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From 'Due Diligence' to 'Adequate Redress'. Towards Compulsory Human Rights and Environmental Insurance for Companies?

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Abstract

This article considers the case for compulsory corporate human rights and environmental insurance. It approaches it within the context of the need for more effective, efficient and just systems of redress for the victims of human rights and environmental harm that is caused by companies where they have operations or supply chains in single or multiple jurisdictions. Developments within the field of corporate responsibility for human rights and environmental issues have led to a variety of different initiatives that range from the UN 'protect, respect, and remedy' framework and the associated human rights due diligence (HRDD) framework, to specific legal developments in certain jurisdictions and other schemes developed by international organisations, as well as by civil-society and businesses themselves. From the perspective of corporate law, these changes have taken place within a legal framework that has certain features that have hindered the availability of remedies for victims of associated human rights and environmental harm. This article problematises the issue of redress for corporate human rights violations and environmental degradation within the context of international developments in this field. It considers whether there is a *prima facie* case for the establishment of a comprehensive compulsory human rights and environmental insurance regime for companies that would require them to operate to a high standard

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of care in their operations, and which would ultimately provide a more straightforward system of redress for victims.

Keywords

due diligence – compulsory liability insurance – human rights due diligence – environment – corporate accountability

1 Introduction

The challenges faced within the field of corporate responsibility for human rights and environmental issues have led to a variety of different initiatives at national, regional and international levels. Since the 1970s the UN has been at the heart of some of the most significant steps.[1] Their flagship initiatives include the Global Compact,[2] and the work of Professor John Ruggie – the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises from 2005 to 2011,[3] which resulted in the 'Protect, Respect, Remedy' framework.[4] Ruggie subsequently developed the United Nations Guiding Principles on Business and Human Rights (UNGPs)[5] in order to operationalize that framework. The UNGPs were unanimously endorsed by the Human Rights Council in 2011,[6] and have been extremely influential,[7] leading to the concept and

1 Eg. UN Department of Economic and Social Affairs, 'Multinational Corporations in World Development' ST/ECA/190 (United Nations: New York, 1973).

2 UN Global Compact <https://www.unglobalcompact.org/> accessed 28 November 2021.

3 John Ruggie, *Just Business: Multinational Corporations and Human Rights*, (2013) p. 141.

4 UN Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' UN Doc. A/HRC/8/5, 7 April 2008.

5 UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc. A/HRC/17/31, 21 March 2011.

6 UN Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises' UN Doc. A/HRC/Res/17/4, 16 June 2011.

7 See also: OECD, 'OECD Guidelines on Multinational Enterprises' (2011) <http://www.oecd.org/corporate/mne/48004323.pdf> accessed 29 November 2021; and ILO, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

practice of human rights due diligence (HRDD) which has been implemented at national and regional levels.[8]

In addition, developments have taken place in relation to the legal 'purpose' of a company,[9] and certain jurisdictions have amended their corporate law to make changes to the duties of directors.[10] Also the financial and investment sectors have developed environmental, social and governance (ESG) performance indices that are used to assess the associated risks to businesses of non-financial factors that interface with their operations.[11] This has formed part of the major growth in reporting schemes and frameworks that have been developed by international organisations as well as by civil-society organisations and businesses themselves.[12]

In terms of liability and redress, some case-law developments in certain jurisdictions have sought to establish liability for parent companies across jurisdictional divides, and have contributed to a gradual crystallisation of the expectations of companies in terms of human rights and environmental standards. However it can be argued that whilst much of the work that has been undertaken, by the international community especially through HRDD frameworks has been preventive in nature, much less has been achieved to ensure adequate and timely remedies for victims of human rights and environmental harm caused by companies, as required under pillar 3 of the UNGPs. Equally, although there has been significant debate relating to corporate liability, there has been little if no attention given to the possibility of addressing the issue of adequate redress for victims of human rights and environmental harm through a compulsory human rights and environment insurance regime.[13] Therefore this article seeks to start the process of addressing this lacuna in the

8 European Parliament Resolution of 10 March 2021 with recommendation to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)).

9 Eg. US Business Roundtable, 'Statement on the Purpose of a Corporation', August 2019 <https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/Business-Roundtable-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf> accessed 29 November 2021.

10 See infra section 2.2 of this article.

11 Stephen J. Turner, 'Corporate Law, Directors' Duties and ESG Interventions: Analysing Pathways towards Positive Corporate Impacts Relating to ESG issues', 4 *J. Bus. L.* (2020) pp. 245–64.

12 Ibid p. 252.

13 See Stephen J. Turner, 'Business, Human Rights and the Environment – Using Macro Legal Analysis to Develop a Legal Framework that Coherently address the Root Causes of Corporate Human Rights Violations and Environmental Degradation', 13, 12709, *Sustainability*, (2021) pp. 1–31; also generally Attila Fenyves, Christa Kissling, Stefan Perner & Daniel Rubin (eds), *Compulsory Liability Insurance from a European Perspective*, (2016).

scholarship by considering the proposition that companies should be required to take out liability insurance that would provide third parties with an avenue for redress where associated harm was caused.

It does this by carrying out a two staged process of analysis that considers key aspects of law, practice and policy pertinent to the potential for such insurance. The first stage focuses on analysing the hurdles that victims of corporate human rights violations and environmental harm currently face in obtaining redress. It considers the practical, procedural and legal barriers as well as the extent to which existing due diligence processes are paving the way towards redress. It also considers recent litigation which demonstrates the efforts taken in certain jurisdictions to overcome the barriers that claimants face and assesses the significance of those developments. The second stage maps out the way that compulsory liability insurance (CLI) is already used at national and international levels to manage specific types of risks that can affect third parties. It then considers the characteristics of CLI regimes against the barriers identified in stage one of the analysis to determine whether there is a *prima facie* case for its introduction and what challenges might exist in terms of its design and implementation, if it were to be effective.

2 Barriers in Making Claims following Human Rights Violations and Environmental Harm Caused by Companies

This section considers in detail the different types of hurdles that are faced by those seeking redress for human rights and environmental harms. In particular it analyses the different types of barriers – practical and procedural, as well as legal, – faced by claimants in various jurisdictions, and the limited solutions provided by recent legislative initiatives to overcome them. It also explores the attempts to respond to some of these challenges in recent case-law. These barriers are analysed to provide an understanding of the constellation of factors that ultimately are crucial to the design of any effective system of redress. As such they are also of paramount importance in considering what would be required of a compulsory system of human rights and environmental insurance.

2.1 *Practical and Procedural Barriers*

Numerous reports and cases have highlighted the reality that claimants filing legal suits on the basis of allegations of corporate human rights and

environmental harms often face many hurdles when attempting to access remedies.[14] Such obstacles occur both in the 'host State' of the company (i.e. the foreign State in which the company operates, generally through a subsidiary or through a business partner) and in the 'home State' (i.e. the State in which the parent or lead company is domiciled). In the host State, barriers to accessing remedies include the lack of effective legal infrastructures, corruption, the lack of judicial independence, a lack of funding to make claims, a scarcity of legal teams with the necessary experience and resources to take on complex translational claims,[15] the absence of protection for claimants and human rights defenders from intimidation and threats or reprisals, and low applicable human rights and environmental standards or the lack of enforcement of such standards.[16] In addition, the legal entity located in the host State may lack the funds to satisfy a compensation claim, and in some cases may no longer exist.[17]

These issues have spurred a growing number of claimants to bring claims before the courts of the home State in recent years. However, numerous barriers to accessing remedies have also been observed in concrete instances filed in home States. A 2019 study for the European Parliament mapped out the relevant legal proceedings filed in the home States of EU companies for alleged human rights harms in third countries over the previous decade.[18] The study analysed 35 cases in total, out of which 13 were dismissed; 4 were settled out-of-court; 17 were still ongoing; and only 2 had led to a positive judicial outcome

14 Jennifer Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies', report prepared for the Office of the UN High Commissioner for Human Rights <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> accessed 29 November 2021; Axel Marx, Claire Bright & Jan Wouters and others, 'Access to legal remedies for victims of corporate human rights abuses in third countries', 1 February 2019 <https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2019)603475> accessed 29 November 2021.

15 *Vedanta Resources Plc and another v Lungowe and others* [2019] UKSC 20.

16 Marx, Bright, Wouters and others (n 14) p. 98.

17 Richard Meeran, 'Accountability of Transnationals for Human Rights Abuses', 148 *NLJ* (1998). p. 168; Gerrit Betlem, 'Transnational Litigation against Multinational Corporations before Dutch Civil Courts', in Menno T. Kamminga & Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000) p. 283; Liesbeth Enneking, 'Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases', 40 *George Washington Int'l L. Rev.* (2009), p. 4; Marx, Bright & Wouters (n 14) p. 98.

18 Marx, Bright, Wouters and others (n 14) p. 18.

on the merits for the claimants. Overall, the study identified three categories of hurdles to accessing remedies faced by the victims: legal barriers, practical barriers and procedural barriers.[19]

2.2 *Legal Barriers*

There are a number of legal barriers to claimants which tend to be specific to individual jurisdictions and they include the unavailability of class actions or other mechanisms to aggregate claims and the difficulties that claimants have to access relevant information necessary to prove their claims. In addition, there are also jurisdictional hurdles relating to the applicable law where harm is caused by a subsidiary in one jurisdiction and claimants seek redress from a parent company in another jurisdiction. These types of hurdles are intrinsic to the nature of corporate law itself and the way that corporate law has developed internationally. Therefore, any development or regime designed to achieve redress through liability and insurance for victims would need to respond adequately to these barriers in the first instance. For the purposes of this article three aspects of this intrinsic nature of corporate law will be considered and summarised in terms of the ways that they affect redress. They are: 'separate legal personality', 'limited liability', and 'directors' duties'.

'Separate legal personality' is fundamental to the manner in which corporate law is designed, and it can play a very important role in the likelihood of victims of human rights and environmental harm being adequately compensated.[20] Each company that is registered, in a specific jurisdiction, is considered to be a separate legal person, with its own rights and responsibilities. As a legal characteristic, separate legal personality enables companies to enjoy some of the legal entitlements attributable to natural legal persons; for example, they are able to enter into contracts in their own names and therefore it makes the corporate form attractive as a medium through which to conduct business. It also means that a company itself will assume ownership of the assets and liabilities of the business. From the perspective of a claimant against a multinational enterprise (MNE) however, the characteristic of separate legal personality can have serious negative ramifications. This is because where an MNE is operating through the structure of a parent company with subsidiaries in a number of countries, each of those subsidiaries will be regarded as being a separate legal entity and will have its own separate registration and its own distinct set of rights and responsibilities. As a result, the parent company is generally not deemed to be liable for the debts of its subsidiaries, as they are

19 Ibid p. 102.

20 Derek French, *Mayson, French and Ryan on Company Law* (35th edn, 2018) pp. 104–9.

technically separate legal persons to the parent company.[21] There are exceptions to this principle which have developed within the legal systems of certain jurisdictions,[22] but it often places an immense barrier for claimants if a subsidiary is either insolvent or is operating in a jurisdiction which does not have an effective legal system.

The second feature that can similarly affect claimants of human rights and environmental harms is that of 'limited liability'.[23] Most companies are limited liability companies which means that the shareholders, in the event that a company cannot pay its debts, are only liable themselves for the amount of money that they have agreed to pay for the shares that they have purchased. Therefore when a subsidiary company within a group fails or becomes insolvent, not only is it difficult for claimants to make claims against the parent company for the reasons stated above, but the law protects the shareholders of the insolvent company from having personal responsibility for any liabilities above the amount that they have subscribed for their shares.[24]

The third feature of corporate law which can directly impact upon claimants relating to human rights and environmental harm is that of the duties that directors of companies have. The legal construct of the company is designed to facilitate the potential for investors to commit their capital to the business ventures that a company is undertaking.[25] As a result, the people that direct companies and their operations are generally charged with a legal duty to ensure that the funds that investors commit, are used in the best interests of the company.[26] As shareholders generally seek to profit from making investments either through distributions of dividends or through an increase in the value of their shares, the duties that directors have are generally understood to require them to protect the interests of those investors.[27] This is logical as a system of corporate law that did not perform this function would ultimately not provide a basis upon which investors would be willing to put money into companies.[28] However, the same level of protection for human rights and the environment has not generally been incorporated into corporate law itself.

21 Peter T. Muchlinski, *Multinational Enterprises and the Law* (3rd edn, 2019) pp. 300–304.

22 See infra section 2.4.

23 French (n 20) pp. 49–53.

24 Turner (n 11) pp. 245–64; Stephen J. Turner, 'Business practices, human rights and the environment' in James R. May & Erin Daly (eds) *Human Rights and the Environment – Legality, Indivisibility, Dignity and Geography* (2019).

25 French (n 20).

26 Stephen J. Turner, *A Global Environmental Right* (2014) pp. 41–4.

27 Beate Sjåfjell, 'How Company Law has Failed Human Rights – And What to do About it', 5 *Bus. Hum. Rights J.* (2020) pp. 182–7.

28 Turner (n 24) p. 378.

Generally speaking governments rely on specific laws relating to human rights and environmental issues to protect those interests. Inevitably as a result there can be a tension between directors' duties and those laws that are designed to protect human rights and the environment.

This tension has led some jurisdictions to amend their corporate law to place a responsibility on directors to take human rights and environmental concerns into consideration. The United Kingdom did so in 2006[29] and in 2013 India amended its law to require directors to have duties to communities and the environment as well as the company.[30] Additionally in 2019 the French government amended its civil code to require companies to be managed in such a way that they take into account social and environmental interests.[31] Following a 2020 EU Commission report, similar requirements may be introduced at the EU level.[32] Despite the positive nature of these steps they generally only require companies to *take into account* those other interests and stakeholders, and do not *require* them to ensure that those interests are protected. Even where a stronger iteration of the responsibility to consider interests other than those of the company is included in the law, as in the case of Indian corporate law, the impact upon corporate decision-making has arguably been limited.[33] Also it must be noted that amendments to directors' duties do not actually lead directly to rights for third parties and specifically the right to compensation for victims of human rights and environmental harm.

The barriers identified in this section add to the general inertia which has been recognised where efforts have been made to improve redress.[34] Therefore in sum, a regime to ensure that liability and adequate redress is achieved would need to be carefully designed to ensure that these specific legal characteristics did not continue to act as barriers for claimants.

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29 Companies Act s. 172(1)(d).

30 Companies Act s. 166(2).

31 Loi PACTE, Loi no. 2019-486, 22 May 2019. <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000037080861/> accessed 5 October 2021.

32 Ernst & Young, 'Study on Director's Duties and Sustainable Corporate Governance' Study for the European Commission, Final Report, July 2020 <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> accessed 28 November 2021.

33 Mihir Naniwadekar & Umakanth Varottil, 'The Stakeholder Approach Towards Directors Duties Under Indian Corporate law: A Comparative Analysis' in Mahendra P. Singh (ed.) *The Indian Yearbook of Corporate Law* (2016) pp. 95–120.

34 A. Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', (2) *J. Hum. Rts.* (2015) 14 p. 248.

2.3 *The Inadequacy of Existing HRDD Initiatives in Providing Effective Access to Remedy*

Developments in the field of HRDD have mainly focused on prevention, leaving the challenge of achieving remedies for victims largely unaddressed. The legislative HRDD initiatives can be grouped into two categories in particular: transparency laws requiring increased reporting from companies concerning the decisions that they have taken and processes that they have put in place relating to ESG issues, and mandatory human rights (and sometimes environmental) due diligence (mHR(E)DD) laws requiring companies to exercise substantive due diligence as set out in the UNGPs.

Examples of the first type of laws – the transparency laws – include the Dodd Frank Act[35] under United States federal law, the California Supply Chain Transparency Act of 2010,[36] the UK Modern Slavery Act of 2015 and the Australian Modern Slavery Act of 2018.[37] This type of legislation has been criticized for lacking teeth. In practice this has meant that there can be widespread non-compliance. It must also be noted that this type of legislation does not contain provisions for redress, and therefore fails to address the challenge of providing access to remedies.

More recently, a growing number of States have been introducing or considering the adoption of laws going beyond mere reporting requirements to make it mandatory for companies to exercise HR(E)DD.[38] Some of these laws focus on a specific issue, for example the Dutch Child Labour Due Diligence Act of 2019, which requires companies selling goods or supplying services to Dutch end users to exercise HRDD in relation to the risks of child labour in their supply chains.[39] Other legislation focuses on specific commodities, such as the EU Timber Regulation, which requires EU traders who place timber products

35 The Dodd Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203) 2010 (US).

36 California Transparency in Supply Chains Act, Cal. Civ. Code para. 1714.43.

37 Australian Modern Slavery Act 2018, s15(13)(2).

38 Claire Bright, 'Mapping Human Rights Due Diligence Regulations and Evaluating their Contribution in Upholding Labour Standards in Global Supply Chains', in Guillaume Delautre, Elizabeth Echeverría Manrique & Collin Fenwick (eds), *Decent Work in a Globalised Economy: Lessons from Public and Private Initiatives* (ILO 2021) 75.

39 The Dutch Child Labour Due Diligence Act 2019, Article 5. Unofficial English translation of the Act: <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies> accessed 18 December 2021.

on the EU market to exercise due diligence,[40] and the Conflict Minerals Regulation, which requires EU importers of tin, tantalum, tungsten and gold to exercise due diligence to ensure that the minerals have not been produced in a way that funds conflict or other related illegal practices.[41] For their enforcement, these various instruments rely on the administrative oversight of a national competent authority, however they do not contain any mechanism for redress when individuals or communities have been adversely affected by corporate activities.

The first and only mHREDD law to have attempted to tackle the issue of remedy provision so far, is the French Duty of Vigilance Law adopted in 2017.[42] It mandates large French companies to exercise HREDD in relation to their own activities and the activities of their established business relationships.[43] In terms of enforcement it provides for a double judicial enforcement mechanism whereby interested individuals can seek an injunction in the event of non-compliance, and a civil action can be filed against a company, in accordance with the conditions required under French tort law, whenever its failure to comply with the obligations set out in the legislation gives rise to damage. Several legal actions are currently pending on the basis of both judicial mechanisms.

If the French Duty of Vigilance Law does constitute a decisive step forward in relation to corporate accountability, it nonetheless falls short of the requirements set out in the UNGPs in relation to ensuring effective access to remedy for affected individuals and communities.[44] In particular, it has been criticized for failing to alleviate the burden of proof that claimants must comply with. According to French tort law the following 3 elements must be proved: 1) a

40 EU Regulation No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, COM(2018) 669.

41 EU Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, COM/2014/0111 final – 2014/0059 (COD).

42 Loi no. 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/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> accessed 18 December 2021.

43 In French Law, the notion of 'established business relationship' is characterized by its regularity, its stability and the volume of business involved. See Cour de cassation, Chambre Commerciale, 15 September 2009, n° 08-19200, Bull. IV, n° 110.

44 Chiara Macchi & Claire Bright, 'Hardening Soft Law: The Implementation of the UNGPs in Domestic Legislations', in Martina Buscemi, Nicole Lazzerini, Laura Magi & Deborah Russo (eds.) *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (2020) p. 218.

fault on the part of the company (which could be the failure to exercise due diligence as set out by the law); 2) a form of damage that they have suffered and 3) a causal link between the fault of the tortfeasor and the damage suffered (in other words that the damage suffered resulted from the breach of the due diligence obligations on the part of the company). In practice, given the frequent difficulties faced by claimants in accessing information and internal documents, this is likely to constitute a serious obstacle to accessing remedies.[45]

In June 2021, Germany and Norway also adopted mHR(E)DD laws. The Norwegian Transparency Act[46] requires large companies that are resident in Norway, as well as certain large foreign companies that offer goods and services in Norway, to carry out due diligence in accordance with the Organisation of Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises with regards to human rights and decent work. The German Act on Corporate Due Diligence Obligations in Supply Chains[47] requires large German companies to exercise due diligence with regards to human rights and certain environment-related risks through their own operations and direct suppliers. Those obligations extend to indirect suppliers where the companies obtain 'substantiated knowledge' of a possible violation.[48] Both laws include enforcement mechanisms that rely on administrative oversight and do not provide for a civil liability mechanism, meaning that they fail to provide any redress for the victims in case of harm.

In a 2020 study for the European Commission on due diligence requirements through supply chains,[49] it was found that the majority of stakeholders supported the introduction of a general requirement at the EU level that would make it mandatory for companies to exercise HREDD in their operations and throughout their global value chains.[50] Nearly 70% of companies sur-

45 Marx, Bright, Wouters and others (n 14) p. 15.

46 Norwegian Act relating to transparency regarding supply chains, the duty to know and due diligence, 2021 <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> accessed 29 November 2021.

47 German Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettengesetz*) of 16 July 2021 <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=3E55392520B5050AE8A10B56DA4EF59E.delivery2-master?__blob=publicationFile&v=3> accessed 29 November 2021.

48 Ibid s. 9.

49 Lise Smit, Claire Bright, Robert McCorquodale and others, 'Study on Due Diligence Requirements through the Supply Chain: Final Report', Study for the European Commission, February 2020 <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> accessed 29 November 2021.

50 Ibid p. 17.

veyed anticipated that it would benefit business to adopt a single, harmonised EU-level standard, as it would increase legal certainty and provide a level playing field.[51] In addition, interviewees also noted that such a system would have the potential to improve access to remedies for affected individuals and communities, provided that it was accompanied by a liability mechanism.[52] The findings of the study led to the announcement of a legislative initiative on mHREDD at the European level.[53]

On the 10th of March 2020, the European Parliament adopted, by a very large majority, a resolution with recommendations to the Commission on corporate due diligence and corporate accountability[54] containing the text of a draft directive in its annex. The text provides for an obligation for companies to exercise HREDD[55] as well as an associated civil liability regime in case of harm.'[56] The text of the European Commission is expected in the coming months.

Against this backdrop, even though legislative developments predominantly focus on the prevention of adverse human rights and environmental impacts by companies, liability regimes are emerging in certain jurisdictions and regions, and these will inevitably lead to the need for companies to insure associated risks. What does not appear to be emerging is a comprehensive system that would enable third parties to achieve redress for human rights and environmental harm through a straight-forward mechanism, such as compulsory human rights and environmental insurance.

2.4 *Cases Where Courts Have Considered Liability of Parent Companies for the Actions of Subsidiaries / Supply Chains*

Recent cases filed before home State courts on the basis of alleged corporate human rights and environmental harms have considered the potential liability of parent companies for the actions of their subsidiaries. Considering these cases assists our analysis in two ways. Firstly they provide concrete examples of the difficulties that claimants face. Secondly, they also illustrate an increasing willingness, within certain jurisdictions at least, to hold parent companies

51 Ibid.

52 Ibid.

53 European Parliament Working Group on Responsible Business Conduct, 'Speech by Commissioner Reynders in RBC Webinar on Due Diligence', 30 April 2020. <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/> accessed 18 December 2021.

54 European Parliament resolution with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

55 Ibid art. 4.

56 Ibid art. 19.

accountable, which could of itself provide a strong argument for a regime of mandatory human rights and environmental insurance.

Key examples include the claim filed in the UK in September 2015 by a group of 1,826 Zambian citizens against Vedanta, the parent company, and its Zambian subsidiary Konkola Copper Mines (KCM), on the basis of alleged repeated toxic discharges from the Nchanga Copper Mine in Zambia owned and operated by KCM, which negatively affected the health of the community and also their farming activities. The defendants made a number of jurisdictional challenges which led the court to consider, *inter alia*, whether there was a real issue to be tried against the parent company. The English courts found that it was well arguable that the parent company may owe a duty of care to the claimants.[57] However, this decision was limited to the primary issue of jurisdiction and no decision was rendered on the merits of the case since the parties subsequently reached an out-of-court settlement.

Similarly, in 2015, claims were filed in the UK against Royal Dutch Shell (RDS), the parent company – which had a registered office in the UK, and its Nigerian subsidiary (SPDC), on behalf of two Nigerian communities on the basis of the alleged damage and harm to their health and livelihoods which arose out of oil spills from a pipeline operated by SPDC.[58] Shell made various jurisdictional challenges which led the court to consider whether there was an issue to be tried against RDS.[59] On the 12th of February 2021, the UK Supreme Court reiterated the fact that a parent company may owe a duty of care, in certain circumstances, to the local communities adversely affected by the activities of a subsidiary.[60] The court also emphasized that there are potentially multiple ways in which parent company liability might arise.[61] Although it is limited to issues of jurisdiction, the judgment shows some evolution towards a greater recognition of parent company liability which seeks to circumvent some of the issues arising out of the concepts of separate legal personality and limited liability. This trend can also be observed in other jurisdictions.

57 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, para. 51.

58 *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 para. 132; see Ekatarina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction', 14 *Utrecht L. Rev.* (2018) p. 6.

59 Claire Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands' in Angelica Bonfanti (ed) *Business and Human Rights in Europe: International Law Challenges* (2018) p. 212.

60 *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3.

61 Ibid para. 27.

In the Netherlands, separate proceedings had also been filed against RDS and SPDC on the basis of the environmental damage caused by oil leaks. On the 29th of January 2021,[62] the Court of Appeal in The Hague delivered three judgments on the merits of the cases, affirming the liability of the parent company in one of them.[63] This case is particularly important as it constitutes the first positive judicial outcome for the claimants on the merits in a civil liability case filed in Europe against a multinational corporation on the basis of human rights harms in a third country. However, it took over 10 years to obtain a decision on the merits of the case which raises the question of the extent to which access to justice is available to individuals and communities in such cases.

These case-law precedents show the progressive judiciarisation of corporate human rights and environmental harms and as such represent an indication of the correlated need for companies to insure associated human rights and environmental risks.

3 Compulsory Liability Insurance – Its Potential in the Context of Corporate Responsibility for Human Rights Violations and Environmental Harm

This section responds to the challenges highlighted in the foregoing sections by analysing the potential role that an international system of compulsory human rights and environmental insurance could play if allied to an appropriate liability regime. It considers existing insurance regimes at the national and international levels that have a similar mandatory character. It also assesses the practical and regulatory challenges that would be faced if steps were to be taken to adopt such an approach.

3.1 *Mapping the Existing Use of Compulsory Liability Insurance Regimes*

The use of CLI regimes, which are sometimes known as 'third party' liability regimes are common throughout the world.[64] States use them to impose statutory requirements on businesses and individuals to take out specific insurance

62 *Fidelis Ayoro Oguru et al. v. Shell Petroleum N. V. et al.*; *Eric Barizaa Dooh et al. v. Shell Petroleum N. V. et al.*; and *de Vereniging Milieudefensie v. Royal Dutch Shell Plc. et al.*, The Hague Court of Appeal, 29 January 2021.

63 See Lucas Roorda, 'Wading through the (polluted) mud: the Hague Court of Appeals rules on Shell in Nigeria' (RightsasUsual, 2 February 2021) <https://rightsasusual.com/?p=1388> accessed 29 November 2021.

64 Fenyves, Kissling, Perner & Rubin (eds) (n 13).

policies to cover the risks associated with certain activities, business operations and professions.[65] The purpose is often to protect third parties who may be negatively affected by the insured party.[66] Whilst there has been significant academic debate relating to the use of insurance as a mechanism to regulate behaviour and provide redress to victims, its widespread use within certain contexts around the globe demonstrates a high degree of acceptance.[67]

There are a number of types of CLI regimes that are particularly common. Employers liability insurance is mandated in many jurisdictions to protect employees from accidents or negligent actions that may cause them harm in the course of their employment.[68] In some jurisdictions there is a requirement for employers to provide healthcare insurance under certain circumstances.[69] Another significant category is professional indemnity insurance that is mandatorily required of professionals such as doctors, lawyers and accountants in many jurisdictions.[70] Other types of CLI may relate to the risks that are associated with specific activities or specific forms of property, such as the ownership of weapons or the ownership of animals.[71]

Worldwide probably the most prevalent type of CLI regime is that relating to motor vehicle use.[72] Within the EU for example, member states are required to ensure that such insurance is mandated by law.[73] This requirement applies to all road users and provides a form of protection for third parties who are caused loss or injury as a result of the insured motor vehicle user. Many regimes facilitate 'direct action' against the insurance company in the event of a claim, which negates the need for the injured third party to make a claim directly against the insured party themselves.[74]

65 Ibid.

66 Daniel Rubin, 'Comparative Report and Conclusions' in Fenyves, Kissling, Perner & Rubin (eds) (n 13) p. 392.

67 Eg. Steven Shavell, 'On Moral Hazard and Insurance', 93 *Q. J. Econ*. (1979) pp. 541–562; Kenneth S. Abraham, *Distributing risk: Insurance, Legal Theory, and Public Policy* (1986); Paul K. Freeman & Howard Kunreuther, *Managing Environmental Risk Through Insurance* (1997); Richard V. Ericson, Aaron Doyle & Dean Barry, *Insurance as Governance* (2003).

68 Employers' Liability (Compulsory Insurance) Act 1969.

69 Patient Protection and Affordable Care Act Pub. L. No 111-148, 124 Stat. 119 (2010); Paul Rishworth, *Human Rights*, (2015) 2 *NZ L. Rev.* p. 275.

70 Eg. United Kingdom, Solicitors Regulatory Authority Indemnity Insurance Rules, Rule 4.1.

71 Robert Koch, 'Compulsory Liability Insurance in Germany' in Fenyves, Kissling, Perner & Rubin (eds) (n 13) p. 137.

72 Özlem Gürses, *The Law of Compulsory Motor Vehicle Insurance*, (Informa Law from Routledge, 2020).

73 European Directive, 2009/103/EC, 16th Sept. 2009.

74 Bernard Tettamanti, Hubert Bär & Jean-Claude Werz, 'Compulsory Liability Insurance in a Changing Environment', in Fenyves, Kissling, Perner & Rubin (eds) (n 13) p. 362.

Some jurisdictions have introduced CLI regimes to reinforce the obligations that arise under their environmental liability regimes; South Korea[75] and China are examples.[76] In the case of China, the law requires businesses involved in specific hazardous activities to take out such insurance.[77] Where compulsory insurance regimes do exist, liability may be implicit and not always referred to explicitly in the establishing instruments.[78] However, the presence of liability is a natural component for the functioning of a compulsory insurance regime. Where compulsory insurance requirements are absent, the presence of a specific liability regime can still have the effect of stimulating a market for associated insurance products. For example the EU's Environmental Liability Directive,[79] has had the effect of catalysing a greater demand from business and industry for associated insurance.[80]

It must be noted that another factor that is stimulating the purchase of insurance products within this sphere is the presence of material risks to businesses themselves that arise through ESG factors. For example, there are now numerous risks associated with climate change that businesses may seek to mitigate through insurance cover.[81] The United Nations Environment Programme Finance Initiative has developed guidance for the insurance industry with regard to the role that it can play in addressing environmental and social impacts on business through policies and products.[82]

75 Tong Keun Seol & Sangmin Kim, 'The Environment and Climate Change Law Review: South Korea' *The Law Reviews* (4 March 2021) <https://thelawreviews.co.uk/title/the-environment-and-climate-change-law-review/south-korea> accessed 26 September 2021.

76 Compulsory Environmental Pollution Liability Insurance Regulation, 2018 (China).

77 Xinkuo Xu & Chenyang Jiao, 'Effects and Choices of Environmental Pollution Liability Insurance in Provinces of China', 7 *Open Access Library Journal* (2020), e6630, pp. 1–19.

78 Öslem Gürses, 'Compulsory Liability Insurance in the United Kingdom' in Fenyves, Kissling, Perner & Rubin (eds) (n 13) pp. 247–9.

79 Directive 2004/35/EC of 21 April 2004.

80 Michael G. Faure, 'Environmental Liability of Companies' (Study Commissioned by the European Parliament – Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies. PE 651.698) May 2020, p. 11.

81 Giorgio Caselli & Catarina Figueira, 'The Impact of Climate Risks on Insurance and Banking Industries' in Marco Migliorelli & Philippe Dessertine (Eds.) *Sustainability and Financial Risks*, (2020) pp. 52–93.

82 United Nations Environment Programme Finance Initiative. 'Principles of Sustainable Insurance' 2012 <https://www.unepfi.org/psi/wp-content/uploads/2012/06/PSI-document.pdf> accessed 27 November 2021; United Nations Environment Programme Finance Initiative, 'PSI ESG Guide for Non-Life Insurance' 2020. <https://www.unepfi.org/psi/wp-content/uploads/2020/06/PSI-ESG-guide-for-non-life-insurance.pdf> accessed 27 November 2021.

At the international level there have been specific developments relating to certain industrial sectors which have provided the requirement of insurance related to particularly hazardous business activities. In particular, treaty regimes have been developed to respond to the threats of harm associated with nuclear accidents and oil spills from shipping. In the case of nuclear accidents, treaty provisions enable victims to make claims in the countries which are ultimately responsible for the harm regardless of their proximity to the harm itself.[83] Also victims of oil pollution are able to claim redress in any of the member states where harm has occurred.[84] However, at the international level, these limited developments fall far short of providing a system that would provide easily accessible redress in the types of instances that were referred to in section 2.

It can also be noted that within private law too, in some jurisdictions, there are certain industries in which specific insurance, whilst not mandated by law, becomes a *de facto* necessity if businesses are to be able to operate successfully. For example construction firms in some jurisdictions may need to provide proof of specific third party liability insurance, if they are to be given building contracts.[85]

3.2 *The Potential for Compulsory Liability Insurance to Overcome the Barriers for the Victims of Corporate Human Rights Violations and Environmental Harm*

The forgoing mapping exercise arguably paves the way for a *prima facie* case for CLI to respond, with a degree of effectiveness at least, to the barriers identified in section 2. This subsection will analyse this proposition in greater depth.

In terms of practical and procedural barriers referred to in section 2.1, compulsory motor vehicle insurance provides an analogous representation of the way that redress for victims of harm can be accessible and workable

83 Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960 Paris Convention) 29 July 1960, in force 1 April 1968, 956 UNTS 251 (as amended by 1964 and 1982 Protocols) Art. 13; 1963 Vienna Convention on Civil Liability for Nuclear Damage (1963 Vienna Convention) 21 May 1963, in force 12 November 1977, Art IX (1); Convention on Supplementary Compensation for Nuclear Damage (Vienna) 12 September 1997, in force 17 April 2015, 36 ILM 1473.

84 International Convention on Civil Liability for Oil Pollution Damage (Brussels) 29 November 1969, in force 19 June 1975, 973 UNTS 3 (as amended) Art. IX(1); International Convention on Civil Liability for Oil Pollution Damage (Brussels) 27 November 1992, in force 30 May 1996, IMO LEG/CONF.9.15 (1992 CLC) as amended Art. 7(1); IMO International Convention on Civil Liability for Bunker Oil Pollution Damage (London) 5 October 2001, in force 17 September 2008, AFS/CONF/26.

85 John Uff, *Construction Law* (13th edn, 2021) pp. 245–56.

without being overly burdensome on the insurance holder. From a governance perspective, CLI regimes can be designed to enable 'direct action' for victims and those suffering harm, which can speed up redress and facilitate equitable outcomes.[86] Additionally, the potential that insurance premiums can rise in the event of successful claims, can act as an incentive for insurance holders to ensure that due diligence, care and attention is taken in their operations. This logic can be applied to corporate human rights and environmental obligations and as such create a governance mechanism for companies to maintain good human rights and environmental standards,[87] whether operating in a single or multiple jurisdictions.

With respect to the legal barriers referred to in section 2.2, CLI does have the potential to reduce the structural barriers that claimants face but not to eliminate them. It is well recognised that compulsory liability regimes have the potential to remedy the insolvency gap which can sometimes occur when a parent company is effectively operating through a subsidiary that becomes insolvent either prior to, or as a result of a claim.[88] Therefore, election of 'limited liability' by the majority of companies internationally, provides a further very strong justification for the adoption of CLI, in order that adequate redress can be achieved, even where a company is unable to meet the costs of a claim itself.

This feature of CLI, ties in with the issue of 'fairness' in terms of the distribution of the financial burden associated with the risks that business ventures take. For example, in the case of environmental degradation, it represents a mechanism through which the 'polluter pays' principle can be realised. Therefore CLI regimes have the effect of 'internalising' rather than externalising the costs of the harm incurred. In other words, rather than distributing the financial costs amongst the victims of harm and the host State, compulsory insurance regimes, when functioning correctly, distribute those financial costs amongst the pool of insured parties through the insurer.

However, the legal barriers referred to in section 2.2 would not automatically be resolved on the creation of a CLI regime or regimes. This is because CLI is reliant on clear regimes of liability. The analysis in sections 2.2 and 2.4 demonstrated how 'separate legal personality' can create difficulties in attributing the harm caused by a subsidiary company to its parent company. Therefore the

86 Daniel Rubin, 'Comparative Report and Conclusions' in Fenyves, Kissling, Perner & Rubin (eds) (n 13) pp. 393–7.

87 Freeman & Kunreuther (n 67) pp. 24–5.

88 Bernard Tettamanti, Hubert Bär & Jean-Claude Werz, 'Compulsory Liability Insurance in a Changing Environment', in Fenyves, Kissling, Perner & Rubin (eds) (n 13) p. 370.

adoption of CLI would inevitably need to be part of a process of improved clarification and reform related to corporate liability both in individual and multiple jurisdictions. The gradual movement towards clearer bases of third party liability for companies related to human rights and the environment harms was analysed in sections 2.3 and 2.4. However it is noticeable that the positive developments mentioned are taking place slowly and are often only applicable in certain jurisdictions. It is outside of the scope of this article to consider the broader options that could be adopted to achieve the legal accountability that would be required, but suggestions have included the possibility of an international system registration of companies and also reform that would revise the purpose of companies, which would affect the duties that they have towards human rights and the environment.[89]

Apart from the development and adoption of appropriate liability regimes, there are also significant questions related to the need to respond appropriately to the risks faced by different industrial sectors.[90] A manufacturing business running a number of factories and warehouses would have a different profile in terms of human rights and environmental risks to a mineral extraction business operating a mining operation in a rural area. Not only does CLI need to be specific enough to respond to the demands of an industrial sector but also relevant expertise from insurers needs to be available and an appropriate infrastructure established to administer claims and to deal fairly with the potential of fraudulent claims.

Alongside these practical challenges are the technical questions over the parameters of any given compulsory insurance regime and the extent to which insurance holders are able to control moral hazards.[91] In other words the scope of cover required, the types of liability covered, the manner in which exclusions within the terms of an insurance policy could be avoided and managed, and the question of the duration of the cover itself are all challenging aspects in the design of any such regime. For example, to achieve its purpose the structure and design of such a CLI regime would need to include mechanisms that

89 Turner (n 26) pp. 73–100; Turner (n 13) p. 22.

90 See William T J de la Mare, 'Locality of Harm: Insurance and Climate Change in the 21st Century' (2013) 20 *Conn. Ins. L.J.* pp. 235–8; Laura A. Foggan, 'Environmental Insurance Claims after Katrina', 18 *Envtl Cl. J.* (2006) p. 228; Mark Popovsky, 'Nanotechnology and Environmental Insurance', 36 *Colum. J Envtl. L.* (2011) p. 125; Frankie McCarthy, 'Actionable Rights and Wrongs: Human Rights Challenges in AXA General Insurance Ltd', 14 *Edinburgh L. Rev*. (1998) p. 284.

91 Michael Faure, 'Compulsory Liability Insurance: Economic Perspectives' in Fenyves, Kissling, Perner & Rubin (eds) (n 13) p. 339.

would uphold the rights of third party victims even where an insured party had failed to comply with legal or HRDD obligations.

Despite the challenges that face the introduction of CLI regimes, it is clear that they may play an important part in the development of more robust, accessible and reliable redress especially in host countries with weak legal systems. Indeed, this rationale is seen in the third draft of the proposed treaty on business and human rights produced by the Open Ended Intergovernmental Working Group on Transnational Corporations (OEIGWG), which includes a provision that would require companies, 'to establish and maintain financial security, such as insurance bonds or other financial guarantees, to cover potential claims of compensation'.[92]

Therefore in summary, whilst CLI in this context does not represent a magic bullet, it has the potential to play an important part for individuals and entire communities to achieve direct access to redress without recourse to lengthy and costly international litigation.

4 Conclusion

Despite all of the regulatory, policy and case-law developments that have taken place in recent years in relation to the corporate responsibility to respect human rights and the environment, there are still significant hurdles for affected individuals and communities to obtain redress. The third pillar of the UNGPs which requires that those whose human rights have been affected by corporate activities, 'have access to effective remedy' remains the weakest pillar of all, and arguably where significant increased effort needs to be made. Many of the initiatives to date have given substance to the first two pillars and have focused primarily on the prevention of human rights and environmental harms, rather than on redress.

Through the introduction of new legally binding obligations seeking to spur or mandate companies to exercise HR(E)DD, the objective has been to avoid the human rights and environmental risks *ex ante*. However, it is undeniable that even with the most robust processes in place, adverse human rights and environmental impacts cannot be suppressed altogether and legislative

92 Open Ended Intergovernmental Working Group on Transnational Corporations (OEIGWG). Legally Binding Instrument to Regulate. In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises; (Third Revised Draft) 2021. Art. 8(5).<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> accessed 26 September 2021.

developments (for the overwhelming majority) have failed to address the issue of providing redress for human rights and environmental harms *ex post*. The case-law has indicated a willingness on the part of certain courts in certain jurisdictions to develop corporate liability for parent and lead companies and to provide redress in certain instances, but the process remains lengthy and costly. In the majority of cases, when human rights and/or environmental harms do occur, claimants face significant – often insurmountable – barriers in obtaining redress in practice, which can be of practical or procedural nature, or of a legal nature through the characteristics of corporate law itself especially when operating across different jurisdictions.

Therefore this article has brought a renewed focus on the challenge of 'adequate redress' for victims of human rights and environmental harm by examining the *prima facie* case for the adoption of compulsory third party liability insurance and analysing it within the context of the barriers that claimants currently face. The article has also sought to highlight the application of existing CLI regimes in other settings and the accessibility of redress that they can achieve, especially if they include a 'direct action' component.

It therefore concludes that given the benefits to those individuals and communities potentially affected, there is a strong *prima facie* case for the adoption of CLI within the context of corporate human rights and environmental harms but it does so with a *caveat*. In carrying out this analysis, it has demonstrated that ultimately such an initiative would need to be accompanied by broader structural reforms that related to the liabilities and responsibilities of companies (including MNEs). Additionally, CLI regimes can only work effectively where the interests of the third parties, to whom the corporate responsibilities are owed, are at the centre of the design and governance integrated within them. The analysis has also recognised the crucial need for such regimes to be carefully designed around the specific needs and requirements of the industrial sectors concerned.

In summary, this article finds that CLI regimes in this context, have the potential to reduce burdens for businesses by providing protection against specific risks, and also to play an important role in safeguarding individuals, communities and the environment itself where they are exposed to human rights and environmental harm caused by companies.

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