procurement contracts.¹⁴⁴

The EU's proposal also provides for a national supervisory authority to oversee the regulations¹⁴⁵ with powers to request information, conduct investigations, order cessation of infringements and

¹³⁵ Modern Slavery Act, supra note 85, at s. 54(5).

¹³⁶ Japan Guidelines, supra note 92, at s. 2.1

¹³⁷ Norway Act, supra note 76, at ss. 8-9.

¹³⁸ Norway Act, supra note 76, at ss 11-14.

¹³⁹ German Law, supra note 81, at s. 19. These are the Federal Ministry of Economics and Energy and the Federal Ministry of Labour and Social Affairs.

¹⁴⁰ German Law, supra note 81, at s. 13.

¹⁴¹ German Law, supra note 81, at ss. 15-16.

¹⁴² German Law, supra note 81, at s. 24.

¹⁴³ German Law, supra note 81, at ss. 24(2) and (3).

¹⁴⁴ German Law, supra note 81, at s. 22.

¹⁴⁵ EU Commission Proposal, supra note 94, at art. 17; EU Parliament, supra note 97, at Amendment 40.

remedial actions and impose pecuniary sanctions.¹⁴⁶ Sanctions are to be set by the Member States but they must be “effective, proportionate and dissuasive” and pecuniary sanctions should be based on the company’s turnover.¹⁴⁷ In addition, the proposal provides for civil liability for companies that fail to comply with their due diligence obligations.¹⁴⁸

Conversely, the UK, Canadian and Swiss laws do not enforce whether a company has engaged in due diligence; rather they only enforce whether a company has reported on the required information. In the UK, failure to adhere to these reporting requirements enables the Secretary of State to ask for an injunction or specific performance.¹⁴⁹ The government specifically notes that compliance with the Modern Slavery Act simply requires that the company produce a modern slavery statement and publish it on its website or state that it has not taken steps to do so; it does not require that the information in the statement be “clear, detailed and informative”.¹⁵⁰

The Canadian law similarly only enforces a failure to report, punishable by a fine.¹⁵¹ However, it also provides for personal liability for directors.¹⁵² The Swiss law takes a similar approach, although the fine imposed for a failure to report the required information is a criminal fine.¹⁵³ In addition, it requires that an expert auditor audit the company’s conflict mineral due diligence process to ensure that the company has complied with its due diligence obligations.¹⁵⁴

Finally, the Japanese Guidelines do not provide for enforcement at all since they are not mandatory. Indeed, all that the Guidelines ask of business is that they “strive” to respect human rights.¹⁵⁵

3. Due Diligence Laws as a Panacea?

The due diligence laws surveyed seem to offer benefits over courts using tort and corporate law to enforce international human rights norms against corporations since they *ex ante* specify some of the issues with which the courts have been struggling. However, the due diligence laws are hardly a panacea for addressing corporate harms. For one, as the survey of due diligence laws makes rather apparent, all due diligence laws are not created equally. A poorly crafted due diligence law is unlikely to address any of the current challenges faced by the court. Indeed, from the due diligence laws surveyed, only the German law offers the promise of attempting to mitigate

¹⁴⁶ EU Commission Proposal, *supra* note 94, at art. 18.

¹⁴⁷ EU Commission Proposal, *supra* note 94, at art. 20(1), (3). See also EU Parliament, *supra* note 97, at Amendments 72 and 192.

¹⁴⁸ EU Commission Proposal, *supra* note 94, at art. 22; EU Parliament, *supra* note 97, at Amendment 41.

¹⁴⁹ Modern Slavery Act, *supra* note 85, at s. 54(11).

¹⁵⁰ UK Government – Practical Guide, *supra* note 86, at s. 2.7.

¹⁵¹ Canada Law, *supra* note 88, at s. 19.

¹⁵² Canada Law, *supra* note 88, at, s. 20.

¹⁵³ Swiss Criminal Code, art 325ter.

¹⁵⁴ Swiss Ordinance, *supra* note 74, at art. 16.

¹⁵⁵ Inter-Ministerial Committee on Policy Promotion for the Implementation of Japan’s National Action Plan on Business and Human Rights, “Guidelines on Respecting Human Rights in Responsible Supply Chains” (September 2022), online at: https://www.meti.go.jp/english/policy/economy/biz_human_rights/1004_001.pdf [provisional English translation], art. 1.3.

corporate harms. It is the only law that mandates human rights and environmental due diligenc;, the use of risk analyses at the business and supply chain levels; the requirement of preventative measures, such as human rights policies;, and remediation measures, among other obligations. All the other laws fail to address at least one of these elements.

A second problem that presents in some of the due diligence laws is the reliance on courts to enforce them. The French Duty of Vigilance law has fallen afoul of this problem. In 2019, six NGOs brought a case against Total Energies alleging that it failed to comply with its due diligence obligations under the Duty of Vigilance in preventing human rights abuses and environmental damage at an oil project in Uganda. The action resulted first in a jurisdictional dispute as the law was not clear on which court should be seized of the matter. Although the Court of Appeal ultimately decided the jurisdiction issue,¹⁵⁶ the case then proceeded to a Paris interim court which dismissed the case for procedural reasons.¹⁵⁷ The Paris court found that the claim had been substantially amended by the plaintiffs warranting a new formal notice to the defendant, which had not been given. It also found that it did not have the jurisdiction to halt the defendant’s business operations, as the plaintiffs wanted, or the jurisdiction to assess the reasonableness of the measures adopted by the defendant’s vigilance plan as this is something that needed to be assessed by a court ruling on the merits of the claim. The Paris court further observed that the Duty of Vigilance is an imprecise law since it does not refer to any international standards or guiding principles.

As the French case example shows, without a high degree of precision in the drafting of the due diligence law on procedural issues, the courts may not be better placed to enforce due diligence laws than they are to enforce human rights norms using tort or corporate law. In this regard, having a specialized adjudicative body, as the German and Norwegian laws contemplate, may work towards mitigating some of these problems.

Finally, as commentators have noted due diligence laws are unlikely, in and of themselves, to fully address the problem of corporate harms.¹⁵⁸ This may be, in part, because the laws themselves are focused on process rather than results or align too closely with the business practice of due diligence which focuses on risks to business rather than risks to persons.¹⁵⁹ Or, it could be because

¹⁵⁶ *S.A. Total SE v. Commune of Bize-Minervois et al.* (18 Nov 2021) Court of Appeal Versailles, [https://media.business-](https://media.business-humanrights.org/media/documents/CA_Versailles_comp%C3%A9tence_NAAT_v_Total_18.11.2021_en-GB.PDF)

[humanrights.org/media/documents/CA_Versailles_comp%C3%A9tence_NAAT_v_Total_18.11.2021_en-GB.PDF](https://media.business-humanrights.org/media/documents/CA_Versailles_comp%C3%A9tence_NAAT_v_Total_18.11.2021_en-GB.PDF).

¹⁵⁷ *Les Amis de Terre France et al v. Total Energies*, N° RG 22/53942 (28 Feb 2023) Tribunal Judiciaire de Paris, <https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2023/03/2253942.pdf>; *L’Association Survie et al v Total Energies*, N° RG 22/53943 (28 Feb 2023) Tribunal Judiciaire de Paris, <https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2023/03/2253943.pdf>. For a good summary in English see Xavier Haranger and Charles Herzecke, “French Interim Civil Judge Dismisses Duty Of Vigilance Case Brought By Ngos Against Total Energies”, Morgan Lewis (4 April 2023), <https://www.morganlewis.com/pubs/2023/04/french-interim-civil-judge-dismisses-duty-of-vigilance-case-brought-by-ngos-against-total-energies>.

¹⁵⁸ See, e.g., Surya Deva, “Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?” (2023) 36(2) *Leiden Journal of International Law* 389; Marianna Leite, “Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models” (2023) *Business and Human Rights Journal* 1; Gabriela Quijano and Carlos Lopez, “Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?” (2021) 6 *Business and Human Rights Journal* 241.

¹⁵⁹ Deva, *supra* note 158; Surya Deva, “The UN Guiding Principles’ Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface” (2021) 6(2) *Business and Human Rights Journal* 336.

due diligence laws do not change the economic order which is facilitating the abuse of human rights and the environment by corporations; an order in which economic outcomes are prioritized over social ones.

In short, due diligence initiatives are unlikely, in and of themselves, to solve problems of corporate harms. However, a well-designed law offers greater promise than reliance on domestic court enforcements of international human rights law.

III. Conclusion

The efforts of domestic courts, including those in Canada, the UK and elsewhere, to find creative solutions to enable international human rights laws to be enforced against corporations should be applauded. Corporate abuse of human rights and the environment is a consistent problem and one that should be addressed from myriad avenues and courts certainly offer a viable avenue.

However, outsourcing the protection of international human rights norms to courts alone is an inefficient and ultimately unsatisfying proposition. Under international human rights law, states have the primary obligation to protect, respect, and fulfill human rights and as part of this obligation they should be introducing legislation that mandates corporate respect for human rights and the environment. Due diligence laws, that at a minimum adhere to the letter and spirit of the UNGPs, are one way forward in achieving this aim. However, states obligations vis-à-vis human rights should not merely stop at the drafting of due diligence laws.

There is a need for greater transformation of the economy such that corporate harms of human rights and the environment are no longer business as usual. This may entail the reshaping of economic laws¹⁶⁰ – from corporate to tax laws – or even a reorganization of the economy with a greater emphasis on the realization of human rights.¹⁶¹ Whatever the form this shift ultimately takes, it is clear that it will require much more than the status quo.

¹⁶⁰ Charlotte Villiers, “A game of cat and mouse: Human rights protection and the problem of corporate law and power” (2023) 36(2) *Leiden Journal of International Law* 415.

¹⁶¹ Leite, *supra* note 158.