Human Rights Due Diligence: Why It Matters and Why It's Not Enough Without Access to Remedies for Human Rights Violations

E. Barrett Ristroph*

ABSTRACT

Transnational corporations (TNCs) operate through subsidiaries and supply chains that may be involved in human rights and environmental abuses in multiple countries, with little recourse for those harmed. There is a need for national legislation and international treaties that require human rights due diligence (HRDD) reporting to uncover and prevent potential abuses. This alone, however, is not enough to prevent abuses and provide for remedies. There is also a need for a "standard of care" for human rights obligations that are binding on TNCs (HRDD+). These rights must come with the ability of those harmed to pursue justice in the court of their choice, with access to information needed to prove their cases. This article outlines the inadequacy of legal systems in the European Union (EU) and beyond to remedy potential abuses, and suggests elements that could be included in an EU law that provides for due diligence and an accompanying standard of care. The law would establish an express parent company duty of care over foreign subsidiaries; provide for a rebuttable presumption of parent company liability for harm caused by subsidiaries; apply the law of the country where the case is tried if the host country provides an ineffective remedy; and facilitate discovery by shifting evidentiary burdens.

I. INTRODUCTION

Do governments have a responsibility to make sure that corporations are not peddling "blood diamonds," benefitting from child labor, or leaving behind a trail of environmental destruction in a foreign country? Should corporations be obligated to monitor their supply chain for potential human rights and environmental abuses, and can they be held liable if they do not have a contract with the entity carrying out these abuses? These issues have come to the forefront in recent years, not just

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among those who drink fair trade coffee, but also in international regulatory circles.

Human rights due diligence (HRDD) is one of the core elements of the United Nations Guiding Principles on Business and Human Rights (UNGPs), whereby corporations must protect human rights and states must enforce such protections.[1] HRDD is an ongoing risk management process through which a company identifies, prevents, mitigates, and accounts for how it addresses its adverse human rights impacts (including environmental impacts) throughout its supply chain (from production to final sale).[2] As this article will discuss, some European nations have already adopted legislation requiring companies domiciled within their borders to carry out HRDD.[3]

In April 2020, European Justice Commissioner Didier Reynders announced that the European Commission would develop HRDD legislation that would bind European Union (EU) companies.[4] Internationally, the United Nations Human Rights Commission has been leading negotiations since 2014 to develop a treaty governing the activities of transnational corporations (TNCs) and other business enterprises regarding human rights.[5] This article first considers the justification for legislation requiring TNCs to protect human rights. It then considers why a due diligence law without an enforceable standard of care would not adequately protect human rights. Finally, it offers recommendations to the EU and other countries on how to provide effective HRDD and what an enforceable standard of care would include.

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1. U.N. Office of the High Comm'r for Human Rights, Guiding Principles on Business & Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011), at Articles 3 and 17 [hereinafter UNGPs].

2. Filip Gregor et al., *The EU Competence and Duty to Regulate Corporate Responsibility to Respect Human Rights Through Mandatory Human Rights Due Diligence*, EUROPEAN COAL. CORP. JUSTICE (ECCJ) (Nov. 2017), *available at* https://media.business-humanrights.org/media/documents/files/documents/Brief_The_EU_competence_and_duty_to_legislate_BLayout.pdf (last visited Feb. 23, 2021).

3. *See* Section III, *infra.*

4. Responsible Bus. Conduct Working Grp., *Presentation and Discussion with Commissioner for Justice Didier Reynders on Due Diligence Study*, VIMEO (Apr. 29, 2020), *available at* https://vimeo.com/413525229 (last visited Apr. 11, 2021).

5. *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. COUNCIL (n.d.), *available at* https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx (last visited Apr. 11, 2021).

II. INADEQUACY OF LEGAL SYSTEMS

Victims and survivors of human rights abuses caused by TNCs face daunting—sometimes insurmountable—obstacles when seeking judicial relief. As discussed in this section, many countries, including "developed" countries, like the United States and the Netherlands, do not offer adequate remedies to litigants seeking damages for human rights abuses.

A. Denial of Jurisdiction

First, a court may avoid considering the merits of the case by asserting that it lacks jurisdiction over a TNC defendant that is not domiciled within the court's country. The court may either be unwilling to hold a domestically incorporated parent corporation liable for the wrongful acts of the corporation's foreign subsidiary ("piercing the veil"),[6] or the court may not consider the jurisdiction it presides over to be a convenient or practical place for the litigation to occur ("forum non conveniens").[7] Even if a defendant is clearly domiciled in the court's country, the court may decline jurisdiction over "extraterritorial" acts committed in another country.[8]

In the United States, the ability to pursue relief under the Alien Torts Claims Act for abuses committed abroad has become increasingly limited.[9] EU laws provide access for litigating violations committed outside of the EU in the member state where the defendant is domiciled,[10]

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6. *See, e.g.*, Barcelona Traction, Light & Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5); *see also* Choc v. Hudbay Minerals, Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.), ¶¶ 4-6.

7. *See* Uniform Law Conference of Canada, Court Jurisdiction and Proceedings Transfer Act, S.B.C., c 28 (1994) (Can.) [hereinafter CJPTA], *available at* https://www.ulcc.ca/en/home-en-gb-1/183-josetta-1-en-gb/uniform-actsa/court-jurisdiction-and-proceedings-transfer-act/1092-court-jurisdiction-proceedings-transfer-act?showall=1&limitstart= (last visited Apr. 11, 2021).

8. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (presumption against the extraterritorial application of U.S. law, including the Alien Torts Statute (28 U.S.C. § 1350)).

9. In 2013, the United States Supreme Court decided that the Alien Tort Claims Act presumptively does not apply extraterritorially. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013). In 2018, the Court decided that foreign domiciled corporations could not be sued under the Act. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

10. *See, e.g.*, Akpan v. Royal Dutch Shell & Shell Petroleum Dev. Comp. of Nigeria, Ltd., (2013) LJN BY9854 (Neth.). The Brussels I Regulation mandated that the national courts of the EU Member States accept jurisdiction in civil liability cases filed against

since EU courts recognize extraterritorial jurisdiction.[11] But *Akpan v. Shell*,[12] litigated in the Netherlands against Shell and its Nigerian subsidiary for damages caused by the subsidiary, demonstrates the challenge of piercing the veil. In *Akpan*, the court held the Nigerian subsidiary liable, but not the parent company. As this case demonstrates, it is difficult for litigants to prove that parent companies are sufficiently related to their subsidiaries as to be held liable for the actions of subsidiaries. Parent company responsibility is important because subsidiaries may be under-funded, leaving them unable to provide adequate compensation.

In the United States, Australia, and Canada, courts use the doctrine of forum non conveniens to dismiss cases when they find that litigation would be more practical elsewhere,[13] even though those cases may never be refiled in the "more practical" country.[14] The Uniform Court Jurisdiction and Proceedings Transfer Act in Canada contains common rules for forum non conveniens.[15] In the EU, *Owusu v. Jackson* expressly barred the doctrine of forum non conveniens.[16]

B. Question of Which Country's Law to Apply

Courts must determine which country's laws to apply when human rights abuses occur abroad. EU courts generally apply the civil compensation law of the state where the damage took place,[17] although

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defendants domiciled in the forum State. (Article 2 (1) of Regulation (EU) No 44/2001). Regulation (EU) No. 1215/2012 [hereinafter Brussels II Regulation] was adopted on December 12, 2012, to replace Brussels I effective to legal proceedings instituted (and to judgments rendered) on or after January 10, 2015. Article 4(1) of the Brussels II Regulation provides similar jurisdiction to that of the original Brussels I.

11. *See* Brussels II Regulation, *supra* note 10, Art. 4(1) and Art. 63 (providing that a company can be domiciled in up to three EU states at the same time or have domiciles both within the EU and outside of it).

12. *See* Akpan, (2013) LJN BY9854 (Neth.), *supra* note 10.

13. *See, e.g.*, the U.S. cases Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Bhopal v. Union Carbide Corp., 809 F.2d 195 (2d Cir. 1987).

14. In a case filed in the U.S. state of Delaware, by Argentine citizens alleging exposure to pesticides used on Argentine tobacco farms, the Delaware Supreme Court held that defendants have demonstrated that litigating in Delaware would result in an overwhelming hardship to defendants; the case could be dismissed under the doctrine of forum non conveniens even if no alternative forum is available. *See* Aranda v. Philip Morris USA, Inc., 183 A.3d 1245 (2018).

15 *See* CJPTA, *supra* note 7.

16. Andrew Owusu v. N.B. Jackson [2002] EWCA (Civ) 877, [2003] PIQR 186 (Eng.).

17. Council Regulation 864/2007, art. 4, 2007 O.J. (L 199) 40 [hereinafter Rome II] (on the law applicable to non-contractual obligations).

there are some exceptions, including cases that involve environmental damage.[18] This application can be problematic if the law of that country allows a certain level of damage[19] or does not provide adequate compensation. For example, a country's criminal laws may exclude remedies for victims and survivors, while civil laws may only compensate for physical damage—not economic loss or moral damage.[20]

C. Difficulty of Obtaining Evidence and Rules Related to Business/Confidentiality

Survivors of human rights abuses may have no information about the corporations and actions that contributed to the harm. Injured parties may be unable to obtain the evidence needed to file a lawsuit due to lack of finances and capacity. While courts in many developed countries have "discovery rules" that require litigants to provide information upon request,[21] a defendant may flout these requirements by flooding the plaintiff with too much information that disguises or obfuscates the human rights issues relevant to understanding the potential human rights impacts. Further, exceptions to the discovery rules allow companies to keep "trade secrets and other information confidential."[22] Information from previous cases may be impossible for a litigant to obtain if the corporation settled the dispute through a confidential settlement.[23]

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18. *Id.* at art. 7 (In claims for "environmental damage," the claimant may elect to have the claim governed by the country's law where the 'event giving rise to the damage' occurred.).

19. This bar was raised in Lubbe v. Cape Plc [2000] UKHL 41, [2000] 1 WLR 1545 (appeal taken from Eng.) (7500 South African asbestos miners suing in the U.K.); Connelly v. RTZ Corp. Plc [1997] UKHL 30, [1998] AC 854 (appeal taken from Eng.) (Namibian uranium miners with throat cancer suing in the U.K.).

20. For example, the United States Department of Justice Human Rights and Special Prosecutions section may prosecute human rights-related crimes committed internationally, but does not provide relief to victims. *See Human Rights and Special Prosecutions Section*, U.S. DEP'T JUST. (n.d.), *available at* https://www.justice.gov/criminal-hrsp (last visited Apr. 12, 2021).

21. *See, e.g.*, Fed. R. Civ. P. Title V ("Disclosures & Discovery").

22. *Id.* at r. 26(b)(5).

23. For example, a case against Monterrico Metals by Peruvian farmers, scheduled for a ten-week trial in the English High Court in October 2011, was also settled without admission of liability in a confidential settlement. *See generally* Dan Collyns, *UK Firm Agrees to Pay Compensation to Peruvian Farmers*, BBC NEWS (July 20, 2011), *available at* https://www.bbc.com/news/world-latin-america-14227670 (last visited Apr. 12, 2021). *See also* Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), *available at*

Finally, the burden of proof in litigation may require so much evidence as to be nearly insurmountable for a plaintiff.[24]

D. Other Inadequacies of Host Country Courts

The following are additional reasons why litigants may not obtain relief from a "host country" (where the damage occurred):

- Human rights laws included in national constitutions may not be justiciable,[25] and there may be significant gaps in civil rights and environmental laws.
- The law of the host country may bar a claim under workmen's compensation laws that prohibit claims against an employer.[26]
- There is a lack of affordable legal assistance (lawyers unwilling to operate on a contingency fee or *pro bono*).
- There may be legal restrictions on non-government organizations (NGOs) that could support litigation[27] or judicial rules limiting their ability to litigate.[28]

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https://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global (last visited Apr. 12, 2021) (settlement just before trial involving Shell).

24. *See, e.g.*, Gomez v. Dole Food Co. (Cal. Ct. App. Oct. 27, 2011) (Dismissal of case against Dole where court found that Dole sustained its evidentiary burden of showing a reasonable probability that it would prevail at trial by presenting "competent evidence that overwhelmingly refutes plaintiffs' primary claim, i.e., that Dole and its Col[o]mbian subsidiary, Tecbaco, conspired with, and made payments to, the AUC in exchange for violent security services.").

25. In the United States, for example, Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments") requires agencies to consult with indigenous communities if a proposed project may impact these communities. But Section 10 of the Order says, "this order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." *See* Exec. Order No. 13175, 65 Fed. Reg. 67249 (2000).

26. *See supra* note 19.

27. Federal'nyi Zakon RF ot 20 Iiulia 2012 Goda N 121-FZ "O Vnesenii Izmenenii v Otdel'nye Zakonodatel'nye Akty Rossiiskoi Federatsii v Chasti Regulirovaniia Deiatel'nosti Nekommercheskikh Organizatsii, Vipolniaiushchikh Funktsii Inostrannogo Agenta" [Federal Law RF of July 20, 2012, N 121-FZ "On Amendments to Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of Non-profit Organizations Performing the Functions of a Foreign Agent"], Ros. Gaz., July 23, 2012 (Russ.) (a Russian law requiring non-profit organizations that receive foreign donations and engage in "political activity" to register and declare themselves as foreign agents).

28. Consider the U.S. doctrine that an NGO must have "standing" (a distinct injury and connection to the injury) to bring a case regarding that injury. *See* Powers v. Ohio, 499 U.S. 400, 410 (1991).

- Local courts may not have the capacity to handle complex litigation,[29] and cases may take decades to resolve.[30]
- There may be blurred lines or even collusion between national governments and corporations,[31] which may contribute to corruption[32] or allow for sovereign immunity.[33]
- Courts may be subject to political interference.[34]

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29. *See The Rule of Law in the Kyrgyz Republic*, IDLO (July 23, 2019), *available* at https://www.idlo.int/fr/what-we-do/initiatives/rule-law-kyrgyz-republic (last visited Apr. 12, 2021) (Until recently, court processes in the Kyrgyz Republic have not been automated; manual or paper systems are still required and the norm.).

30. Paul Cartsen, *UPDATE 1-UK Supreme Court Hears Nigerian Communities' Case Against Shell*, REUTERS (June 23, 2020), *available at* https://https://www.reuters.com/article/nigeria-oil-idUSL8N2E04YR (last visited Apr. 12, 2021).

31. Examples include state-owned petroleum entities in joint ventures with TNCs, as is the case with Shell's subsidiary in Nigeria, and the appointment of a lobbyist for coal producer Murray Energy (Andrew Wheeler) as the head of the United States Environmental Protection Agency in 2018. *See* Lisa Lambert, *Trump Nominates Acting EPA Head, an Ex-Coal Lobbyist, to Run Agency*, REUTERS (Jan. 9, 2019), *available at* https://www.reuters.com/article/us-usa-trump-epa/trump-nominates-acting-epa-head-an-ex-coal-lobbyist-to-run-agency-idUSKCN1P324H (last visited Apr. 8, 2021).

32. *See Transparency Afghanistan*, TRANSPARENCY INT'L (n.d.), *available at* https://www.transparency.org/en/countries/afghanistan?redirected=1 (last visited Feb. 25, 2021) (country data includes corruption perception ranking); *see also* Ximena Barria, *Odebrecht Case: Deficiencies in the Rule of Law in Latin America*, U. DE NAVARRA (Feb. 6, 2018), *available at* https://www.unav.edu/web/global-affairs/detalle/-/blogs/the-odebrecht-case-deficiencies-in-the-rule-of-law-in-latin-america (last visited Feb. 18, 2021) (Brazilian firm confessed to offering numerous bribes to political leaders). *See also* Jill Ambrose, *Prosecutors Seek Jail Terms Over Shell and Eni Oil Deal in Nigeria*, THE GUARDIAN (July 22, 2020), *available at* https://www.theguardian.com/business/2020/jul/22/prosecutors-seek-jail-terms-shell-eni-executives-nigeria-oil-deal (last visited Feb. 18, 2021) (Italian prosecutors seeking corruption charges against Shell and Eni officials involved in Nigerian oil deals).

33. In the U.S. case *Saleh v. Titan Corp.*, involving a contractor's actions at Abu Ghraib prison in Iraq, the D.C. Court of Appeals found that, among other things, because the defendants had contracted with the United States for their work in Iraq, the plaintiff's claims were pre-empted by the Federal Tort Claims Act combat exception related to sovereign immunity, even though the contractors were private entities. *See* Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009). In the EU, at least for the countries that have signed the Basel Convention, sovereign immunity is more limited. *See* European Convention on State Immunity art. 6, May 16, 1972, 1495 U.N.T.S. 181, 184. According to Article 6, such immunity cannot be claimed if the State "participates with one or more private persons in a company, association or other legal entity having its seat, registered office, or principal place of business in the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand."

34. *See* José Luis Castro-Montero & Gijs van Dijck, *Judicial Politics in Unconsolidated Democracies: An Empirical Analysis of the Ecuadorian Constitutional Court (2008–2016)*,

- Plaintiffs, witnesses, and/or activists may be persecuted by the host country's government.[35]
- Plaintiffs may face retaliation in the form of Strategic Lawsuits Against Public Participation (SLAPP) suits.[36]

It may be difficult to execute a judgment in a host country if all of the assets are in the country of the parent company.

III. LIMITATION ON DUE DILIGENCE GUIDANCE AND REQUIREMENTS

Globally, there is already abundant voluntary guidance regarding due diligence,[37] including the UNGPs[38] and some TNCs that are developing policies to address potential abuses in their supply chains ahead of any legal mandate to do so. But these voluntary policies may be insufficient. An example of a voluntary policy is Shell's corporate social responsibility policy, which guides operations in Nigeria through its subsidiary Shell Petroleum Development Company of Nigeria Limited. Researchers have argued that this policy has done little to improve the social and environmental standards in local communities,[39]

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38 JUST. SYS. J. 380, 380-98 (2017) (discussing lack of judicial autonomy in Ecuadorian constitutional court). Another example is the State of Louisiana in the United States, where judges are elected and depend on campaign contributions. *See* Caitlin Morgenstern, *Ethical Guidelines for Judicial Campaigning*, LA. SUP. CT. JUD. CAMPAIGN OVERSIGHT COMM. (n.d.), *available at* https://www.lasc.org/judicial_campaign_oversight/Ethical_Guidelines_For_Judicial_Campaigning.pdf (last visited Feb. 18, 2021).

35. *See* Alexandra Krylenkova, *Crimean Tatars Face Unfounded Terrorism Charges*, HUM. RTS. WATCH (July 12, 2019), *available at* https://www.hrw.org/news/2019/07/12/crimean-tatars-face-unfounded-terrorism-charges# (last visited Feb. 18, 2021); *see also* Green Scenery, *Jailed for Resisting Big Palm Oil: Release the MALOA Six!*, RAINFOREST RESCUE (June 2016), *available at* https://www.rainforest-rescue.org/petitions/1046/jailed-for-resisting-big-palm-oil-release-the-maloa-six (last visited Feb. 18, 2021).

36. For example, in a case involving Texaco's extraction efforts in Ecuador, defendant Chevron sued plaintiffs and the lawyer for fraud under the Racketeer Influenced Corrupt Organization (RICO) Act for conspiracy. *See* Chevron v. Donziger, 990 F.3d 191 (2021).

37 Lise Smit et al., *Study on Due Diligence Requirements Through the Supply Chain*, EUR. COMM'N (Jan. 2020), *available at* https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en (last visited Apr. 14, 2021).

38. UNGPs, *supra* note 1.

39. SHELDON LEADER ET AL., CORPORATE LIABILITY IN A NEW SETTING: SHELL AND THE CHANGING LEGAL LANDSCAPE FOR THE MULTINATIONAL OIL INDUSTRY IN THE NIGER DELTA, ESSEX, AND HUMAN RIGHTS PROJECT 19-28 (2011); *see also* TARA VAN HO, DUE DILIGENCE IN TRANSITIONAL JUSTICE STATES: AN OBLIGATION FOR GREATER TRANSPARENCY? (Jernej L.

despite the assertion that the subsidiary carried out business activities "efficiently, profitably, and to high standards."[40] Rather, local residents have been affected by oil spills,[41] pollution,[42] gas flaring,[43] and related practices on the part of the subsidiary, similar companies, and the Nigerian government.

Even mandatory due diligence requirements are insufficient to protect human rights if they simply require TNCs to report potential abuses in their supply chains without any enforcement regarding the accuracy of the report. Information contained in a due diligence report could be irrelevant, selective, or insufficient to prove a case against the corporation. Companies may fail to meet the reporting requirement with little to no consequence. An example of an existing reporting requirement is the United Kingdom's Modern Slavery Act. The Act requires entities to prepare an annual slavery and human trafficking statement that enumerates the steps taken by companies "to ensure that slavery and human trafficking [are] not taking place—(i) in any of its supply chains, and (ii) in any part of its own business" or states that "the organization has taken no such steps."[44] However, the content of these reports may be vague, and there are no clear sanctions for failing to report or for misleading reports. The U.K. government estimates that 40% of the companies required to file a report under the legislation have failed to

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Cernic & Tara Van Ho eds., 2015); Hakeem O. Yusuf & Kamil Omoteso, *Combating Environmental Irresponsibility of Transnational Corporations in Africa: An Empirical Analysis*, 21 LOC. ENV'T INT'L J. JUS. & SUSTAINABILITY 1372, 1372-86 (2016).

40. Uwem E. Ite, *Changing Times and Strategies: Shell's Contribution to Sustainable Community Development in the Niger Delta, Nigeria*, WILEY (Aug. 5, 2006), *available at* https://onlinelibrary.wiley.com/doi/10.1002/sd.294 (last visited Apr. 7, 2021).

41. *Shell's Nigerian Subsidiary Agrees £55 Million Settlement with the Bodo Community*, SHELL (Jan. 7, 2015), *available at* https://www.shell.com/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html (last visited Apr. 7, 2021).

42. Sarah Kent, *Pollution Worsens Around Shell Oil Spills in Nigeria*, WALL ST. J. (May 25, 2018), *available at* https://www.wsj.com/articles/pollution-worsens-around-shell-oil-spills-in-nigeria-1527246084 (last visited Apr. 7, 2021). A 2011 UNEP report estimated that the clean-up of Ogoniland, United Nations Environment Programme, Nigeria could take thirty years. U.N. Envtl. Programme, *Rep. on the Environmental Assessment of Ogoniland*, UNEP (2011), *available at* https://www.unenvironment.org/explore-topics/disasters-conflicts/where-we-work/nigeria/environmental-assessment-ogoniland-report (last visited Apr. 14, 2021).

43. Leonore Schick et al., *Gas Flaring Continues Scorching Niger Delta*, DW (Nov. 14, 2018), *available at* https://www.dw.com/en/gas-flaring-continues-scorching-niger-delta/a-46088235 (last visited Apr. 7, 2021).

44. Modern Slavery Act 2015, c. 30, 6 § 54 (UK), *available at* https://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted (last visited Apr. 12, 2021).

do so.[45] As with the voluntary guidelines, reporting requirements do not clearly provide compensation for those harmed by due diligence failures.[46]

Another example of a reporting requirement is the EU law requiring certain companies ("public interest entities" with over 500 employees) to disclose their social and environmental responsibility policies and non-financial information about the outcomes of these policies.[47] But there is no obligation to report on "significant incidents," and member states can permit companies to withhold information associated with ongoing developments or negotiations. Other EU laws require due diligence, which includes requirements for companies that deal in certain raw minerals, metals,[48] and forest products.[49] But these EU laws have no enforcement mechanisms, leaving enforcement to member states.

Finally, even with robust reporting requirements that have penalties for non-compliance, human rights abuses will continue if there is no legal mandate to remedy and prevent the abuses uncovered by the reporting process. The reporting requirements could become a procedural "checkbox" that a TNC must satisfy before carrying out business as usual.

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45. *Home Office Tells Business: Open Up On Modern Slavery or Face Further Action*, GOV.UK (Oct. 18, 2018), *available at* https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action (last visited Apr. 12, 2021). At the time of this 2018 assessment, only 60% of industries required to file reports under the 2015 Modern Slavery Act had done so. *Id.*

46. The EU Council recognized this limitation in the UNGPs in its document revisiting the UNGPs five years after their creation. Council Conclusions on Business and Human Rights 10254/16 of June 20, 2016, Annex, 2016 O.J. 12.

47. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L330/1), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 (last visited Apr. 14, 2021). *See also The Non-Binding Commission Guidelines on Non-Financial Reporting*, EUR. COMM'N (June 26, 2017), *available at* https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (last visited Apr. 12, 2021); *see also Commission Guidelines on Reporting Climate-Related Information*, EUR. COMM'N (June 20, 2019), *available at* https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en#climate (last visited Apr. 12, 2021).

48. *See* Council Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1, 5, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0821 (last visited Apr. 14, 2021).

49. Commission Regulation 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, 2010 O.J. (L 295) 23, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995 (last visited Apr. 14, 2021) (referring to but not clearly designating "competent authorities" to monitor operators for compliance).

Countries need a "standard of care" in their HRDD legislation akin to the standards found in the international human rights instruments onto which those countries have signed. This standard would illustrate the scope of abuses (i.e., child labor) that a TNC domiciled in that country must avoid perpetuating through its subsidiaries and/or supply chains.[50] Along with the standard, there must be a right to a remedy[51] and access to justice[52] for those harmed by the TNC's abuses.

To that end, criminal law, although important for other reasons, does not compensate victims. While there are model principles of EU tort law that suggest a route for compensation, there is no uniform body of law or a statutory obligation to adhere to these principles.[53] Individual EU member states' tort laws are also insufficient to protect against ongoing human rights violations in supply chains because tort liability depends on clear evidence of a defendant proximately causing past harms. Tort law is not designed to address human rights violations, such as child labor and lack of free, prior, and informed consent.

IV. RECOMMENDATIONS FOR HHRD+ LAW

This section considers the elements HRDD legislation should include to address HRDD, as well as a standard of care and access to justice (referred to collectively as HRDD+). It specifically considers a potential EU law, given the possibility of its implementation in the near future.[54]

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50. *See Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HUM. RTS. COUNS. (June 8, 2020), *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (last visited Apr. 14, 2021) (referencing a second revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises).

51. *Id.* at art. 4 ("Rights of Victims").

52. *Id.* at art. 7 ("Access to Remedy").

54. The European Commission has committed to enacting EU-wide human rights due diligence law by June 2021. *See* Mayer Brown, *The EU's Proposed Mandatory Human Rights Due Diligence Law - What You Need to Know*, LEXOLOGY (Feb. 10, 2021), *available at* https://www.lexology.com/library/detail.aspx?g=0171490e-fcc5-4a33-ad62-b60105ec206c (last visited Apr. 12, 2021). *See also* Consolidated Version of the Treaty on the Functioning of the European Union art. 50(2)(g), May 9, 2008, 2008 O.J. (C340), which authorizes the EU to harmonize national company laws to attain freedom of establishment companies. Article 114 also allows the EU to approximate legislation to ensure the establishment and proper functioning of the internal market.

A. Applicability and Scope

An EU HRDD+ law should at least apply to all companies domiciled in EU member states, operating in certain sectors (i.e., extractive industries), and of a certain size if operating in other sectors (i.e., 500 or more employees). Arguably, the law could apply even more broadly since the UN Guiding Principles "apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure."[55]

The law should mandate minimum reporting requirements, such as what risks and impacts a company must report and their methodology for assessing those risks and impacts. Each company should specify all of its subsidiaries and the relationships between the parent and its subsidiaries in terms of percentages owned. Board directors for each company should also be listed, and this information should be easily accessible so the public can understand the relationship between each entity (i.e., whether the directors are nearly the same for the subsidiary and parent such that the two are highly intertwined). The public should have the chance to offer input on due diligence reports similar to the process in the United States for environmental impact statements.[56]

In addition to due diligence requirements, the law should have codified standards of care, establishing norms of conduct and providing remedies for those harmed by companies that are domiciled in the EU or offer products or services in the EU market. Namely, such companies should (1) follow the same human rights and environmental standards the EU adheres to;[57] (2) ensure that these standards are respected by the companies under their control; and (3) take appropriate measures so that subsidiaries and suppliers throughout the supply chain respect these standards. EU law should also have penalties for non-compliance and an opportunity to litigate damages in a competent court within the EU.

B. Violations

If due diligence requirements are unilateral proclamations by a company without standards of care (which I do not recommend), then rules on unfair competition and consumer protection should at least hold companies accountable for misleading statements that unfairly gain

55. UNGPs, *supra* note 1, at General Principles.

56. National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (1970).

57. These standards could be akin to those in the UNGPs (i.e., limited to child labor and discrimination and harassment).

consumer goodwill. Inaccurate or incomplete reporting should have consequences including sanctions, withdrawing licenses or government support, appointing monitors, and allowing interested parties to legally seek the necessary amendments.

Particularly if the EU adopts a HRDD+ law, the EU and individual member states can create oversight and enforcement bodies within existing institutional structures such as domestic state departments, which may already oversee traditional corporate law requirements.[58] Violations and reporting failures could result in the penalties described above, as well as the company's dissolution and/or subjugation to civil suit by injured parties, government entities, and non-government public interest groups.[59]

A due diligence statement should not absolve a company from liability for its conduct.[60] Liability could be based on the severity or significance of the company's impact, size, sector (this may not be relevant if the applicability of the law is already limited to a certain size and sector), ownership, structure, resources, industry practices, amount of leverage they hold, if the leverage was exercised, and what they knew or should have known.[61]

C. Jurisdiction and Legal Access

The EU should modernize its laws and court rules to account for the global nature of TNCs and the way business takes place in the modern Internet era. EU law should clarify that the extraterritorial actions of companies domiciled in EU member states can be subject to the EU's jurisdiction when those actions violate the laws of the host country in which they occur—even if the host countries have no due diligence requirements.[62]

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58. Smit et al., *supra* note 37, at 258.

59. *Id.*

60. *Id.* at 107, 250; *see also* UNGPs, *supra* note 1, at 19 ("business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses"); Human Rights Council Rep., U.N. Doc. A/HRC/38/20, at ¶12 (June 1, 2018).

61. Smit et al., *supra* note 37, at 250-51.

62. Council of Europe (CM), Recommendation to Member States on Human Rights and Business, CM/Rec(2016)3, ¶ 35 (Mar. 2, 2016) (The Council of Europe has called for "domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter Enterprises."). *See* The OHCR Accountability and Remedy Project's *Illustrative Examples for Guidance to Improve Corporate Accountability and Access to Judicial Remedy for*

To address the challenge of regulating subsidiary companies that are not domiciled within the EU, legislation could establish an express duty of care for the parent company. A model is the French law that imposes a "duty of vigilance" on certain large French companies to prevent environmental and human rights harms caused by their subsidiaries and other business relationships.[63] Parent companies must design, implement, and account for the measures put in place to identify, prevent, and address the human rights risks and impacts of their global operations. Those harmed by an alleged lack of vigilance may sue the parent company in a French court of law.[64]

EU law already defines a parent company.[65] For any company that meets this definition, there should be a rebuttable presumption of parent company liability for harm caused by subsidiaries. The parent company could rebut the presumption by showing that it took every reasonable step to avoid the harm caused by the subsidiary. Even if the presumption is adequately rebutted, liability should still be imposed on the parent company if the subsidiary no longer exists, was underfunded to avoid liability, or if there is no adequate avenue to pursue a remedy in the host country.

The European Commission should reintroduce its proposal (which it considered making as part of the 2011 recast of Brussels I Regulation) to add a "forum necessitates" provision to the Brussels I Regulation, requiring European courts to exercise jurisdiction if no other forum

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Business-Related Human Rights Abuse, Companion Document to A/HRC/32/19 and A/HRC/32/19/Add.1, at Policy Objectives 12-13 (July 5, 2016) (UN guidance calls for a legal regime "sufficiently robust to ensure that there is both effective deterrence from and remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.").

63. *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, FRENCH REPUBLIC (Mar. 27, 2017), *available at* https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/ (last visited Apr. 8, 2021). This applies to companies domiciled in French with at least 5000 employees in the parent and subsidiary companies or domiciled elsewhere with at least 10,000 employees in the parent and subsidiary company.

64. Another model is the holding adopted in the U.K. case *Chandler v. Cape Plc* [2010] EWCA (Civ) 525 (Eng.) (holding that a parent company may owe a direct duty of care to its subsidiary's employees where (1) the business of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or out to have, superior knowledge on some relevant aspects of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent know, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection).

65. Council Directive 2013/14/EU, art. 22(1), 2013 O.J. (L 182/19) (defines "parent undertaking").

guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the member state concerned (i.e., by virtue of a parent company to the defendant being domiciled in the member state).[66]

The law of the state where the case is tried should apply when the law of the host state does not provide an effective remedy. This may already be the state of the law under the EU regulation regarding the conflict of laws on the law applicable to non-contractual obligations, known as the Rome II Regulation.[67] Rome II Article 16 provides that "[n]othing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."[68] But it is not clear what "mandatory" means, and interpretations may vary per court. Another possible way to apply the law of the state in which the case is heard is Article 26 "[t]he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."[69] The EU should clarify the extent to which the exceptions incorporated into the Rome II Regulation may be used to address these problems, including in Articles 16, 26, and 17 (which address application of domestic rules of safety and conduct). Article 7 (which recognizes the right of victims of environmental damage to elect whether the court will apply the law of the State in which the harm occurred or the law of the state in which the event that gave rise to the harm took place) could be expanded to cover human rights violations.[70]

D. Discovery of Evidence

EU law should address the challenges of obtaining evidence in litigation against TNCs and the lack of laws facilitating discovery. If plaintiffs present reasonably available evidence to support a cause of action and indicate that further evidence is controlled by the defendants,

66. *See* GWYNNE L. SKINNER, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY (2020).

67. Rome II, *supra* note 17, at art. 16.

68. *Id.*

69. *Id.* at art. 26.

70. *Id.* at art. 7.

then the courts should order defendants to timely provide information regarding company actions.[71]

The law should specify minimum requirements for what must be disclosed and the format for disclosure to ensure it is both complete (avoiding glaring omissions) and concise (avoiding obfuscating and superfluous information). The law should also specify what information (e.g., background technical data or assessments) companies must maintain and disclose upon request.

Finally, to avoid situations where evidence regarding past corporate violations is confidential due to non-disclosure provisions in settlements, the law should generally prohibit settlements from being confidential. There could be some exceptions for legitimate trade secrets.

E. Financial Considerations

Funding cases will always be a challenge. The United States' and Australian models of using class actions,[72] in which the plaintiff's lawyer takes a contingency fee,[73] are one way to reduce this financial barrier.[74] A class action resolves key legal issues through a single suit involving a large number of individual claimants, thereby reducing the level of legal resources required and any financial disincentive for claimants' lawyers. Potential plaintiffs may opt out of the class to avoid being bound by the outcome of the action.

EU law should provide for some form of collective redress, whether modeled after United States and Australian class actions or another format. Legal standing should include representative action by public interest NGOs, whose statutory objectives are to protect and assist those harmed by business-related human rights abuses. The EU should allow class actions even if claimants live outside of the EU, and when non-EU

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71. This would be consistent with the 2016 Council of Europe Recommendations, *supra* note 62, calling for revisions of "civil procedures where the applicable rules impede access to information in possession of the defendant or a third party if such information is relevant to substantiating victims' claims of business-related human rights abuses, with due regard for confidentiality considerations."

72. *See* Fed. R. Civ. P. 23; *Supreme Court Act 1986* (Vic) pt. 4A (Austl.).

73. Through a contingency fee, a lawyer takes a significant portion of any compensation paid, or else nothing at all. *See* MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 1983); *Legal Profession Act 2004* (Vic) ss 3.4.27-3.4.28 (Austl.).

74. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). The U.S. Supreme Court decision imposed a higher requirement for certifying a class action, impeding the ability of injured parties to bring a class action. The EU should not adopt such a high bar.

law will apply to their claim (following the rules of the Rome II Regulation).

In the United States and other jurisdictions, SLAPPs aim to shut down critical speech and lawsuits by intimidating critics and draining their resources. While Australia, Canada, and some states in the United States have "anti-SLAPP" statutes in place,[75] the EU has none. The EU should adopt an anti-SLAPP law that would give investigative journalists and human rights advocates the power to request the rapid dismissal of "vexatious lawsuits."[76]

Finally, the EU could consider establishing a fund to support litigation on behalf of those whose human rights have been violated. This fund would be consistent with Article 47 of the EU Charter of Fundamental Rights, which stipulates that "[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."[77] There is no limitation on residence or citizenship in this provision.

V. CONCLUSION

The call for HRDD comes at a time when the world is more connected and interdependent than ever before because of international trade and the instant exchange of information on the Internet. At the same time, it is a world where the annual revenues of many TNCs exceed that of many countries.[78] There are positive trends in the sphere of voluntary corporate social environmental efforts, just as there are advancements in European national legislation to promote HRDD. Yet, with all of these advancements, there remain significant abuses in TNC supply chains, leaving those who are harmed without a remedy.[79]

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75. *See, e.g.*, COLO. REV. STAT. §13-20-11 (2019).

76. *See* Stephanie Kirchgaessner, *MEPs Call for Power to Tackle 'Vexatious Lawsuits' Targeting Journalists*, THE GUARDIAN (Feb. 22, 2018), *available at* https://www.theguardian.com/world/2018/feb/22/meps-call-for-power-to-tackle-vexatious-lawsuits-targeting-journalists (last visited Apr. 16, 2021).

77. Charter of Fundamental Rights of the European Union 364/01, art. 47, 2000 O.J. (C 326) 395, 405 (EU).

78. *See* Fernando Belinchón & Qayyah Moynihan, *25 Giant Companies That Are Bigger Than Entire Countries*, BUS. INSIDER (July 25, 2018), *available at* https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7 (last visited Apr. 16, 2021).

79. *See, e.g.*, Patricia Jolly, *Cambodian Farmers Accusing Bolloré of Spoliation Are Asked To Show Proof*, LE MONDE (Nov. 11, 2019), *available at* https://www.farmlandgrab.org/post/view/29298-cambodian-farmers-accusing-bollore-of-spoliation-are-asked-to-show-proof (last visited Apr. 16, 2021) (outlining the difficulties of

There is a need for national legislation and international treaties that not only provide for mandatory due diligence but also set forth a standard of care for human rights obligations that are binding on TNCs. These rights must come with the ability for those harmed to pursue justice in the court of their choice, with adequate access to the information needed to prove their cases.

Cambodian farmers seeking a remedy for damages caused by a subsidiary of the European company Bolloré).