Holding Parent Companies accountable for the Human Rights and Environmental harms caused by their Subsidiaries: the role of the Civil Law concept of the "Head of the Household"

ALICE MARIA PEREIRA MILHEIRAS

Dissertation submitted in part fulfilment of the requirements for the degree of Master in International and European Law

Supervisor:
Professor Claire Bright

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"I am a multilateralist. I am deeply convinced that there is no other way to deal with global challenges than with global responses, and organized in a multilateral way."

- António Guterres

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In total this dissertation has 199 285 characters.

Abbreviations

BIICL	British Institute of International and Comparative Law
EU	European Union
ESG	Environmental, Social Governance
GVCs	Global Value Chains
KMC	Konkola Cooper Mines plc.
NAAC	Cape Industries plc. Subsidiary (no other meaning found)
NCPs	National Contact Points
NGO	Non-governmental organization
OECD	Organization for Economic Co-operation and Development
RBI	Responsible Business Initiative
RDS	Royal Dutch Shell
SDGs	United Nations Sustainable Development Goals
SPDS	Shell Petroleum Development Company
UK	United Kingdom
UN	United Nations
UNGPs	United Nations Guiding Principles
USA	United States of America

Abstract

Globalization allowed not only the growth of economy but also the creation of its current greatest motor - multinationals.

Because International Law on Human Rights and the Environment protection is seen as something created by the States and for the States, the issues created by the private actors of International Law – companies – have been ignored to a large extent, and a number of corporate Human Rights and environmental harms have been reported.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) were created in order to fill in the gaps of International Law and to try to reach a consensus between States and private actors regarding corporate's respective duties and responsibilities. However, these principles have not solved all the problems and nowadays the third pillar remains the weakest of them all.

Enshrined in international Human Rights law, victims have the right to access justice and remedies. By applying concepts like the principle of separate corporate personality and the concept of limited liability, corporate law creates legal barriers for victims to access remedy.

On the 23rd of February 2022 the European Commission adopted a new European Directive which brought a possible solution to these problems. This proposal intends to create an environmental and Human Rights due diligence obligation for companies in the European Union (EU).

This Directive is indeed a big step towards company's liability in Human Rights and environmental damages cases.

However, the proposal also creates issues that need to be assessed in order to not increase the list of unsatisfactory and defective environmental and Human Rights due diligence legislation.

The aims of this dissertation are to analyze: the corporate veil doctrine; its repercussion in case-laws; the proposal of the new European Directive and its flaws; to propose a solution for the problems found in this Directive.

Resumo

A globalização permitiu não só o crescimento económico como a criação do seu grande motor — as Multinacionais.

Como as leis internacionais relativas à proteção dos Direitos Humanos e Ambiente são consideradas leis criadas de e para os Estados, os problemas criados pelas empresas têm sido ignorados mesmo tendo em conta o grande volume de queixas feitas contra estas, no que concerne o desrespeito pelos Direitos Humanos e pelo Ambiente.

Os "UN Guiding Pinciples on Business and Human Rights" (UNGPs) foram criados precisamente para preencher as lacunas criadas pelo Direito Internacional, numa tentativa de chegar a acordo entre Estados e entidades privadas relativamente aos deveres e responsabilidades destas. No entanto, estes princípios não foram a solução para todos os problemas existentes e nos dias de hoje o terceiro pilar destes princípios mantém-se o mais frágil.

De acordo com os Direitos Humanos as vítimas têm o direito de acesso à justiça e à reparação/indeminização pelos danos sofridos. Aplicando conceitos como o princípio de "separate corporate personality" e de "limited liability", a lei das empresas está a impedir o acesso das vítimas à reparação/indeminização.

No dia 23 de Fevereiro de 2022 a Comissão Europeia adotou uma nova Diretiva que trouxe uma possível solução para estes problemas. Esta proposta tem por objetivo criar uma obrigação de diligência devida, relativamente aos Direitos Humanos e Ambiente, para as empresas na UE.

Esta Diretiva é um grande passo para a responsabilização das empresas nas violações dos Direitos Humanos e Ambiente. No entanto, a proposta apresenta algumas fragilidades que, se não forem corrigidas, podem levar à ineficácia da mesma.

O objetivo desta dissertação é analisar a Doutrina "Corporate Veil", a sua repercussão na vida prática, a proposta da nova Diretiva Europeia e as suas fragilidades e apresentar uma proposta de solução para os problemas detetados nesta Diretiva.

Table of Contents

1. Introduction

After the creation of the United Nations (UN), in 1945[1], many movements appeared all over the world in order to protect Human Rights.

With globalization, two different movements emerged: one - States focus on economic growth ignoring Human rights; two - States bring the obligation of protecting Human Rights to entities like corporations.

In a global economy, mainly influenced by multinational law, national law and consequently international law have prioritized shareholders and the economy over the victims of business activities.

Furthermore, Company law[2] created the corporate veil doctrine[3] and limited liability[4] which makes it difficult to regulate companies' activities.

[1]BERNAZ, Nadia – *Business and Human Rights: History, law and policy – Bridging the accountability gap*. New York: Routledge, October 19, 2016. PP. 81-111. ISBN 978-1-138-68300-6.

[2]Company law is the body of law governing the rights, relations and conduct of persons, companies, organizations and businesses. (MARES, Radu – *Liability within corporate groups: Parent company's accountability for subsidiary human rights abuses* [online]. In book S. Deva (ed.) Research Handbook on Human Rights and Business. Published by Edward Elgar, 2020. [Accessed on October 13, 2021]. PP. 1-25. Available in: <https://ssrn.com/abstract=3481052>).

[3]Radu Mares defined the Corporate Veil as a creation of Company law that *"allow for corporate personality, which means that the law sees (...) the company and its subsidiaries, as separate entities with their own assets, rights and obligations" (*MARES, Radu – *Liability within corporate groups…,* P. 2).

[4]Limited liability allows shareholders to be protected in case the company has any financial trouble, like debt. This means that creditors are only entitled, in the event of company debt, to the value of each shareholder's share.

This was extended to companies, through the incorporation option which allows "investors (…) to incorporate a company as a limited liability company" *(*MARES, Radu – *Liability within corporate groups…,* P. 3).

Limited liability differs from the Corporate Veil Doctrine, because as Cheng explained, formally, limited liability is a legal rule and the Corporate Veil Doctrine derives from it. This Doctrine can only be applied to corporations that have certain characteristics (CHENG, Thomas K., *Form and Substance of the Doctrine of Piercing the Corporate Veil* [online]. ResearchGate, April 06, 2015. [Accessed on October 13, 2021]. PP. 502-510. Available in: <https://www.researchgate.net/publication/228214576_Form_and_Substance_of_the_Doctrine_of_Piercing_the_Corporate_Veil>).

The corporate veil was created with the purpose of facilitating trade and, subsequently, increase investment[5].

Primarily, it was applied only to natural persons, to protect them from the commercial risks of businesses[6]. Over time, that changed and with the growing ambition of States to get more capital and investments, the corporate veil doctrine was applied to legal persons like corporations[7].

The problem is that the doctrine has led companies to be shielded from liability and, consequently, to act more and more recklessly.

In addition to this, globalization brought the need for corporations to assume several forms, in order to reach a bigger market.

The most common type of corporate structure is the Global Value Chains[8] (GVCs), which created an easy way for parent companies to avoid liability, because it is extremely difficult to find the "source of the problem" within such a structure. In fact, it is quite a challenge to show in Court the connection between the parent company and its value chain.

So, there are several reasons and advantages for a parent company to have a subsidiary company:

- All the current legal systems incentivize corporations to organize themselves in that way. The issue is that "(…) liability risks remain within the sphere of a foreign subsidiary"[9] which, from the perspective of the victim, encourages to ask for piercing the veil doctrine, direct liability or other type of conduct that allows him/her to make the parent company liable;

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[5]MARES, Radu – *Liability within corporate groups…*

[6]Idem.

[7]MALTBY, Josephine – *UK joint companies' legislation 1844-1900: accounting publicity and "mercantile caution"* [online] – Sage journals [online]. Vol. 3:1, May 1, 1998. [Accessed on September 20, 2021]. PP. 9-32. Available in: <https://doi.org/10.1177/103237329800300102>.

[8]This type of corporate groups is created with contracts and is characterized by the existence of several companies, each one of them with one purpose (production, extraction, distribution, etc.) – different stages of the production process. They are located in different countries which facilitates trade investment.

[9]BAISCH, Rainer; WEBER, Rolf H. — *Liability of Parent Companies for Human Rights Violations of Subsidiaries* [online]. European Business Law Review, Vol. 27:5, 2016. [Accessed on October 10, 2021]. PP. 669-695. Available in: <https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/27.5/EULR2016030>.

- Most subsidiary companies are located in developing countries because it is where the raw materials for their activities are located (location reasons). This allows the company to save capital in freight transport from one country to the other;
- Having a subsidiary company in a developing country implies legal, tax and financial advantages. Most host countries have weak laws and restrictions which makes it easier for corporations to run their business without any additional costs (like taxes, for example) and therefore leads to more profit;
- A subsidiary company allows a multinational to limit the liability of the business owners, shareholders or investors.

The UNGPs[10] were the beginning of the solution to the problems mentioned above. They were able to change the international perspective on company's liability because it raised the debate on whether corporations do or do not own a duty of care or are responsible for other objectives besides profit.

In 2011 the Human Rights Council endorsed the principles, introduced by John Ruggie, which became the first authoritative global standard on Business and Human Rights.

John Ruggie was able to unite the will of States and companies and created an idea of principles with three pillars at their foundation.

These pillars allowed to understand who is responsible for the application and respect of Human Rights: the State duty to protect Human Rights (it is a legal duty); the corporate responsibility to respect Human Rights (this is different from duty); and access to remedy (it is a victim's right to access to effective remedy).

The UNGPs explained that the State's duty to protect Human Rights (first pillar) is confronted with the victims' right to receive effective remedy. States have, therefore, the duty to ensure that victims have access to justice.

This is even more evident in developing countries, where the investment made by companies is essential for the economy of those countries, and most of the time it coincides with the subsidiary company location.

[10]United Nations, UN Guiding Principles on Business and Human Rights, (16 June 2011), HR/PUB/11/04 adopted on 16 June 2011.

Consequently, and according to the report[11] that will be explained in this dissertation, the victims of Human Rights and environmental harms have been increasingly bringing their claims to the parent company's country (usually a developed country) where they have better chances to succeed.

However, there is another issue: the law is not the same in all Home State countries. For example, in the EU, some countries have national laws or case-laws decisions that seek to hold the parent company accountable for the damages arising out of the actions or omission of their subsidiaries. Some other countries have no such laws or case-laws.

So, for victims the access to justice and remedies depends on the country (and its legislation) where the parent company is located.

In order to guarantee that victims have the same chances of getting access to remedies regardless of the country of the parent company and in order to harmonize the applicable rules procedures as well, the European Union recently created a legal mechanism that will be applied uniformly in all EU countries – the Draft Corporate Sustainability Due Diligence Directive.

However, for the Directive to be effective some things need to be changed, in particular when it comes to its scope and its practical application.

In this dissertation we will present arguments to improve, to facilitate and to standardize the practical application of this Directive by introducing the concept of the head of the household (a Civil Law concept) as a standard of care for parent companies in the EU (implemented in Member-States), in order to guarantee access to remedy for victims.

Parent companies have to be held accountable for their subsidiaries actions and the experience has proven that the existent soft and hard law instruments were not efficient enough. On the contrary, these instruments have not fully addressed one of the UNGPs vital pillars – the third pillar.

This dissertation will be divided in three parts. In the first chapter the UNGPs will be explained in more detail, as well as the many attempts to regulate corporate liability.

Moreover, the corporate veil doctrine as a barrier will be addressed;

[11] MUCHLINSKI, Peter — *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union.* Abingdon, UK: Routledge: Juan José Álvarez Rubio and Katerina Yiannibas (editors), 2017. P.146. ISBN 978-1-138-28418-0.

At the end of this chapter, two piercing the corporate veil theories – agency and duty of care – will be analyzed in order to understand their importance and the reasons for their failure;

The second chapter will be focused on some case-laws examples and the practical consequences of applying the corporate veil doctrine;

In the last part of this paper, the French Corporate Duty of Vigilance Law and the Swiss Responsible Business Initiative will be dissected in order to understand the process of application of the Head of the Household to parent companies in the EU.

Additionally, the proposal of the EU environmental and Human Rights due diligence Directive will be explained in order to understand its content and the reason why it should be altered so it can be effective.

In the last part of this chapter the definition of the head of the household will be explained and how this concept can be applied to a parent company, complementing and improving the proposed EU Directive.

2. The Corporate Veil Doctrine: the remaining barrier

2.1 UNGPs: the change of perspective

2.1.1 ESG interventions: evolution

The international law that already exists protecting Human Rights and the Environment was created by and for States. For that reason, one could argue that it does not apply to private international entities, like corporations[12].

Thus, some soft law and hard law instruments were created for corporations by States and non-State actors, with the objective of controlling and mitigating the impacts of these entities' activities to the Environment and Human Rights.

Through the years there were three types of ESG interventions in Company Law.

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[12]However, it is important to notice that some scholars have stated the opposite.

See: ALVAREZ, Jose E. — *Are Corporations "Subjects" of International Law?* [online]. Santa Clara J. Int'l L. Vol. 9:1, 2011. [Accessed on November 14, 2021]. PP. 1-9. PP. 3, 8, 9. Available in: <https://digitalcommons.law.scu.edu/scujil/vol9/iss1/1>.

Also see: CLAPHAM, Andrew — *Human Rights Obligations of Non-State Actors. Collected Courses of the Academy of European Law*. Oxford University Press. March, 2, 2006. PP. 1- 648. Chapter 6. ISBN: 9780191707681.

A Reputational Initiative, that aimed at making companies feel pressured to make decisions based on their reputation. Basically, NGO's and International organizations publicized the corporations lack of interest to ESG and the consequences of that. This made a lot of companies change their behavior in order to not lose stakeholders that started to take interest in these types of matters.

NGO's have been a major contribution to the change of paradigm regarding corporations and their role in Human Rights and the Environment protection. However, they could only work as a starting point.

The second initiative was the Legal Compliance one. The legislation and regulation that were created in the EU and the French Law of Vigilance are examples of this.

These initiatives "place mandatory obligations upon the operations of companies but do not affect the legal core construct of the company itself"[13].

Nevertheless, these legislations/regulations create an issue by putting the companies covered by them in disadvantage compared to other companies located in countries that do not apply the same laws.

To be effective and avoid this gap between companies, this initiative requires that the law is equitable. The Human Rights and environmental due diligence expectations set out by the law cannot be the same to all companies. The liability of a company has to be applied according to the size, influence and economic position of the company, like it was envisaged in the RBI.

The last ESG intervention in Company law was the Legal Construct Initiative. This initiative intended to change the directors' duty, which are connected with the idea that the interests of the company are above everything else, including International Human Rights law.

States and Non-State actors had to find other ways to regulate corporations' activities. A great example of this, were the SDGs, adopted in 2015 by all UN Member States. With these goals, States were called to action to poverty, protect the planet and have some other goals/targets.

[13]TURNER, Stephen J. — *Corporate Law, directors' duties and ESG interventions: Analysing pathways towards positive corporate impacts relating to ESG issues* (Document repository) [online]. [Accessed on September 20, 2021]. PP. 1-21. Available in: <http://repository.essex.ac.uk/id/eprint/25881>.

In these goals there is an underlining idea that companies can have a positive impact on society and the Environment. Moreover, there is a connection between corporations' profit and their social responsibility. Companies have the moral duty to invest their profit in social projects that can contribute for some of the goals (there is the assumption that companies have a lot of money).

They can help a country economic growth and development by creating jobs, transferring skills and technology.

The possible justification for companies to have a social obligation can be connected with their reputation. More than ever companies are required to be conscious of the harms they may cause to Human Rights and the Environment and, for that reason, they should prevent it.

Corporations that make public statements regarding the protection of Human Rights and the Environment but fail to do so suffer a negative impact on their reputation.

Another possible reason for corporations to have a social obligation is connected with their profit. Most corporations prefer to explore areas in countries that do not have many laws restricting their activity, like laws prohibiting child labor. The majority of these countries are developing or underdeveloped countries.

If companies profit from these countries, by exploring them, they should give something in return in a positive way, by contributing for their development and refraining from harming some basic Human Rights and individuals in these countries.

Furthermore, the lack of legal protection of Human Rights and the Environment does not mean that corporations should harm the people and the countries they explore.

The SDGs were a good initiative, they had influence on the reputation of the States and corporations that were involved with it. However, being a soft law instrument, States adopted them but did not develop them.

Through the years other international and national attempts were made in order to regulate Companies' activities. One of those attempts was self-regulation by companies, like the UN Global Compact[14].

[14]RUGGIE, John G. — *The Social Construction of the UN Guiding Principles on Business and Human Rights* [online]. Corporate Responsibility Initiative Working Paper No. 67. Cambridge, MA: John F. Kennedy School of Government, Harvard University. June 12, 2017. [Accessed on March 23, 2022]. PP. 9-11 Available in: <https:www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights>.

Self-regulation comes from the company, which means that it is not a hard law instrument because it only binds the company. However, even within the corporation, self-regulation is not effective, as it will be explained further on.

The UN Global Compact is a group of shared values known for being the largest voluntary corporate responsibility initiative in the world, with 16,169 corporate participants in 162 countries[15]. It is based on the previous proposal, in 2000, of the General Secretary of the UN, Kofi Annan[16], and it is composed by 10 principles focusing on four areas: Human Rights, labor, Environment and anticorruption.

The principles derive from previous Human Rights and the Environment declarations, in particular, the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

In practice, the UN Global Compact allows companies to have a standard of behavior and clarifies their obligations regarding the protection and respect of Human Rights and the Environment.

In terms of reputation and image, corporations have advantages by joining the initiative, because a lot of important companies from all over the world are also involved in it. It was a successful initiative, according to Turner, "it has been widely accepted by companies, States and the NGO community"[17].

However, being a self-regulation and a voluntary initiative, companies are not obliged to enter the initiative and there are no legal consequences for those that disrespect the UN Global Compact principles.

The UN Norms on Business and Human Rights[18] were another response to the effects of the corporate operations on Human Rights and the Environment. They were elaborated

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[15]UN Global Compact [online]. [Accessed on December 5, 2021]. Available in: <https://www.unglobalcompact.org/>.

[16]RUGGIE, John G. —*The Social Construction...*, P. 10.

[17]TURNER, Stephen J. — *Human rights and the environment — Legality, Invisibility, Dignity and Geography*. Elgar Encyclopedia of Environmental Law series. Edited by: James R May (Professor of Law, Delaware Law School, Widener University, USA) and Erin Daly (Professor of law, Delaware Law School, Widener University, USA). 2019.P. 379. ISBN: 978-1-78811-145-4.

[18]United Nations — *UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.* 26 August 2003, E/CN.4/Sub.2 adopted on 13 August 2003.

by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003 with the purpose of imposing Human Rights obligations on companies. They relied on the idea that with power comes responsibility, similar to the idea behind the SDGs[19]. Nevertheless, the UN Commission on Human Rights considered the Norms in 2004 but did not approve them[20].

The difference between this initiative and the previous ones is that it implies a legal obligation for companies.

Finally, the most successful initiative was a result of John Ruggie's work – the UNGPs[21]. The principles have as their basis three pillars[22]: the State duty to protect Human Rights, the corporate responsibility to respect human rights respect and the access to remedy.

In the first pillar, "States must protect against Human Rights within their territory and/or jurisdiction by third parties, including business enterprises"[23]. Therefore, all States should prevent, investigate and punish whoever disrespects Human Rights, even if it is a company.

Regarding the second pillar, when States do not have norms that have that protection effect, it is the company's responsibility to improve the respect for Human Rights, or at least to not violate them. It is possible to do this, for example, by implementing a due diligence process[24]; by having a company policy with rules regarding the protection of Human Rights within and outside the company; by implementing consequences and punishments for those in the company that are responsible for the violations mentioned above.

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[19]RUGGIE, John G. —*The Social Construction…,* PP. 8, 9.

[20]RASCHE, Andreas; WADDOCK, Sandra — *The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research* [online]. Business and Human Rights Journal. Vol. 6:2. June, 2021. [Accessed on March 5, 2022]. Available in: <10.1017/bhj.2021.2>. PP. 227- 240.

[21]Idem.

[22]European Parliament, Directorate-General for External Policies of the Union, FARACIK, Beata — *Implementation of the UN guiding principles on business and human rights* [online]. 2017. [Accessed on December 7, 2021]. P. 20. Available in: <https://data.europa.eu/doi/10.2861/29813>.

[23]United Nations, UN Guiding Principles on Business and Human Rights, HR/PUB/11/04 adopted on 16 June 2011. UNGP1 (A. 1) – The State Duty to Protect Human Rights.

[24]RUGGIE, John Gerard; SHERMAN III, John F. — *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale* [online]. European Journal of International Law, Vol. 28:3. August 2017. [Accessed on December 7, 2021]. PP. 921–928. PP. 908, 909. Available in: <https://doi.org/10.1093/ejil/chx047>.

The due diligence[25] process connected to this pillar is very important because it requires companies to implement policies in their supply chain and branches (subsidiaries) but, most importantly, to supervise them in order to make sure that they are complying with what is implemented[26].

This includes[27] assessing actual and potential adverse impacts; integrating the findings of those impact assessments across relevant internal functions and processes; acting upon the findings; and, finally, a company should track the effectiveness of its systems and responses and be prepared to communicate the results to impacted individuals and communities, as well as to other legitimate stakeholders.

The due diligence process, according to Mr. Cassel falls, "within the existing tort of negligence, consistent with widely recognized factors relevant to recognizing a new duty of care: foreseeability, proximity, fairness and public policy"[28].

The third pillar is a little more complex. It requires that the victims have the right to access to justice, as well as an impartial judicial process.

This is only possible if States make sure this happens, so this pillar is connected to the first one[29].

Moreover, for victims to actually have compensation for the damages they suffered, the parent company has to be liable, not only its subsidiary company.

In most cases, the damage occurs in a country where the subsidiary company is, and because of the application of the corporate veil doctrine, this is the only one that is liable in court[30]. However, the parent company being the one that usually controls or influences the subsidiary company's actions and decisions should be liable as well.

After UNGPs were unanimously accepted by the UN assembly, many States turned them into hard law.

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[25]Due Diligence refers to a process, or bundle of processes, which allow companies to "identify, prevent, mitigate and account for" the actual and potential adverse Human Rights' impacts that they may cause or contribute to through their own activities, or throughout their value chains.

[26]RUGGIE, John Gerard; SHERMAN III, John F. — *The Concept of 'Due Diligence'…,* PP. 921–928.

[27]Idem. P. 900.

[28]CASSEL, Douglass — *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence* [online]. 1 Bus. & Hum. Rts. J. 179. 2016. [Accessed on December 10, 2021]. P.188. Available in: <https://scholarship.law.nd.edu/law_faculty_scholarship/1263>.

[29]European Parliament, Directorate-General for External Policies of the Union, FARACIK, Beata — *Implementation…,* P. 20.

[30]See: MARES, Radu – *Liability within corporate groups...*

All the soft law initiatives mentioned above had a major role in explaining and clarifying corporations' duties in terms of Human Rights and the Environment.

Another initiative that is important to mention is the OECD. This is an international organization that tries to achieve some international goals related to several matters, in particular Human Rights and the Environment, with the cooperation of governments, policy makers and citizens[31].

In 1976, the OECD adopted the OECD Guidelines on Multinational Enterprises, which are recommendations by governments to corporations[32].

They are a list of shared values in several themes in relation to corporates activities. The OECD tries to lead companies to contribute to economic, environmental and social progress worldwide. They have an enforcement and conflict mechanism, the NCPs[33]. These focus on problem solving[34]. They have a grievance mechanism that allows complainants to reach an agreement with the defendant – the corporation – through mediation, which is a way for victims to have access to remedies.

When the OECD Guidelines were revised in March 2011 to bring into line with the UNGPs, this initiative innovated because it extended the concept of due diligence to other areas, like the Environment.

Non-State actors have been involved in reporting and publicizing Human Rights and the Environment violations by businesses and in the creation of frameworks of guidelines and standards for businesses.

[31]RUGGIE, John Gerard; NELSON, Tamaryn — *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* [online]. The Brown Journal of World Affairs. Vol. 22:1, 2015. [Accessed on January 12, 2021]. PP. 99–127. PP. 99, 100. Available in: <http://www.jstor.org/stable/24591004>.

[32]BUHMANN, Karin — *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions* [online]. Osgoode Legal Studies Research Paper Series. Vol. 52, 2014. [Accessed on January 12, 2021]. Research paper number 20/2014. P. 10. Available in: <http://digitalcommons.osgoode.yorku.ca/olsrps/52>.

[33]Idem.

[34]RUGGIE, John Gerard; NELSON, Tamaryn — *Human Rights and the OECD Guidelines…*, P. 100.

For a better understanding of NCPs also see: BUHMANN, Karin — *Analyzing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook, Nordic Journal of Human Rights* [online]. Australian Journal. Vol. 36:4, 2018. [Accessed on January 13, 2021]. PP. 390-410. Available in: <10.1080/18918131.2018.1547526>.

They also had a major role with Sustainability indices which are of extreme importance for company's reputations because they operate "by certain stock exchanges to create criteria that companies must comply with if they are to be included in specific listings"[35]. The OECD and the UNGPS do not move liability upwards to companies. Being so, they do not really address the issue (the corporate veil doctrine). On the contrary, they combine both legal and non-legal incentives in order to make companies observe rights.

As mentioned before, even though some instruments do not create binding obligations for companies, they generate a reputational expectation from the corporations involved. This ultimately influences corporation's behavior. They need to fulfill their duties to keep their reputation, the investors, the brand image, etc.

Nevertheless, if binding instruments are not created the issues mentioned above regarding corporate accountability will remain.

Through the States and the implementation of legal instruments it is possible to guarantee that if the non-legal instruments fail the victims of Human Rights and environmental damages can still get access to remedies.

2.2 Company Law and ESG

Although Company law created the corporate veil doctrine it is not against ESG protection. However, ESG is only taken in consideration by corporations when it provides an advantage in the long term or does not affect the company's income.

J. Turner[36] explains that, by analyzing corporation's workers answers, companies use ESG as a mean to reach their interests/goals and not because they are driven by the protection of the Environment or Human Rights.

This conduct by companies is not entirely inappropriate because, ultimately, they avoid causing damages. Nevertheless, the problem is that if respecting and considering ESG, goes against the corporation's commercial purposes, then they are completely ignored.

In conclusion, ESG is being used as a risk management. An example of this is "fossil fuel as coal-fired power stations are on decline"[37], and therefore, it is a long-term risk to invest in such companies.

[35]TURNER, Stephen J. — *Human rights and the environment*…, P. 381.

[36]TURNER, Stephen J. — *Corporate Law, directors' duties...*

[37]Idem. PP. 15.

The option to use ESG as risk management is related to the company's director decisions[38].

The directors of a company "have to make decisions that lead to successful financial outcomes and therefore fulfill the purpose of the capital investment that they have received."[39] – this is their duty. This implies that the director of a company will only take Human Rights and the Environment in consideration if these factors influence the profit, economic and financial advantages of the corporation.

Directors can use the excuse of duty "to act in the best interests of the company"[40] to disrespect ESG and, ultimately, "the subsidiary can be used as vehicle through which commercial operations, that may have high risks for ESG concerns, can be conducted whilst restricting the liability of the parent company and its owner"[41].

There are three features within Corporate Law that are the root for corporations prioritizing their interests over Human Rights and the Environment: the corporate veil doctrine, the director's duty to seek profit for the company and reputation.

The Director's duty to seek profit *prima facie* cannot coexist with the duty of making sure that the corporation protects and respects Human Rights and the Environment, in particular because there are some States that have national laws requiring directors to prioritize the economic interest of the company[42].

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[38]Which result from the company's objectives.

See about this matter: GELTER, Martin; HELLERINGER, Geneviève — *Lift Not the Painted Veil! To Whom Are Directors' Duties Really Owed?* [online]. FLASH, Fordham Law Archive of Scholarship & History. U. Ill. L. Rev. 1069 (2015). [Accessed on February 8, 2022]. P. 1075. Available in: <https://ir.lawnet.fordham.edu/faculty_scholarship/963>.

[39]TURNER, Stephen J. — *Human rights and the environment…*, P. 378.

[40]TURNER, Stephen J. — *Corporate Law, directors' duties…,* P. 2.

[41]Idem.

[42]See: BAULER, Tom — *Corporate accountability* [online]. Ejolt, Mapping Environmental Justice. Edited by: Hali Healy, Sylvia Lorek and Beatriz Rodríguez-Labajos. [Accessed on January 13, 2022]. Available in: <http://www.ejolt.org/2013/05/corporate-accountability/>.

This article explains that a corporation isn't only accountable for its profits but also for any other consequences (positive or negative) that might result from its economic activity.

And also, to understand how directors' duties work across States, see: GERNER-BEUERLE, Carsten; PAECH, Philipp; SCHUSTER, Edmund-Philipp — *Study on directors' duties and liability* [online]. SSRN. LSE Enterprise. European Commission. July 23, 2021. [Accessed on January 2, 2022]. PP. 1-396. Available in: <https://ssrn.com/abstract=3886382>.

Reputation because a company's director can prioritize Human Rights and the Environment if it serves the shareholders, consumers and investors interests.
According to the interviewees mentioned in Stephen J. Turner's study[43], stakeholders' opinions are important, and for that reason in certain industries they especially pay attention to environmental and Human Rights issues.
Through risk management ESG can be one of the factors that influence corporation's decisions in the sense that the corporation will only include ESG in its strategy if it is gaining a good reputation by doing so.
This means that ESG is only disrespected because there isn't a permanent reason for companies to prioritize it.
There is also no judicial or legal consistency that proves that corporations will be negatively affected if they do not take into consideration Human Rights and environmental matters.
And since it is very difficult to change Company law and the current companies' structures, it is necessary to take a different approach and try, instead, to incentivize or to make companies include EGS in their business strategy.
It is possible to do this with the Draft Directive on Corporate Sustainability due diligence, published on the 23rd of February 2022, if it is applied to all EU companies. This would, eventually, influence multinationals all over the world to follow the same steps in order to maintain their reputation and economic value.

2.3 Legal personality and capacity: what give corporations different entities

The reason for the corporate veil doctrine to be able to support the concept of legal separate entities is because each company has legal personality and capacity.
For a company to be able to exercise rights and obligations it needs this legal personality and capacity, but obviously in different terms than the individuals' ones.

[43]TURNER, Stephen J. — *Corporate Law, directors' duties…*

Legal personality[44], in Portugal starts since birth. However, for corporations, which are created by individuals, they usually start to have legal personality when they are registered[45]. Legal capacity[46] also exists but it is restricted to the purpose of their creation. In other words, every company is originally created with a purpose, which limits their legal capacity. This can be interpreted in a corporate group as a role.

The problem with the separate legal entity principle/corporate veil doctrine is that, even though, in practice, the parent company might have the control[47] over the subsidiary's decisions and, consequently, their actions, the law sees both companies as separate which means that the parent company won't be liable for any of the harms that the subsidiary company might cause.

2.4 Barriers/ issues

2.4.1 Corporate Groups

Corporate groups can be created by contracts or by shares ownership[48], and they can assume a lot of forms[49]: the "Pyramidal form of organization" (U-form). In this one, although the functions of each company are distributed, they all work as one under the control of one company (the parent company); in the "Multidivisional form ('M-form')", the companies coordinate their activities in order to create a product. In this form, the corporations are ruled by targets that they need to achieve and those targets are implemented by one main company, the parent company; the "Free standing firms in

[44]Refers to the possibility of an individual being subjected to legal rights and obligations. Portuguese Civil Code, Decreto-lei nº 47344, November 25, 1966, Diário do Governo n.º 274/1966, Serie I de 1966-11-25. Lisbon: Ministry of Justice. Article 66º(1).

[45]Idem, Article 160º.

[46]Legal capacity can be divided in the capacity to have rights and completely take advantage of them and the capacity to use those rights. For example, to be able to go to court and bring a claim against somebody.

[47]The control exercised by the main company can be voting control, managerial control or coercive control.

[48]See: HARPER HO, Virginia E. — *Theories of Corporate Groups: Corporate Identity Reconceived* [online]. Seton Hall Law Review, Vol. 42, August 25, 2011. Last revised in August 29, 2012. [Accessed on January 13, 2021]. PP. 1-74 Available in: <https://ssrn.com/abstract=1915745>.

[49]MARES, Radu – *Liability within corporate groups…,* P.7.

global value chains”[50] (they are “GVCs”)[51] are not exactly a corporate form but a way for companies to organize their business in order to internationalize their activity. This is the result of increasing the division of production, trade and investments in several different countries.

With globalization, GVC’s are increasingly common. This has created another issue when it comes to the victims getting access to remedies, because in value chains it is difficult to identify the liable company[52] or the company that controlled the operations leading to the damages.

According to Radu Mares, the parent company can exercise control over other company or companies in three possible ways[53]: voting control, managerial control and coercive control.

In the first one the parent company has ownership over the voting rights in the subsidiary. This implies that all the major decisions in the subsidiary company belong to the parent company.

In the managerial control the management of the subsidiary company belongs to the parent company, which includes the activities of setting the strategy of an organization and coordination of the its employees’ efforts to accomplish its objectives through the application of available resources, such as financial, natural, technological, and human resources.

Lastly, with the coercive control the subsidiary’s managers and employees respond to expectations of the parent company.

Nevertheless, according to the law the subsidiary company is a completely different separate legal entity from its parent company.

2.4.2 The disconnection between shareholders and corporation: the creation of legal barriers

[50]United Nations — *Frequently asked question about the guiding principles on business and human rights*. No. E.14.XIV.6, ISBN 978-92-1-154207-3 e-ISBN 978-92-1-056839-5, 2014. P. 45.

[51]ANTRÀS, Pol — *Conceptual Aspects of Global Value Chains* [online]. *The World Bank Economic Review*. Vol. 34:3, October 14, 2020. [Accessed on March 13, 2022]. P. 551–574. Available in: <https://doi.org/10.1093/wber/lhaa006>.

[52]See in regards to the corporate group delimitation: HARPER HO, Virginia E. — *Theories of Corporate Groups...*

[53]MARES, Radu – *Liability within corporate groups…*

The disconnection created, by corporate veil doctrine, between shareholders and corporation have international consequences. For example, if a parent company decides to have a subsidiary company in another country, although the company has some type of control over the actions and decisions of the subsidiary, to the law they are considered separate legal entities. Being so, normally the parent company is not legally liable for any harm against Human Rights and the Environment that the subsidiary company might cause – this is the basis of the corporate veil doctrine.

Economically speaking this is very efficient and extremely useful in case the parent company has many branches.

As a shareholder this is extremely attractive because it means that the parent company's assets will not be jeopardize even if the subsidiary company goes to bankruptcy or has to pay a large amount in compensation for damage.

Nevertheless, the legal separation between the parent company and its subsidiary company is not ESG friendly and prevents victims to have access to remedy[54].

To have access to justice a victim has to overcome several challenges, in particular, legal restriction resulting from corporate structures, private international law hurdles (jurisdiction and applicable law), procedural issues like financial issues (bringing claims to the Home State requires a lot of money), lack of access to business information and the problem of burden of proof, availability of funding (legal aid; etc.), availability of class actions, experienced lawyers and experts, etc.

Jurisdiction is one of these challenges because a claim against a parent company can be brought to the Host States or the Home State[55] , which means that the victims' access to justice and remedies depends on the country (and its legislation) where the parent company is located.

Applicable law can be another issue because when a case involves damages of people from more than one State and the damages occurred in a different State it is necessary to determine which law will be applied. With the determination of the applicable law there

[54]See: MARX, Axel [et al.] — *Access to legal remedies for victims of corporate human rights abuses in third countries.* European Parliament's online database, 'Think tank'. February 01, 2019. PP. 12, 13, 14. ISBN: 978-92-846-4642-5 (pdf).

[55]To bring proceedings to this country, implies having the burden of proof which forces victims to show the nexus between the subsidiary company's misconduct and the parent companies influence.

Most of the times it is impossible for the claimants to prove this nexus, in particular, because they do not possess the means to do so.

might be other issues involved, like the compatibility between the laws - from the country where the claims were brought to and the law from the Host State (where, in most cases, is the place where the situation that led to Court proceedings occurred).

There is even a safety barrier because the victims bringing the proceedings to the Home State, may be threatened in the Host State not to do so[56].

Host States usually need the companies' investment as a motor for their national economy. Consequently, there is a legal void concerning the victims and the protection of Human Rights environmental abuses[57].

A report about the barriers to access to justice[58] shows that the victims of corporate activities have been increasingly bringing their claims to the parent company's country (usually a developed country) where there is a bigger chance to succeed.

This is all regularized by the environmental and Human Rights due diligence Directive. However, for it to be effective and so the law is harmonized in all countries, the Directive needs to be applied to every company independently of their size.

2.4.3 Limited Liability: legitimizing risk-shifting from companies to victims

Another element that prevents parent company's accountability for their subsidiaries actions is limited liability.

[56]A report authored by Coalition for Human Rights in Development, from May 2019, shows the number of attacks to human rights defenders in several parts of the world and in different sectors (Defenders in Development Campaign — *Uncalculated Risks — Threats and attacks against human rights defenders and the role of development financiers* [online]. Coalition for Human Rights in Development. May, 2019. [Accessed on May 17, 2022]. P. 12. Available in: <https://rightsindevelopment.org/wp-content/uploads/2019/06/Uncalculated-Risks-Full-report-cmpr-h.pdf>).

[57]Most States do not follow the UNGPs because to restrict the corporation's actions can make countries loose the benefits that come from these companies' activities.

See: Corporate Human Rights Benchmark Limited (CHRB Ltd) and its partners work — *2019 Key Findings: Across Sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing* [online]. Published in 2019. [Accessed on May 17, 2022]. Available in: <https://www.corporatebenchmark.org/>.

[58]MUCHLINSKI, Peter — *Human Rights in Business…,* P. 3.

When applied to companies, this theory implies that it is the subsidiary company that has to pay compensation to the victims and the shareholders are only affected to the amount of their shares[59].

By having limited liability "the law legitimizes risk-shifting from companies to victims"[60]. Therefore, the legal system allows companies not to have any accountability which creates an absence of remedies for victims.

So, if the assets of the subsidiary company and the shares are not enough to compensate for the damage caused by corporate activity, it means that the victims of Human Rights and environmental violations will not be compensated.

Both the European Directive and the theory proposed at the end of the third part of this text, if implemented allow victims to have a bigger chance to have access to remedies, even if limited liability is applied, because creates liability for the parent company.

2.5 Piercing of the Corporate Veil

2.5.1 Agency

In some countries, victims' resort to tort law[61] to bring claims against companies.

By abusing Human Rights and the Environment, companies cause damages to those affected by these wrongs.

This could lead to criminal or civil liability. However, with the corporate veil doctrine a lot of times it does not happen.

Company law wanted to create an exception for this doctrine[62] so claimants could have the possibility of accessing remedies.

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[59]THOMPSON, Robert B. — *Piercing the Corporate Veil: An Empirical Study* [online]. 76 Cornell L. Rev. 1036 (1991). P. 1039. [Accessed on February 16, 2022]. Available in: <https://scholarship.law.cornell.edu/clr/vol76/iss5/2>. ISSN: 0010-884.

[60]MARES, Radu – *Liability within corporate groups…,* P. 5.

[61]Tort law is one branch of common law that deals with civils wrongs (WAGNER, Gerhard — *Tort Law and Liability Insurance* [online]. Geneva Papers on Risk and Insurance - Issues Practice 31. 2006. [Accessed on May 13, 2022]. PP.277–292. Available in: <https://doi.org/10.1057/palgrave.gpp.2510074>).

[62]MARES, Radu – *Liability within corporate groups...*

Also see: Corporate Human Rights Benchmark Limited (CHRB Ltd) and its partners work — *Corporate Human Rights Benchmark…*

This report shows that in a 2019 corporate human rights benchmark assessment of 200 of the largest companies in the world, nearly half (49%) of companies scoring zero against every human rights' due diligence indicator. This lack of care from corporations for human rights is one of the reasons for the creation of piercing the veil theories.

The piercing of the corporate veil implies that there is an identification of the shareholder with its company, because to order the company to compensate the victim, the Court needs to get access to the shares of the company[63].

Claimants have two possibilities to pierce the corporate veil[64]: either they state that the subsidiary company acts as an agent for the parent company or they allege that the parent company breached its duty of care. The "(…) agency requires a consensual relationship in which one person, to a certain degree, acts as a representative of or on behalf of another person"[65].

In a principal-agent relationship the subsidiary company acts on behalf of the parent company. However, the parent company holds control over the actions and decisions of the subsidiary company[66].

The agency theory allows the claimants to argue in Court that damages were incurred by the subsidiaries because the parent company was controlling them, which means that, in fact, who is at fault is the principal corporation and not the subsidiary company.

This theory isn't very successful because for it to be applied, the plaintiff has to demonstrate that a corporation was an "alter ego" or a "mere instrument", as evidence by complete control and domination[67] of a shareholder used to perpetuate a fraud, wrong or injustice. And this can be complicated for two reasons: what can be considered complete control and domination? The theory doesn't answer. And how can this be proved? In practice, it is very difficult to the plaintiff to bring any type of proof to court.

2.5.2 Duty of Care

[63]This is the justification for the piercing of the veil to be an exception and extreme measure.

[64]See: MACEY, Jonathan; MITTS, Joshua — *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil* [online]. Columbia Law School, Scholarship Archive. 100 CORNELL L. REV. 99, 2014. [Accessed on June 2, 2022]. PP. 100-154. Available in: <https://scholarship.law.columbia.edu/faculty_scholarship/2784>.

[65]SCHAEFER, Marcela E. — *Should a Parent Company be Liable for the Misdeeds of Its Subsidiary? Agency Theories Under the Foreign Corrupt Practices Act* [online]. New York University Law Review. Vol. 94:6, December, 2019. [Accessed on May 1, 2021]. PP. 1655-1686. P. 1664. Available in: <https://www.nyulawreview.org/wp-content/uploads/2019/12/NYULawReview-94-6-Schaefer.pdf>.

[66]Idem.

[67]Control needs to exist in order to apply the theory. (SCHAEFER, Marcela E. — *Should a Parent Company…,* P. 1666).

The duty of care is considered by some legal scholars as another piercing the veil doctrine theory, and is seen "as mandatory task to apply the amount of care that people of ordinary prudence would use in the decision-making process under similar circumstances"[68].

According to the duty of care, companies have the responsibility to make sure that Human Rights and the Environment are being respected by parent companies and their subsidiaries[69]. If it is not the case, they have to guarantee that victims have access to remedy.

It is the existence of a direct link between parent companies and subsidiary companies that justifies the duty of the first corporation.

The Okpabi[70] V Shell and the Vedanta cases are case-laws examples of this theory's application. They have some common features[71]: they are private negligence claims based on domestic Tort law; they focus on an English-domiciled parent company and its acts and omissions in relation to a foreign subsidiary company's operations; the breach of the duty of care establishes a territorial nexus with England; the cases emerged as a response to weak laws in Host States (low safety, environmental and health standard, corrupt government, weak judiciary system, lack of legal and technical expertise, etc); there is always a question of jurisdiction in these cases (Home State has jurisdiction or is it the Host State?).

[68]BAISCH, Rainer; WEBER, Rolf H. — *Liability of Parent…,* P. 685.

[69]PALOMBO, Dalia — *The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals* [online]. Business and Human Rights Journal, Cambridge University Press, Vol. 4:2. July 2019. [Accessed on June 5, 2022]. PP. 265-286. Available in: <https://doi.org/10.1017/bhj.2019.15>.

[70]Nigerian citizens, from two communities, brought proceedings to the U.K. against Shell, the parent company (RDS) and its Nigerian subsidiary (SPDC), because of an oil spill resulting in environmental, health and livelihood damages. (Okpabi and others (Appellants) v. Royal Dutch Shell Plc and other (Respondents), The Supreme Court, United Kingdom, (Judgement given on 12 February 2021). Paragraph 4, 5.)

[71]CASSEL, Douglass — *Outlining the Case…,* P. 179.

As Mares[72] explained, the problem with tort law[73] is that the claimant has the burden of proof[74]. So, the part that accuses the corporation of Human Rights and environmental harms has to prove the nexus between the action or omission of the company and the damages, demonstrating that "the damage would not have occurred 'but for' the defendant's breach of duty, then the breach of duty is a cause of the damage"[75].

The issue here is that most claimants don't have the resources to get this proof. This can be explained by the fact that most of them are victims of the corporation they are accusing and that is one of the reasons for them to not have an easy access to documents, contracts, written statements made by the company, etc. because they are usually in the possession of the corporation itself.

Moreover, there might be necessary to hire some experts, and for that the claimants need to have some funds.

The Court could be asked to force defendants to allow the claimants to get access to some documents, for example, but it is common for the Court to not accept this request[76]. And even when if it does, it is a long process, and during that period the corporation can destroy, hide or even distort the content of those documents.

There is a duty of care of a parent company because, although a parent company and a subsidiary company are two legal separate entities, the actions of the subsidiary company result from some kind of manipulation and domination (direct or indirect control) by the parent company[77].

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[72]MARES, Radu – *Liability within corporate groups…*

[73]MARKENISIS, Basil S. — *Tort Law* [online]. Encyclopedia Britannica. Added to new online database (26 July 1999). Last updated on 04 June, 2008. [Accessed on May 10 2021]. Available in: <https://www.britannica.com/topic/tort>.

[74]MUCHLINSKI, Peter — *Human Rights in Business…,* P.125.

[75]HOSSAIN, Md Sazzad. — *An analysis of the supply chain principle for the UK's overseas companies: The practice of tort law under international corporate law* [online]. International Journal of Law and Management. Vol. 60:2, 2018. [Accessed on June 5, 2022]. PP. 470-477. P. 471 Available in: <https://doi.org/10.1108/IJLMA-12-2016-0183>. ISSN: 1754-243X.

[76]MUCHLINSKI, Peter — *Human Rights in Business…,* P.126.

[77]Idem. P. 125.

There are some similarities with the duty of care and the second pillar of the UNGPs - the corporate responsibility to respect Human Rights[78].

To fulfill this, corporations have to have a due diligence process in place.

The steps taken in this process can be compared to what underlies the duty of care.

The Vedanta case[79] was of extreme importance for the concept of duty of care[80] because it clarified that the parent company does not need to have a direct control over the subsidiary company in order to have that duty. Contrary to what might have been though before about the concept of duty of care, the Court expressed that there isn't just one criterion[81] to determine if the parent company had any type of control, supervision or influence in the subsidiary company.

After this case-law, in order to determine if a parent company has a duty of care it is necessary to know if the company: has an active involvement in/management of subsidiary's business; has issued group-wide policies and their implementation at subsidiary's level through training, supervision and enforcement; provides a defective advice and/or promulgating defective group-wide safety/environmental policies; omits in supervising and controlling subsidiaries contrary to its public commitments.

The agency theory and the duty of care, although different piercing the veil theories, are important in the sense that they allow the victims to bring claims to the Home State.

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[78]BRIGHT, Claire — *Business, Human Rights and Sustainability: The Corporate Responsibility to Respect* [online]. October 2, 2020. [Accessed on October 10, 2020]. Available in: <file:///Users/Alice/Downloads/Powerpoint%20slides.%20The%20Corporate%20Responsibilty%20to%20Respect.%20Moodle%20(2).pdf>.

[79]Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Repondents), The Supreme Court, England, Lord Briggs (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agree)10 April, 2019 judgment.

See point 3.3.

[80]ROORDA, Lucas; LEADER, Daniel — *Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court* [online]. Cambridge University Press. Vol. 6:2, 2021. [Accessed on June 25, 2022]. PP. 369-376. PP. 372. Available in: <https://doi.org/10.1017/bhj.2021.26>.

[81]Norton Rose Fulbright — *UK Supreme Court clarifies issues on parent company liability in Lungowe Vedanta* [online]. April, 2019. [Accessed on June 16, 2022]. Available in: <https://www.nortonrosefulbright.com/en/knowledge/publications/70fc8211/uk-supreme-court-clarifies-issues-on-parent-company-liability-in-lungowe-v-vedanta>.

The Vedanta and Okpabi[82] cases clarified the steps that the Court should take in order to determine in the parent company has a duty of care.
Let us draw attention to some clarifications that the Supreme Court gave, in the Vedanta case, regarding parent company's liability: when determining if a parent company intervened in its subsidiary operations, we need to have in mind that there are several levels of involvement and control; the management of the subsidiary company or the implementation of group-wide policies can be perceived as enough elements to justify the parent company's liability; a parent company can be liable by action or by omission. For example, in the case of group-wide policies, if the parent company does not monitor whether the subsidiary company implements/dos not implement these policies and if that lack of action ultimately leads to the damages, that means that the damages are caused because the parent company didn't act as it should.
In the cases mentioned before show how "direct liability considers more broadly the extent to which the parent company takes over, intervenes in, controls, supervises, or advises the management of the relevant operations"[83] while the agency "requires that the parent company dominate the relevant activities"[84].
It is more difficult for claimants to prove that a parent company exercises control over its subsidiaries main activities because most companies do not have a direct control over these operations. Instead, the main corporation exercises its control through other methods like group-wide policies.
In conclusion, duty of care is a standard for businesses, a way of conduct but not a goal. It is possible to claim negligence against a company because the duty of care implies the application of a due diligence process by the company throughout its supply chain, however, there are some issues with the application of the duty of care. In particular, it

[82]The Okpabi case also has shown that the burden of proof shouldn't be on the claimants but on the defendants as well, because as the Supreme Court has made it clear "courts cannot place unrealistic evidential burdens on claimants in parent company liability cases prior to trial" (ROORDA, Lucas; LEADER, Daniel — *Okpabi v Shell and Four Nigerian…*, P. 374).

[83]CHAMBERS, Rachel — *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court* [online]. Penn Law, Legal Scholarship Repository. 42 U. Pa. J. Int'l L. 519, 2021. [Accessed on January 15, 2022]. P. 36. Available in: <https://scholarship.law.upenn.edu/jil/vol42/iss3/1>. ISSN: 1086-7872.

[84]Idem.

allows the parent companies not to be liable if they prove that they did everything possible to avoid the damage.

It also demands that victims prove that the parent company exercised control over the subsidiary company and "they are not in a position to prove the existence of such control"[85].

Another issue with the duty of care, is that it is applied case by case. Therefore, it is not a general rule that can be used by victims in all cases regarding corporate liability.

3. Case-Law: the impact of the refusal to change

As it was explained in the previous section, the application of the corporate veil doctrine goes beyond companies. It is a practice of company law that has grown to the point of acceptance in Court, as a justification for environmental and Human Rights abuses by the parent company in its value chain.

Having a subsidiary company has many advantages for parent companies but not for the victims of these abuses, because it blocks them from getting access to justice.

The implications of the application of this doctrine can no longer be ignored and it is necessary to implement a regulation that is effectively and uniformly applied in all countries to all the companies.

Piercing the veil doctrines aren't enough, in particular, when they are applied in a case by case situations.

In order to understand which mechanisms should be used to block the effects of the application of the corporate veil doctrine it is necessary to understand the role that Courts have had in the environmental and Human Rights abuses by companies' cases.

Along with soft law and hard law mechanisms create by ONGs, States and other entities, Courts have had a major role in developing theories that regulate corporate activities, as it will be explained in this chapter.

3.1 Adams v Cape Industries plc.

In some cases, the parent company uses its subsidiaries as a vessel to escape liability.

This wouldn't be an issue if the victims of Human Rights and environmental damages had access to remedy.

[85]MUCHLINSKI, Peter — *Human Rights in Business...*, P. 122.

However, as some case-laws have shown, the subsidiary company sometimes doesn’t have enough funds to compensate victims or to repair the damages that were inflicted and, consequently, they cannot achieve real justice even if they win the case.
In the Adams v Cape Industries plc. case, it was clear that the parent company took advantage of its subsidiary company to avoid liability and the Court allowed it by applying the corporate veil doctrine.

3.1.1 Description of the case

Cape Industries plc. is a company registered in England (the parent company) that was engaged in the mining asbestos in South Africa.
Asbestos are a type of minerals that are well-known to cause health issues[86] (appointed to be one of the possible causes for cancer)[87] for those who work with it.
Since 1953, the British corporation had a subsidiary company in the USA, in Illinois, called NAAC This corporation had the purpose of marketing the British company’s products.
In 1978 Cape closed NAAC, and other subsidiaries were formed in the USA.
In 1979, Cape sold its asbestos mining and marketing business terminating any possible relation with the American company.
Proceedings were brought in the USA against Cape, in April 1978, by factory workers that became ill after inhaling asbestos dust. They argued that the Court had jurisdiction because the parent company had a subsidiary company located in the USA[88].
Nevertheless, they did not succeed. The Court of Appeal stated that because Cape didn’t have a registered and fixed place (company) in the USA and the representative of the British corporation didn’t “carried on business there for more than a minimal time”[89] the

[86] TWEEDALE, Geoffrey; FLYNN, Laurie — *Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004* [online]. Cambridge University Press. Vol. 8:2, 2015. [Accessed on June 26, 2022]. PP. 268-296. P. 272. Available in: <http://www.jstor.org/stable/23700978>.

[87] NIH: National Cancer Institute — *Asbestos* [online]. Last updated on February 4, 2022. [Accessed on May 16, 2022]. Available in: <https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos>.

[88] Adams and Others v. Cape Industries PLC. and another: Appeal. Court of Appeal, United Kingdom, England (24 October 1989). P. 458, Paragraph B.

[89] LawTeacher — *Adams v Cape Industries* [online]. November 2013. [Accessed 23 November 2021]. Available in: <https://www.lawteacher.net/free-law-essays/business-law/adams-v-cape.php?vref=1>.

Court couldn’t accept jurisdiction and Cape should be considered a legal separate entity[90] from the American company.

The claimants alleged that both companies were a single economic unit. However, the Court stated that it was “not entitled to lift the corporate veil merely because the corporate structure had been used to avoid liability”[91].

According to the claimants the corporate form of the companies was a façade and the subsidiary company was an agent[92] of the parent company.

Nevertheless, none of these arguments were accepted by the Court.

3.1.2 Corporate groups: diverting rights and liability

Multinationals have the capacity to have such a structure that they can avoid liability for their subsidiaries’ actions.

This is possible, in corporate groups, “by interposing a separate legal entity between the victims and the ultimate controller of the group, be it a parent company or its controlling shareholders”[93]. Consequently, corporate structures are used for company’s advantage, “diverting rights and liabilities”[94].

A subsidiary company is created by the parent company to work as a liability shield. This is possible because these corporations are not located in the same country and consequently they are not subjected to the same jurisdiction. Understandably, this has a negative impact on the victims of Human Rights and environmental damages because it prevents the access to remedies[95].

This was what happened in the Adams v Cape Industries plc.

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[90]The Corporate Veil Doctrine was applied.

[91]MUCHLINSKI, Peter — *Limited liability and multinational enterprises: a case for reform?* [online]. Cambridge Journal of Economics. Oxford University Press. Vol. 34:5, September 2010. [Accessed on June 26, 2022]. Pages 915–928. P. 921. Available in: <doi:10.1093/cje/beq023>.

[92]Regarding the agency theory, read point 2.5.1.

[93]MUCHLINSKI, Peter — *Limited liability…,* P. 916.

[94]LawTeacher — *Adams v Cape Industries...*

Also read: SUPERVILLE, Malcolm — *The Court's shift in attitude toward piercing the corporate veil* [online]. University of the West Indies (Saint Augustine), June 11 2011. [Accessed on January 10, 2022]. PP. 1-8. Available in: <https://ssrn.com/abstract=3864658>.

[95]Even if victims suffer severe damages, like in this case, they might not succeed (IMANALIN, Ali — *Rethinking Limited Liability* [online]. 7 Cambridge Student L. Rev. 89, 99 (2011). [Accessed on January 10, 2022]. P. 90. Available in: <https://www.gratanet.com/up_files/index.pdf>.

Moreover, because the damages occurred in the subsidiary company's country it could be argued in Court that because of *forum non conveniens*[96] the Host State (USA) would be more suitable to hear the case than the Home State (UK).

In International Law cases – involving more than one State – one of the criteria used to determine which Court should have jurisdiction is the idea that it should be the one in the State that is more closely connected with the case.

"Closely connected" can mean: the residency of the parts, or where the contract was celebrated, or where the obligation should be fulfilled, or the place determined by the parts, or the place where the damage occurred, etc.

The Adams v Cape Industries plc. case-law showed that it is necessary to have an undoubtable proof that there is a connection between companies in order to legally consider both companies to be a part of the same group.

3.1.3 Piercing the Corporate Veil: the Court's discretionary power

Piercing of the corporate veil[97] is an extreme an exceptional measure.

There are some case-laws and doctrine that give some possible reasons for it - fraud, tax issues, employment issues, etc. - still there is no consensus.

Consequently, lifting the corporate veil is left to the discretionary power of the Court.

It would not be possible, for any part in the Adams v Cape plc., to predict the Court's decision.

This leads to legal uncertainty and has negative effects not only for the victims but for corporations as well. This also raises questions of objective justice.

Moreover, applying the corporate veil doctrine leads parent companies to conduct their business recklessly because they feel less pressure to act according to the law, knowing that they are not liable for their subsidiaries acts.

3.2 Vedanta Resources Plc. and Another v Lungowe and Others

3.2.1 Description of the case

[96]MUCHLINSKI, Peter — *Limited liability…*, P. 921.

[97]MARES, Radu – *Liability within corporate groups…*

In 2015 Zambian claimants started proceedings in the UK[98] against an English parent company, Vedanta, and its subsidiary company, KMC, for environmental, health and personal damages[99].

They accused KMC of constantly "discharging toxic materials in their watercourses over the course of 15 years"[100], which were used for farming and in their daily lives.

Consequently, the citizens faced health, economic and environmental problems.

KMC operates and owns NChanga Cooper Mine, and in turn KMC is owned by Vedanta and the Zambian government.

To justify the existence of Vedanta's duty of care, the claimants used group-wide polices "and guidelines adopted by the parent company regarding operations and management at the mining sites"[101].

According to the Court, to understand if there is a duty of care this argument is not enough, instead "everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary"[102].

KMC argued that the claimants used the duty of care as an excuse to reach KMC, who they had no relation with. This also meant that the Court had no jurisdiction.

Vedanta also claimed that they did not own a duty of care to the subsidiary company because they were completely different and separate legal entities, which meant that the parent company had no control over the acts of its subsidiary company.

3.2.2 Burden of proof

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[98]In the Technology and Construction High Court in England and Wales (TCC)

[99]See: VAN HO, Tara — *Vedanta Resources Plc and Another v. Lungowe and Others*. American Journal of International Law, 114 (1). University of Essex, 2020. [Accessed on January 17, 2022] PP. 110-116. Available in: <https://doi.org/10.1017/ajil.2019.77>. ISSN 0002-9300.

[100]OJEDA, Elvis — *Transnational Corporate Liability Litigation and Access to Environmental Justice: The Vendanta v Lungowe Case* [online]. LSE LAW REVIEW. Vol. 6:3, 2021. [Accessed on January 18, 2022]. PP. 223-248. P. 228. Available in: <https://lawreview.lse.ac.uk/articles/abstract/166/>.

[101]VAN HO, Tara — *Vedanta Resources Plc*...

[102]Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Repondents), The Supreme Court, England, Lord Briggs (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agree)10 April, 2019 judgment. Paragraph 49.

The Vedanta case allows to understand that, as it was mentioned above[103], the major issue that claimants and victims face in Human Rights and environmental harms cases is the burden of proof.

The burden of proof means that they claimants have to demonstrate "the damage would not have occurred "but for" the defendant's breach of duty, then the breach of duty is a cause of the damage"[104]. Most of the times, claimants do not possess the resources, knowledge or funds to get this proof.

Instead, it is necessary to have the burden of proof on the defendants and apply a mechanism[105] to the parent companies that would create a presumption of liability.

3.2.3 Jurisdiction and substantial justice

The civil procedure rules in England and Wales[106] dictate that the Court only has jurisdiction if it is the *forum conveniens*[107].

In the Vedanta case, in particular, two questions were raised in order to determine which Court had jurisdiction: the risk of having more than one contradictory judgement and process and the risk of not having substantial justice[108].

With regard to the first question, the trial judge explained that Zambia would be the right place for the Vedanta case, because it was where the events that led to the proceedings occurred and it was the place where KMC was located.

However, the second question had to be considered jointly with the first one. And when the substantial justice issue was analyzed the trial Court determined that if the claimants brought proceedings to Zambia Courts they would be denied justice[109].

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[103]See point 3.1.

[104]HOSSAIN, Md Sazzad. — *An analysis of the supply chain*..., P. 471.

[105]See point 4.

[106] Location of the Court's that where the Vedanta case-law as decided.

[107]In cases involving more than one State, the "forum conveniens" is the proper place to bring the case.

[108]VAN HO, Tara — *Vedanta Resources Plc…,* PP. 114, 115.

[109]The negation of justice blocks victims from having access to remedies.

Moreover, Host States might not be the suitable place to bring proceedings against parent companies and their Subsidiaries if they are not equipped with the necessary legal expertise.

The reasoning regarding access to justice, in this judgement, was connected to its narrow definition The Court strictly considered the legal process of the case and its implications.

For the Vedanta case the Supreme Court analyzed two cases[110], in order to determine if the Courts of the Host State could have jurisdiction, and considered several factors[111].
The first factor was the financial resources of the companies. The Court had to consider if the subsidiary company had, by itself, enough financial resources to satisfy the claims. The Court realized that the it did not, and that would prevent victims to access remedies.
The second factor was the legal expertise. The Supreme Court, by consulting previous cases in Zambia, concluded that Zambia did not possess the suitable legal experts and knowledge for the case.
The third one was the enforcement of the decision. According to the Court, the Host State had an ineffective enforcement system which meant that there wouldn't have any practical consequence for the companies.
The fourth and final factor was the volatile situation of the claimants.
All of these points, would lead to a poor judgment or the Court would reject the claims. Consequently, all of these facts justified the agreement of the Supreme Court with the High Court and the Court of Appeal's decision, determining that Vedanta had a "high degree of control"[112] of KMC and allowed the case to proceed in UK courts.
Lord Biggs determined that the parent company, in the Vedanta case, owned a duty of care because the relationship between this corporation and KMC[113] "provided an opportunity for the parent company to exercise oversight, and the parent company's actions created the duty of care"[114].

3.2.4 The Supreme Court's decision: the impact of the Vedanta case

It is essential, in some cases, to bring the claims to the Home State because some Host States might not possess the knowledge, funds and legal experts to solve corporate liability cases leading to unjust and incoherent judgments.
In the Vedanta case-law, the Supreme Court stated that "even if the court concludes (…) that a foreign jurisdiction is the proper place in which the case should be tried, the court

[110]The Nyasulu and the Shamilimo v Nithrogen Chemicals of Zambia Ltd cases.

[111]VARVASTIAN, Samvel; KALUNGA, Felicity — *Transnational corporate liability for environmental damage and climate change: reassessing access to justice after Vedanta v. Lungowe* [online]. Transnational Environmental Law. Cambridge University Press. Vol. 9: 2, July 2020. [Accessed on March 4, 2022]. PP. 323-345. PP. 231, 232. Available in: <https://doi.org/10.1017/S2047102520000138>.

[112]OJEDA, Elvis — *Transnational Corporate...*, P. 229.

[113]VAN HO, Tara — *Vedanta Resources Plc…,* P. 115.

[114]Idem. PP. 114, 115.

may nonetheless permit (…) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction"[115]. Ultimately, substantial justice overlaps the rules of jurisdiction which is a justification for victims to bring claims to the Home State. Besides, in this judgment Lord Briggs clarified a lot of doubts of these types of cases, in particular, he warned companies that if they benefit from making a public statement (a commitment) regarding the advocacy of Human Rights and the Environment protection they have the social duty of fulfilling that statement.

The Vedanta case-law clarified that in order to determine if a parent company has a duty of care it is necessary to know if the corporation has an active involvement in/management of Subsidiary's business; if it has group-wide policies and implements them at the subsidiary's level through training, supervision and enforcement; if it provides a defective advice and/or promulgates defective group-wide safety/environmental policies and if it omits to supervise and control subsidiaries contrary to its public commitments.

The Supreme Court's decision "expands the grounds that limit claimant's capacity to obtain substantial justice, including the lack of technical expertise in addition to the lack of funding"[116]. The decision allowed to establish an opportunity for foreign claimants to start proceedings in English Courts against parent companies[117], domiciled in the UK.

3.3 Four Nigerian Farmers and Milieudefensie v. Shell

3.3.1 Description of the case

On 29 January 2021, the Court of Appeal of the Hague (Netherlands), delivered its judgment regarding the case of Four Nigerian Farmers and Milieudefensie v. Shell.

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[115]Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Repondents), The Supreme Court, England, Lord Briggs (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agree)10 April, 2019 judgment. Paragraph 88.

[116]VARVASTIAN, Samvel; KALUNGA, Felicity — *Transnational corporate liability…,* P. 329.

[117]HOWARD, Justin — *Vedanta Resources Plc and Another v Lungowe and Others [2019]* [online]. UKSC. June 5, 2019. [Accessed on March 3, 2022]. Available in: <https://www.schindlers.co.za/2019/vedanta-resources-plc-and-another-v-lungowe-and-others-2019-uksc-20/>.

The Four Nigerian Farmers and Milieudefensie v. Shell concerns three separate lawsuits[118] brought by four farmers and a non-governmental organization, Milieudefensie[119], against Shell[120], from the Netherlands (RDS) and its subsidiary company, from Nigeria (SPDC), for 3 oil spills[121] that contaminated the farmlands and fishing grounds bringing "death, illness and destruction"[122] on three different communities, making those lands and grounds unusable.

The Court delivered three decisions for the three cases.

According to the claimants the spills were a result of the negligence of the two companies that did not do the maintenance of the pipelines and wellhead and, after the spill, they did not mitigate the oil spill[123].

Before the appeal, the Court rejected all claims except the ones in regards to the Ikot Ada Udo case, because it accepted Shell's argument of sabotage[124].

The Court of Appeal reversed this decision[125], by applying both Nigeria's law[126] and the Netherland's law.

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[118]TIRUNEH, Wubeshet — *Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell. EJIL: TALK!* [online]. European Journal of International Law. February 19, 2021. [Accessed on March 3, 2022]. Available in: <https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/>.

[119]Milieudefensie (Friends of the Earth International) — *Justice at last – Dutch court orders Shell to compensate Nigerian farmers for oil spill harm* [online]. February 5, 2021. [Accessed on March 3, 2022]. Available in: <https://www.foei.org/justice-at-last-dutch-court-orders-shell-to-compensate-nigerian-farmers-for-oil-spill-harm/>.

[120]Shell is "a global group of energy and petrochemical companies".

[121]XU, Alison — *Four Farmers' Expedition: A Review of the Shell Case* [online]. WIAS Bulletin. April 1, 2022. [Accessed on June 4, 2022]. PP. 55- 61. P. 56 Available in: <https://www.waseda.jp/inst/wias/news-en/2022/03/31/9504/>.

In Oruma, Goi, and Ikot Ada Udo.

[122]Milieudefensie (Friends of the Earth International) — *Justice at last...*

[123]TIRUNEH, Wubeshet — *Holding the Parent Company Liable…*

[124]BERNAZ, Nadia — *Lowering the bar (in a good way): the UK Supreme Court Decision in Okpabi v. Shell* [online]. Rights as Usual, human rights and business (and a few other things). February 17, 2021. [Accessed on June 5, 2022]. Available in: <https://rightsasusual.com/?m=202102>.

Milieudefensie (Friends of the Earth Netherlands) — *Milieudefensie's lawsuit against Shell in Nigeria* [online]. [Accessed on June 5, 2022]. Available in: <https://en.milieudefensie.nl/shell-in-nigeria>.

[125]ROORDA, Lucas; LEADER, Daniel — *Okpabi v Shell and Four Nigerian…,* P. 371.

[126]In regards to the applicable law matter see: XU, Alison — *Four Farmers' Expedition…,* P. 59.

It used the first law to understand which obligations both companies had in concerns to the pipelines[127] and the second one, on common law torts of negligence, to see if there was a duty of care of the parent company[128].

According to the Nigeria's Law there is a "strict liability standard for operators of oil pipelines"[129] which means that the operator is not liable only if he can "prove beyond reasonable doubt"[130] that the oil spills were caused by sabotage.

This was not the case, leading the Court to conclude that SPDC was liable[131] because it had the duty of care, after the spills, of mitigating the damages and cleaning the farmlands and fishing grounds.

SPDC, according to the Court, had the knowledge of risk of spills and did nothing to prevent the damages.

For the parent company liability, the Court analyzed two previous cases, — the Chandler v. Cape and the Vedanta v. Lungowe[132] — internal documents, policies and a witness's statements.

After this, it concluded that after 2010 RDS was actively trying to reduce the oil spills in SPDC's operations[133].

Thus, the Court found that the parent company had breached its duty of care in the Oruma pipeline case, because RDS had installed a Leak Detection System in the other locations except in this one, which means that RDS knew that there was an issue in SPDC oil pipelines.

3.3.2 The impact of the case and the consequences of having uneven regulation

[127]BERNAZ, Nadia — *Lowering the bar…*

[128]ROORDA, Lucas — *Broken English: a critique of the Dutch Court of Appeal decision in Four Nigerian Farmers and Milieudefensie v Shell* [online]. Transnational Legal Theory. Vol. 12:1, 2021. [Accessed on March 3, 2022] PP. 144-150. P. 146. Available in: <https://doi.org/10.1080/20414005.2021.1937447>.

[129]BERNAZ, Nadia — *Lowering the bar…*

[130]Idem.

[131]Idem.

[132]TIRUNEH, Wubeshet — *Holding the Parent Company Liable...*

[133]Idem.

It is undeniable the importance of the Court's decision[134]. It was the first time that a parent company was directly liable for breaching its duty of care to claimants of a foreign country[135].

But one can see the issues that were highlighted in this case[136].

First of all, if Nigeria's law didn't have a specific provision concerning oil pipelines, Shell might have not been liable.

And this is the consequence of the lack of legal harmonization. In other words, depending on the country where the proceedings are brought, the claimants might be able to win or not win the case. For that reason, it is important to have a law about companies' liability in Human Rights and environmental harms cases with a big scope[137].

It is unconceivable that justice and the access to justice depends on "luck".

Another issue in this decision was the Court of Appeal's interpretation of the duty of care[138]. Because instead of taking in consideration the capacity to control, the Court only gave importance to the actual interventions of the parent company in its subsidiary company[139].

Like Bernaz explained[140], in order to avoid liability, this could incentivize parent companies to be less transparent and to not intervene in their subsidiary companies while having control over them.

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[134]See: JÄGERS, Nicola; JESSE, Katinka D.; VERSCHUUREN, Jonathan — *The Future of Corporate Liability for Extra territorial Human Rights Abuses: The dutch Case Against Shell* [online]. American Journal of International law. Vol. 107, 2013. [Accessed on June 10, 2022]. PP. 36-41. P. 40. Available in: <https://doi.org/10.1017/S2398772300009673>.

[135]ROORDA, Lucas — *Broken English…,* P. 144.

[136]BERNAZ, Nadia — *Lowering the bar…*

[137]Milieudefensie (Friends of the Earth Europe) — *Nigerian farmers and Friends of the Earth win oil pollution case against Shell in historic ruling* [online]. January 29, 2021. [Accessed on June 10, 2022]. Available in: <https://friendsoftheearth.eu/press-release/nigerian-farmers-and-friends-of-the-earth-win-oil-pollution-case/>.

[138]ROORDA, Lucas — *Broken English…,* P. 147.

[139]TIRUNEH, Wubeshet — *Holding the Parent Company Liable…*

[140]BERNAZ, Nadia — *Lowering the bar…*

Finally, before the Court of Appeal's decision many years have passed[141] since the first claims were brought against RDS and SPDC, in which time two of the original claimants died[142].

This is another possible consequence for the lack of legal harmonization, because without a coherent way to solve these types of cases, it implies more time consuming for the Court and for the parts to find legal reasoning for their arguments.

4. Head of the Household: the application of a Civil Law concept

The three case-laws explained in the previous point show the implications of the applicability of the corporate veil doctrine.

The corporate veil doctrine allows companies to evade liability by conducting their business through their subsidiaries but without having any legal consequences if a damage occurs, because according to the law they are legally separated.

The Adams v Cape plc., the Vedanta and the Four Nigerian Farmers and Milieudefensie v. Shell case-laws also showed how ineffective and inconsistent piercing the corporate veil theories are. Because they are exceptional measures, only the Courts can decide to apply them.

In addition to this discretionary power, each Court decision shows that there is not a consensus regarding the criteria to apply the duty of care, which leads to conclude that piercing the corporate veil theories are not the solution to the problems that have been presented until now.

It is necessary to harmonize the law in order to get objective justice, reduce the length of these cases and allow Courts to apply the same legal standards in every environmental and Human Rights abuses by corporations' cases, regardless of the place where the claims are brought to (Home State or Host State).

In conclusion, although progress has been made like in the case of Four Nigerian Farmers and Milieudefensie v. Shell case-law, where a parent company was directly liable for breaching its duty of care to claimants of a foreign country, still it is clear that corporate activities need to be regulated in a more effective way.

[141]XU, Alison — *Four Farmers' Expedition...*, P. 60.

[142]Milieudefensie (Friends of the Earth International) — *Justice at last...*

Fortunately, in the past few years some legal improvements were made with State laws and, more recently, the proposed environmental and Human Rights due diligence Directive.

In this new chapter these initiatives will be explained as well as a new theory, in which a Civil Law concept can be used to create a due diligence obligation for corporations, in order for the EU Directive to be effective and have a different impact on corporations' behaviors.

4.1 The French Duty of Vigilance Law: history and content

In the aftermaths of tragic events[143] provoked by corporate's negligence towards Human Rights and the Environment, it became apparent that something needed to change in order to make parent companies accountable for their subsidiaries.

As mentioned before, there are several issues concerning the lack of regulation in Host States, which leaves the Home States the responsibility of fulfilling this gap in order to apply the UNGPs and protect Human Rights and the Environment.

The French Law of Vigilance[144] and the Swiss Initiative are examples of States and other organization's efforts to do this.

The Duty of Vigilance Law[145] was adopted in 21 of February 2017 and is the result of a collaboration between "civil society organizations, trade unions, academics, lawyers and Members of Parliament"[146].

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[143]CLERC, Christophe — *The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains* [online]. ETUI Research Paper - Policy Brief (European Economic, Employment and Social Policy). Vol. 1, January 13, 2021. [Accessed on June 14, 2022]. P. 1. Available in: <https://ssrn.com/abstract=3765288>.

[144]BRIGHT, Claire — *Creating a legislative level playing field in business and human rights at the European level: is the French duty of vigilance law the way forward?* [online]. EUI Working Paper MWP. November 16, 2018. Last revised in February 14, 2020. [Accessed on June 14, 2022]. PP. 1-10. PP. 1, 3. Available in: <http://hdl.handle.net/1814/65957>. ISSN: 1830-7728.

[145]For better understanding of the law see: NASSE, Laura — *The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences* [online]. Nova Centre on Business, Human Rights and the Environment Blog. May 26, 2021. [Accessed on June 14, 2022]. Available in: <https://novabhre.novalaw.unl.pt/french-duty-vigilance-law-german-due-diligence-act/>.

[146]BRIGHT, Claire — *Creating a legislative level playing field…,* P. 4.

This law combines soft and hard law mechanisms[147] by setting the goals that companies should achieve but leaving space for them to decide the process that leads to that result. The law has 4 articles and describes 3 obligations. The first one introduces an article to the French Commercial Code which contains an ex-ante prevention plan[148].

According to article 1[149], French corporations (with certain characteristics) have to create, disclose and implement a Vigilance Plan in the parent company its subsidiaries and/or companies that are controlled as well as the activities of subcontractors and suppliers with whom the company maintains an established business relationship (the supply chain)[150].

One of the characteristics of this law is that it only applies to a company that fulfills the following requirements[151]:

- Be incorporated or registered in France for two consecutive fiscal years;
- Employ at least 5,000 people itself and through its French subsidiaries;
- Or employ at least 10,000 people itself and through its French and foreigner subsidiaries.

The second obligation for the parent company is to effectively implement the plan which can be achieved by following five measures[152] that can be compared to the due

[147] VERCHER-CHAPTAL, Corinne — *Limitations and perspectives of responsible management of Global Value Chains: From codes of conduct to the French law on the duty of vigilance* [online]. EURAM 2018. June 20, 2018. [Accessed on June 15, 2022]. Reykjavik, Iceland. P. 13. Available in: <https://halshs.archives-ouvertes.fr/halshs-02141407>.

Also see: LAVITE, Cannelle — *The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence* [online]. Verfassungs Blog, on matters constitutional. June 16, 2020. [Accessed on June 15, 2022]. Available in: <https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/>.

[148] BRIGHT, Claire — *Creating a legislative level playing field…,* P. 5.

Ex-ante means before something happens. It is a prevention plan, that has the purpose of avoiding Human Rights harms.

[149] French Law of Vigilance (translation), 2017, French Parliament, Article 1, paragraph 3.

[150] SAVOUREY, Elsa; BRABANT, Stéphane — *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption* [online]. Business and Human Rights Journal Vol. 6:1, 2021. [Accessed on June 15, 2022]. PP. 141-152. P. 144. Available in: < https://doi.org/10.1017/bhj.2020.30>.

[151] COSSART, Sandra; CHAPLIER, Jérôme; BEAU DE LOMENIE, Tiphaine — *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All* [online]. Business and Human Rights Journal. Vol. 2:2, July 2017. [Accessed on June 16, 2022]. PP. 317-323. P. 320. Available in: <https://doi.org/10.1017/bhj.2017.14>.

[152] French Law of Vigilance (translation), 2017, French Parliament, Article 1, paragraph 5.

diligence[153] in the UNGPs, because they also include identify, assess, mitigate and monitoring the plan in the supply chain.

The third obligation concerns the transparency of the company with the public. According to the law[154] the parent company should make its vigilance plan public as well as a report about the effective implementation of that plan.

In the law the parent company is accountable for what controls directly or indirectly and for its commercial relationships[155], which is justified by the fact that it has dominance[156].

Besides transparency, the law tries to achieve cooperation[157] by giving stakeholders the right to monitor the implementation and creation of the vigilance plan.

The French Law also contains an enforcement mechanism in article 1, paragraph 8, article 2, that states that if a company fails to comply with the law, it is liable. After this a formal notice can be sent to the company to comply with the law within three months. If this does not happen, "any person with legitimate interest in this regard"[158] can go to Court and ask for compensation.

4.1.1 Issues with the French Law: space for improvement

Although the impact of the French Duty of Vigilance Law in the world as one of the first State laws targeting corporations and the protection of Human Rights and the Environment is undeniable, it is also impossible to disregard its weaknesses.

Firstly, the scope of this law restricts the application of the law to companies with a certain size which, doesn't solve the access to justice issue[159].

With the constant transformation of companies and corporate groups[160], this implies that the law doesn't keep up with these evolutions.

As mentioned before, the law applies to "(…) other controlled companies and to the activities of subcontractors and suppliers with whom the company maintains an established business relationship".

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[153]Due diligence or HRDD is only a mean by which the respect of the UNGPs can be achieve.

[154]French Law of Vigilance (translation), 2017, French Parliament, Article 1, paragraph 6.

[155]COSSART, Sandra; CHAPLIER, Jérôme; BEAU DE LOMENIE, Tiphaine — *The French Law on Duty of Care…,* P. 320.

[156]VERCHER-CHAPTAL, Corinne — *Limitations and perspectives...*, P. 14.

[157]French Law of Vigilance (translation), 2017, French Parliament, Article 1, paragraph 5.

[158]Idem.

[159]For better understanding of the law see: NASSE, Laura — *The French Duty of Vigilance…*

[160]SAVOUREY, Elsa; BRABANT, Stéphane — *The French Law on the Duty of Vigilance...* P. 142.

The definition of controlled companies[161] and established business relationship isn't given by the French law but by the Code of Commerce.

Both definitions do not clarify the extent of the obligations or the exemption situations for the controlled companies or for those that have an established business relationship with the parent company.

Besides, the French Law contains an obligation of result which means that as long as the companies create and implement a vigilance plan they are not liable. This can lead to negligence by companies or to a type of doing "the bare minimum" behavior by companies which implicates that the protection of Human Rights and the Environment is not a priority.

The last issue within the law is that the burden of proof still remains on the claimant.

4.2 The Swiss Responsible Business Initiative: history and content

After the UNGPs were created in 9 December 2016[162], the Swiss government created the Swiss Action Plan on Business and Human Rights in order to implement the principles. However, the Plan did not include any measures with mandatory due diligence[163]. That was only done when the Swiss Responsible Business Initiative was introduced.

The initiative was conducted at the same time as the Action Plan[164]. It was launched by civil society organizations in Switzerland and aimed to do the same as the French Duty of Vigilance Law.

The RBI intended to introduce[165] a modification, with article 101a, to the Swiss Constitution[166] which aimed at creating a specific provision about businesses responsibility for Human Rights and the Environment.

[161]Code of Commerce, Article L233-3.

[162]BUENO, Nicolas — *The Swiss Responsible Business Initiative and its counter-proposal: Texts and current developments* [online]. Business and Human Rights Blog (Originally posted here). 2018. [Accessed on June 16, 2022]. Posted at the Zurich Open Repository, University of Zurich. Available in: <https://www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/>.

[163]Idem.

[164]Idem.

[165]The RBI was later rejected.

[166]BUENO, Nicolas; BRIGHT, Claire — *Implementing Human Rights Due Diligence Through Corporate Civil Liability* [online]. International & Comparative Law Quarterly, 2020. November 2, 2020. [Accessed on June 17, 2022]. PP. 1-27. P. 13. Available in: <http://dx.doi.org/10.2139/ssrn.3689241>.

Article 101a stated that "companies must respect internationally recognized Human Rights and international environmental standards, also abroad; they must ensure that Human Rights and environmental standards are also respected by companies under their control"[167].

In other words, parent companies must protect and respect the Human Rights and environmental standards that are present in international agreements and conventions like the International Covenant on Civil and Political Rights or the Montreal Protocol for the protection of the ozone layer, for example.

Like it was showed in the Milieudefensie et al. v Royal Dutch Shell case-law[168], although companies are not a part of the creation and ratification of such international agreements, they are duty bearers.

The RBI also sets out a due diligence obligation[169] which is the same due diligence present in the UNGPs and other relevant international soft law standards[170]. However, the provision includes an exception for small and medium companies that might not be able, in certain circumstances, to fulfill their obligation like bigger companies would.

This can be justified by the fact that the companies with a smaller size have a lower probability of exercise a business conduct that will harm Human Rights and the Environment. In addition, most of them do not possess the same means as multinationals to avoid or stop these damages.

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[167]The Swiss Business Initiative, 2017. Art. 101a (a.).

[168]See: Milieudefensie et al. v Royal Dutch Shell, The Hague District Court, Netherlands, Judgment of 26 May 2021.

The Milieudefensie et al. v Royal Dutch Shell case is a climate litigation, in which the same arguments, usually used in cases involving States, were used against a company.

The Court, in this case, adopted a broad approach to the duty of care, which means that international instruments like the UNGPs were used in order to determine if there was a breach of duty.

This decision was an historical moment for BHRE, because it was the first time that a Court directly stated that, although corporations are not directly mentioned in international conventions and treaties about climate change and other environmental issues, they too are environmental duty bearers.

[169]The Swiss Business Initiative, 2017, Art. 101a (b.).

[170]JENTSCH, Valentin — *Corporate social responsibility and the law: international standards, regulatory theory and the Swiss responsible business initiative* [online]. EUI (European University Institute), MWP. Working paper. May, 2018. [Accessed on June 20, 2022]. PP. 1-17. P. 14. Available in: <http://hdl.handle.net/1814/59084>. ISSN: 1830-7728.

Point c. of article 101a contains specific liability for parent companies or the companies in control: they are liable for their own conduct and their subsidiaries and other controlled companies in Switzerland and abroad.

There is a due diligence defence clause. The parent company might escape liability if it can prove that it "took all due care"[171].

In other words, there is a reverse of the burden of proof because it is the corporation that has to prove that it fulfilled its due diligence duty and the damage still occurred.

The RBI contains a presumption of liability of the parent company - even without any proof the parent company is presumed liable.

In June 2018, the text of the counter-proposal was presented. Although they have many similarities, the counter-proposal included some changes.

In this counter-proposal there is a responsibility of the board director's clause, in the sense that they are the ones that have to ensure that the parent company and controlled companies protect and respect Human Rights and the Environment[172];

The scope of the counter-proposal is also different from the RBI, because the companies to whom the counter-proposal applies (the parent company and the controlled companies) need to "exceed two of the following values in two consecutive financial years:

- a balance sheet total of 49 million Swiss francs;
- sales of 80 million Swiss francs;
- 500 full-time positions on an annual average."[173]

So, the scope of the counter-proposal is stricter and more restrict than the original proposal.

[171]The Swiss Business Initiative, 2017, Art. 101a (c.).

[172]Proposal by the Legal Affairs Committee of the Swiss National Council Responsible Business Initiative: indirect counter-proposal.

Art. 716a bis CO (new) 2a Compliance with the provisions for the protection of human rights and the environment also abroad (1).

[173]Proposal by the Legal Affairs Committee of the Swiss National Council Responsible Business Initiative: indirect counter-proposal.

Art. 716a bis CO (new) 2a Compliance with the provisions for the protection of human rights and the environment also abroad (3).

Moreover, the liability clause[174] in article 55(1bis)[175] of the counter-proposal, like in the proposal, contains a provision about liability dictating that a parent company is liable for its own actions and its controlled companies' actions if it fails to comply with its due diligence obligation.

However, the controlled companies are only the ones that are "actually controlled by them (the parent companies) in the performance of their official or business activities"[176], which means that if a controlled company isn't performing an action in line with the business activities, the parent company isn't liable[177].

Additionally, the damages covered by this liability provision are only Human Rights and environmental damages that cause bodily harms and damage property.

Once again, the counter-proposal restricts the scope of protection of Human Rights and the Environment.

4.2.1 The application of the RBI counter-proposal: issues and space for improvement

In November 2020 a national referendum, in Switzerland, took place leading to the rejection of the RBI[178].

Therefore, its counter-proposal will be applied and the Swiss Code of Obligations, the Swiss Civil Code and the Swiss Federal Code on Private International Law will have new norms[179].

[174]PALOMBO, Dalia — *The Duty of Care of the Parent Company…,* PP. 277, 278.

[175]Proposal by the Legal Affairs Committee of the Swiss National Council Responsible Business Initiative: indirect counter-proposal.

Art. 55 CO C. Liability of employers 1bis (new).

[176]Proposal by the Legal Affairs Committee of the Swiss National Council Responsible Business Initiative: indirect counter-proposal.

Art. 55 CO C. Liability of employers 1bis (new).

[177]JENTSCH, Valentin — *Corporate social responsibility and the law…,* P. 16.

[178]WETTSTEIN, Florian — *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights* [online]. Business and Human Rights Journal. Vol: 6:2, 2021. [Accessed on June 20, 2022]. PP. 312-325. P. 320. Available in: <doi:10.1017/bhj.2021.21>.

[179]CALSTER, Geert [et al.] — *Options for Mandatory Human Rights Due Diligence in Belgium* [online]. Leuven Centre for Global Governance Studies. 2020. [Accessed on June 21, 2022]. PP. 8-121. P. 39. Available in: <https://ghum.kuleuven.be/ggs/publications/research_reports/options-for-mandatory-human-rights-due-diligence.pdf>. ISBN 9789082643138.

The main focus of the counter-proposal is transparency, non-financial duties, in regards to Human Rights and the Environment, and anticorruption measures[180].

Although it is an important step to regulate businesses conduct, the counter-proposal has a lot of issues that does not help to improve international legislation[181].

Once again, the scope[182] of the counter-proposal is different from the RBI. In it, the due diligence obligation, which is an obligation of means[183], is only applied to large companies with a certain threshold or small companies that deal with specific activities that endanger Human Rights and the Environment[184].

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[180]LENZ & STAEHELIN, The world's Swiss law firm — *Counter-Proposal to Responsible Business Initiative: Overview of New Duties for Companies* [online]. November, 2020. [Accessed on June 20, 2022]. Available in: <https://www.lenzstaehelin.com/fileadmin/user_upload/newsflash/201130_Newsletter_Counter_Proposal_EN_Final.pdf>.

See: Logan & Partners, your in-house counsel — *Swiss Responsible Business: Parliament's counter-project. Sustainability* [online]. April 14, 2021. [Accessed on June 21, 2022]. Available in: <https://www.loganpartners.com/swiss-responsible-business-parliaments-counter-project/>.

[181]VILLIERS, Charlotte — *Collective Responsibility and the Limits of Disclosure in Regulating Global Supply Chains* [online]. Deakin Law Review. Vol. 23, November 27, 2018. [Accessed on June 21, 2022]. P. 160. Available in: <https://doi.org/10.21153/dlr2018vol23no0art809>.

[182]GAUKRODGER, David — *Business responsibilities and investment treaties* [online]. OECD Working Papers on International Investment. OECD Publishing, Paris. February, Vol. 2, 2021. [Accessed on June 21, 2022]. PP. 1- 125. PP. 48, 49. Available in: <https://doi.org/10.1787/4a6f4f17-en>.

[183]MCKNIGHT, Zoe — *Human Rights Due Diligence: Legislative Scan* [online]. Canadian Labour Congress. Research Paper #54. August, 2018. [Accessed on June 22, 2022]. PP. 3-52. P. 18. Available in: <https://canadianlabour.ca/wp-content/uploads/2019/04/053-HRDD-International-Intruments-2018-09-26.pdf>.

[184]See in regards to the scope of the counter-proposal: DUVANEL, Vanessa Alarcon — *The Swiss Responsible Business Initiative Has Been Rejected, but the Government's Counterproposal Will Likely Enter Into Force: Brief Overview of the New Duties for Companies* [online]. JDSUPRA. King & Spalding. December 10, 2020. [Accessed on June 22, 2022]. Available in: <https://www.jdsupra.com/legalnews/the-swiss-responsible-business-28152/>.

The counter- proposal imposes "non-financial reporting duties[185] on certain Human Rights and environmental, social and employment-related matters"[186]. In addition to that, the transparency and due diligence duties only concern the conflict of minerals and the prevention of child labor[187].

There is also, instead of civil liability, "criminal sanctions and (…) fines in case of non-compliance with the reporting duties or for making false statements"[188].

However, in regards to the due diligence obligation, these sanctions are only applied if the damage is to life, personal injury or/and property[189].

There is also an exemption possibility[190], but only if the parent company can prove that it had no control over its subsidiary when the damage occurred or that it did everything in its power to stop the damage from occur but it still happened[191].

[185]BUENO, Nicolas — *Human Rights Due Diligence Legislation in Switzerland: The state-of-play after the Swiss Responsible Business Initiative* [online]. Nova Centre on Business, Human Rights and the Environment Blog. February 1, 2021. [Accessed on June 23, 2022]. Available in: <https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/ >.

[186]LENZ & STAEHELIN, The world's Swiss law firm — *Counter-Proposal to Responsible Business Initiative...*

[187]Ibidem.

[188]DELAUTRE, Guillaume [et al.] — *Decent work in a globalized economy: lessons from public and private initiatives* [online]. ILO (International Labour Organization). 17 February, 2021. [Accessed on June 23, 2022]. P. 97. Available in:<https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771481.pdf>. ISBN (pdf): 978-92-2-033720-2.

[189]GAUKRODGER, David — *Business responsibilities…*, P. 49.

[189]MCKNIGHT, Zoe — *Human Rights Due Diligence…,* PP. 15, 16.

See: BUENO, Nicolas — *Human Rights Due Diligence Legislation in Switzerland...*

[190]GAUKRODGER, David — *Business responsibilities…,* P. 49.

See: DELAUTRE, Guillaume [et al.] — *Decent work in a globalized economy...*, PP. 96, 97.

Also see: EY, Building a better working world — *The Swiss Federal Council intends a swift implementation of the counterproposal to the Responsible Business Initiative* [online]. 29 April, 2021. [Accessed on June 24, 2022]. Available in: <https://www.newrealityblog.com/2021/04/29/the-swiss-federal-council-intends-a-swift-implementation-of-the-counterproposal-to-the-responsible-business-initiative/>.

[191]CALSTER, Geert [et al.] — *Options for Mandatory Human Rights...*, P. 41.

In this proposal there is no entity that can monitor if businesses are fulfilling their obligations[192]. However, the reporting obligations[193] have the objective of making business activity and corporate behavior more transparent, which in a certain way allows the public to confirm if corporations are trying to protect and respect Human Rights and the Environment.

Overall, the counter-proposal is very small in scope and only protects the Human Rights and environmental standards considered by the Switzerland government. It also only applies a due diligence obligation to "child labor and mineral sourcing from conflict areas"[194] situations.

In conclusion, the RBI was showing that a very important step was going to be taken in order to protect the Environment and Human Rights from businesses, but it was replaced by a counter-proposal that did not help to solve the current issues caused by corporation's reckless behavior.

4.3 Corporate Sustainability Due Diligence Directive

On the 23rd of February 2022 the proposal of a new European directive was adopted by the European Commission[195], which is a result of the joint efforts of the BIICL, which has done a study on what it takes to fulfill a due diligence obligation in a supply chain[196],

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[192]Idem.

[193]LENZ & STAEHELIN, The world's Swiss law firm — *Counter-Proposal to Responsible Business Initiative*...

See: KILCHMANN, Jörg, — *RBI: what is the most important content of the counter-proposal?* [online]. KPMG Switzerland Blog. December 1, 2020. [Accessed on June 24, 2022]. Available in: <https://home.kpmg/ch/de/blogs/home/posts/2020/12/responsible-business-initiative.html>.

[194]Swiss Coalition for Corporate Justice (SCCJ) — *Protecting Human Rights and the Environment — The Responsible Business Initiative* [online]. [Accessed on June 24, 2022]. Available in: <https://corporatejustice.ch/>.

[195]European Commission, Press release — *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains* [online]. 23 February, 2022. [Accessed on June 25, 2022]. Brussels. P. 1. Available in: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145>.

[196]BRIGHT, Claire; SMITH, Lise — *The new European Directive on Corporate Sustainability Due Diligence* [online]. BIICL (British Institute of International and Comparative Law) and NOVA School of Law. 23 February, 2022. [Accessed on June 26, 2022]. PP. 1-10. P.1. Available in: <https://www.biicl.org/documents/11164_ec_directive_briefing_bright_and_smit_1_march_update.pdf>.

and a resolution of the European Parliament[197] to the European Commission containing recommendations concerning corporate due diligence and corporate accountability[198].

The Study led by the BIICL was important because it showed that the voluntary initiatives did not really works[199]. It is necessary to have an enforcement mechanism to actually make companies fulfill their obligation.

The new proposal intends to create an environmental and Human Rights due diligence obligation (which is an obligation of means) for companies[200] in the EU, which is inspired by the due diligence explained in the UNGPs.

This includes the obligation, for companies, to recognize and respect the standards contained in the Paris Agreement on climate change[201] through the obligation of implementing a plan[202] that includes their business strategy reflecting the reduction of the global warming.

The scope of the proposed directive covers three groups of companies[203]: every European company that "had more than 500 employees on average and had a net worldwide

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[197]To better understand the drafting process of the Directive, see: SCHILLING-VACAFLOR, Almut; LENSCHOW, Andrea — *Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges* [online]. Regulation & Governance. May 6, 2021. [Accessed on June 26, 2022]. PP. 8, 9. Available in: <10.1111/rego.12402.>.

[198]BRIGHT, Claire; SMITH, Lise — *The new European Directive…,* P.1.

[199]Companies only act in their interests.

Read: CAMOLETTO, Stefania [et al.] — *Corporate Social Responsibility due diligence among European companies: The results of an interventionist research project with accountability and political implications* [online]. Corporate Social Responsibility and Environmental Management. February 23, 2022. [Accessed on June 26, 2022]. P. 3. Available in: <10.1002/csr.2258>.

[200]Gibson Dunn & Crutcher LLP — *European Commission proposes far-reaching human rights and environmental due diligence obligations* [online]. March 11, 2022. [Accessed on June 26, 2022]. P. 1. Available in: <https://www.gibsondunn.com/european-commission-proposes-far-reaching-human-rights-and-environmental-due-diligence-obligations/>.

[201]This is the case for the companies that belong to the first group mentioned in the scope of the proposal.

Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 15.

Also see: Gibson Dunn & Crutcher LLP — *European Commission proposes…,* P. 4.

[202]FOLQUE, Maria — *A proposta de 'Diretiva sobre Diligência Devida e Sustentabilidade Empresarial'* [online]. NOVA BHRE Podcast. 12 April, 2022. [Accessed on June 27, 2022]. Available in: <https://www.youtube.com/watch?v=qr7IYV2UGJM>.

[203]Idem, for a better understanding of the scope.

turnover of more than EUR 150 million in the last financial year"[204] which is based in the EU (first group); every European company that "had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of"[205] the sectors that are considered to be a risk to Human Rights and the Environment[206] like extraction of minerals or the manufacture of textiles, or agriculture for example (second group); and third country companies with a turnover threshold aligned with the 1st and 2nd group generated in the EU (third group).

Basically, only large companies are directly covered by the Directive.

Small and medium enterprises[207] are covered by the Directive when they are a part of the value chain of one of the companies mentioned above.

So, as a consequence of their business relationship SMEs also might have an environmental and Human Rights due diligence obligation[208].

This is only a possibility because besides the parent company the only subsidiary companies, contractors or subcontractors, covered by the Directive are the ones that have "an established business relationship"[209] with the main company.

Furthermore, articles 5 to 11 of the proposal identify several obligations of the companies to whom the proposal applies[210], in particular, they have to[211]: integrate a due diligence process into the company's policies; identify, prevent and mitigate Human Rights and

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[204]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 2.

[205]Idem.

[206]Only the relevant companies are included in the scope of the proposal.

See: Gibson Dunn & Crutcher LLP — *European Commission proposes…,* PP. 1, 2.

[207]European Commission, Press release — *Just and sustainable economy…,* P. 1.

See: FOLQUE, Maria — *A proposta de 'Diretiva...*

[208]As said in Claire and Lise's text, "The new European Directive on Corporate Sustainability Due Diligence", this might present an issue since "the vast majority (99%) of all companies in the EU" are SMEs. (BRIGHT, Claire; SMITH, Lise — *The new European Directive…,* P. 3).

[209]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 1.

See: Gibson Dunn & Crutcher LLP — *European Commission proposes…,* P. 3.

[210]See: Idem. PP. 1, 2.

[211]BRIGHT, Claire; SMITH, Lise — *The new European Directive…,* PP. 4, 5.

environmental harms; implement and maintain a complaints procedure[212], which allows employees from the company or people affected by the corporation's activities to come forward and expose the potential risks or issues that these activities can cause to Human Rights and the Environment; monitor the effectiveness of the policy and measures and annually make a public report[213] about the description of the due diligence approach adopted by the corporation, the measures taking place and their effectiveness, etc.

In terms of liability, if a company does not fulfill its obligation it is subjected to civil and administrative consequences, and in extreme cases of intentional damage it may be subject to severe sanctions.

In particular, if a company does not try to prevent, mitigate or stop Human Rights and environmental damages, it has to stop, temporarily, or terminate the business relationship with the partner with whom it has, at the time the damage occurs, a commercial activity[214]. In other words, the company is obliged to stop a certain activity with the partner because of non-compliance.

In practice, this might bring a great loss for the corporation.

Regarding the civil liability, article 22[215] of the proposal explains that there are only two exemption situations. The first one refers to the situation in which the damage occurred because of the company's partner actions and not the parent company. The second one is in those situations in which it is unreasonable to require the company to prevent the event that led to the damage to happen, because it is inevitable or impossible to predict.

The major innovation of this Directive is that it uses public and private mechanisms to enforce companies to fulfill their obligations.

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[212]DUARTE, Ana — *Proposta de Diretiva relativa ao Dever de Diligência das Empresas e a Responsabilidade Empresarial* [online]. NOVA Business Human Rights and the Environment. May 10, 2021. [accessed on June 27, 2022] Available in: <https://novabhre.novalaw.unl.pt/proposta-diretiva-dever-diligencia-responsabilidade-empresarial/>.

[213]Gibson Dunn & Crutcher LLP — *European Commission proposes…,* P. 2.

[214]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 8(6). Also see: BRIGHT, Claire; SMITH, Lise — *The new European Directive…,* P.7.

[215]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 22.

According to the proposal, every Member State has to create a national administrative authority[216] which will supervise the new rules and impose fines or other administrative sanctions in case of non-compliance[217]. Furthermore, the victims of environmental and Human Rights abuses have the right to take legal action against companies[218].
Directors duties are also affected by the new Directive[219]. According to it, directors should set up and oversee a due diligence plan. In addition, they have to "while acting in the best interests of the company" take into consideration, Human Rights the Environment and climate change.
Therewith, this Directive solves the legal harmonization in the EU and creates equal opportunities for companies of any size.
In conclusion, this Draft Directive is a big and needed step towards company's liability in Human Rights and environmental damages cases.
It combines private and public mechanisms both to control and to give freedom to companies, by allowing them to create and implement their own due diligence process, but monitoring if they are fulfilling their obligations with a national authority[220].
The EU proposal of environmental and Human Rights due diligence Directive is based on transparency, sustainability and equity[221]: this transparency is achieved with a report obligation and the national authority[222] mentioned above; it has a sustainability purpose because it imposes Human Rights and Environment due diligence to a number of companies and even has a concern with climate change and the Paris Agreement; it

[216]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 17.

[217]European Commission, Press release — *Just and sustainable economy…,* P. 1.

[218]Idem.

[219]Idem. P. 2.

[220]LOW, Jo En; TAN, Suyin — *EU Mandatory Environmental and Human Rights Due Diligence Law – What You Need To Know* [online]. The National Law Review. Vol. 12, March 15, 2021. [Accessed on June 27, 2022]. PP. 1-4, P. 3. Available in: <https://www.natlawreview.com/article/eu-mandatory-environmental-and-human-rights-due-diligence-law-what-you-need-to-know>.

[221]CATALÃO, Mariana Nunes — *A proposta de Diretiva da União Europeia para a obrigatoriedade de Due Diligence em matérias de Direitos Humanos e em matérias Ambientais* [online]. Sérvulo & Associados, Sociedade de Advogados SP. RL. April, 22, 2021. [Accessed on June 27, 2022]. PP. 1, 2. Available in: <https://www.servulo.com/pt/investigacao-e-conhecimento/A-proposta-de-Diretiva-da-Uniao-Europeia-para-a-obrigatoriedade-de-Due-Diligence-em-materias-de/7525/>.

[222]CAMOLETTO, Stefania [et al.] — *Corporate Social Responsibility...*, P. 5.

creates equity between companies[223] because it harmonizes the law, which allows all companies to be in the same legal position with the same duties and rights.
Moreover, the Directive will allow any victim of Human Rights or environmental abuses to have access to justice more easily and to bring proceedings[224] to any country in the EU.
However, the proposal has some issues that need to be assessed in order for this Directive to not be another failure in the protection of the Environment and Human Rights from corporate behavior.

4.3.1 The application of the new EU Directive: space for improvement

It is undeniable the need for an EU mandatory environmental and Human Rights due diligence law.
The soft and hard law mechanisms that were created until now were insufficient and ineffective because they did not harmonize the law and most of them did not block the effects of the application of the Corporate Veil Doctrine.
Creating a standard will allow the Courts to apply the same rules uniformly which will bring legal certainty for the claimants and the defendants.
Case-laws, like the Adams v Cape Industries plc., show that the application of the corporate veil doctrine cannot be left to the discretionary power of the Court.
This legal uncertainty does not only have negative impacts in claimants but also in corporations that see the advantage for this theory to be applied (the incentive for investment) disappear.
The Vedanta case-law showed that substantial justice should be a priority and that is possible, without lifting the corporate veil, to achieve justice.
Moreover, Human Rights and environmental international law can't keep being ignored by private actors since they are also duty bearers.
The three case-laws explained in the previous chapter showed that lifting the corporate veil is not effective either because the interpretation of each Court of piercing the veil theories is different. This is a consequence of the fact that there is no standard in which the Court can rely on for its decision, which leads to a different outcome for each case depending on the applicable law, jurisdiction, facts, proofs, argumentation, etc.

[223]DE NADAL, Elisabeth — *ESG: a caminho de um modelo europeu para as empresas* [online]. Dinheiro Vivo. April 27, 2021. [Accessed on June 28, 2022]. Available in: <https://www.dinheirovivo.pt/opiniao/esg-a-caminho-de-um-modelo-europeu-para-as-empresas-13615846.html>.

[224]Idem.

Other case-laws like the Milieudefensie et al. v Royal Dutch Shell also show that the UNGPs can be applied to corporations and how it can be done. This is possible because the principles allow to create legislation outside a State[225], which means that a rule created based on those principles can be applied to more than one State.

Although a significant advance in the regularization and control of business activities, the State laws and initiatives that were created do not apply to all countries and companies. Such fact leaves a big gap for claimants that want to have access to justice.

The recent EU Draft Directive on Corporate Sustainability Due Diligence shows a lot of potential by doing what these laws and instruments could not previously do – harmonize the law.

Yet some issues can be found in the proposal and if it is not changed it can end up by being another ineffective legal instrument.

The first issue with the Directive is its scope. According to article 2 of the proposed Directive, the law mainly applies to large companies and a few medium sized companies. Being so, the vast majority of the companies in the EU won't be directly affected by the due diligence obligation in this law.

The Directive itself[226] explains that 99% of companies in the EU are SMEs.

However, as Folque explains[227], SMEs can be affected by the Directive, indirectly if they are a part of the value chain of the companies covered by the law.

A question arises in this situation. Is this enough to protect Human rights and the Environment from corporate abuses? In practice, it might be difficult to see a big change in corporate accountability if the scope of the Directive is not extended to more companies.

In addition, it seems meaningless to have a new legislation that still cannot be applied to all companies, which was one of the revolutionary points in the UNGPs.

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[225]RAMASASTRY, Anita — *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability* [online]. Journal of Human Rights. University of Washington, School of Law (Research Paper No. 2015-39). Vol. 14: 2, December 20, 2015. [Accessed on June 28, 2022]. PP. 237-259. P. 246. Available in: <https://ssrn.com/abstract=2705675>.

[226]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. P. 14, Paragraph 4.

[227]FOLQUE, Maria — *A proposta de 'Diretiva...*

Another issue that can be found in this Directive. It is connected with some concepts, in particular the concept of "established business relationship"[228], present in article 1 (a).

According to this article, the Directive creates obligations for companies "regarding actual and potential Human Rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship"[229]. Later in article 3 (f) "established business relationship" is defined as "a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain"[230].

One of the main proposes of this Directive is to harmonize the law and that is only possible if each Member State applies the same rules.

The concept presented above is not clear about the criterion that should be used in order to consider a business relationship an "established business relationship", because although it says it has to be lasting and/or intense it does not explain what needs to exist, in practice, in order to reach this conclusion. What can be considered a lasting relationship? How long does it need to last? Months? Years? If so, how many? What does an intense business relationship mean? Does it have to do with turnover? If so, what numbers should be considered?

As it is easy to understand the lack of details in these concepts can lead to a different application of the law in each Member State, which is exactly the opposite of the harmonization purpose of the law.

Finally, another issue that can be found in article 8 (6)[231] of the Directive. In this article a heavy sanction is applied to the companies that could not stop or mitigate the "actual adverse impacts within the meaning of paragraph 1"[232]. These companies have to

[228]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 1 (a).

[229]Idem.

[230]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 3 (f).

[231]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 8 (6).

[232]Idem.

"temporarily suspend commercial relationships with the partner"[233] that provoked these adverse impacts "while pursuing efforts to bring to an end or minimize the extent of the adverse impact"[234] or "terminate the business relationship with respect to the activities concerned, if the adverse impact is considered severe"[235].

Although it seems like an appropriate legal punishment for companies to cut ties with their partners, in practice this could lead to some negative consequences[236]. In particular, because of the heaviness of the measure, companies can start to "hide" their business relationships and issues, reversing the transparency purpose of the Directive.

In sum, if these issues are not solved before the Directive is applied by Member States its purposes of transparency and harmonization of the law lose their value and effectiveness completely leading to the inefficiency of the law.

4.4 Head of the Household: harmonization of the law

The second pillar of the UNGPs dictates that companies should respect Human Rights which can be done through Human Rights due diligence[237].

In practice, companies have to: identify and assess actual Human Rights impacts; integrate and act upon the findings; track the effectiveness of the action taken; communicate how the impacts are addressed. In other words, companies have to be transparent and show proof (through documents, experts report, testimonies from workers, etc.) that they are fulfilling their due diligence obligation.

This is exactly the environmental and Human Rights due diligence obligation present in the Swiss Responsible Business Initiative (and its counter-proposal), French Law of Vigilance and the EU Directive, explained in the previous point.

In these, the due diligence serves as a way of fulfilling the company's duty of care[238].

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[233] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 8 (6) (a).

[234] Idem.

[235] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 8 (6) (b).

[236] BRIGHT, Claire; SMITH, Lise — *The new European Directive…,* P.7.

[237] RAMASASTRY, Anita — *Corporate Social Responsibility…,* P. 247.

[238] European Commission [et al.] — *Study on due diligence requirements through the supply chain: final report* [online]. Publications Office, January 2020. [Accessed June 27, 2022]. P. 157. Available in: <https://data.europa.eu/doi/10.2838/39830>.

In this sense, the concept that is being introduced in this dissertation - head of the household - serves as a duty of care that needs to be fulfilled by having Human Rights and environmental due diligence.

The purpose of the head of the household is to provide an easy way to apply most of the content of the EU Directive but also to fulfill the gaps contained in this law.

4.4.1 Head of the Household: a civil law concept

In Portugal there is a concept/standard applied in Civil accountability – the head of the household or *Bom Pai de Família*. This notion works as a standard in Civil cases when the court needs to evaluate if the defendant is guilty or not and if he/she is guilty, in what degree.

To summarize, the head of the household is the expected behavior of a “normal” person: what would a conscious and rational person do if he/she was in the defendant’s place at the time of the crime?

If the Court decides that the defendant could have had a different behavior, it is necessary to see the degree of the illegal act.

If the defendant, at the time of the occurrence, did not pay attention when he/she should have, and because of that a damage occurred, then the defendant was negligent.

However, if the defendant intended to create damage for the claimant, then he/she will be accused by the court of maliciousness.

It is important to use the standard mentioned above because it will allow the court to recreate the situation that led a person to make a claim, and it will determine if the sentence shall be less or more severe.

Therefore, if it is determined that the defendant had the intention to create damage, then he might have to pay for moral and physical damages (if there are any) and could also have to go to prison.

However, if the offender unintentionally created damage for the claimant, then he might just have to pay moral and physical damages and, in some cases, he might be absolved.

In other words, the head of the household is a presumption of guilt of the company, in which it is the defendant that has to prove that he/she did an act in accordance with its environmental and Human Rights due diligence obligation.

This is similar to the content of the EU mandatory environmental and Human Rights due diligence law, in particular, article 22[239].

4.4.2 Head of the Household: the concept of control

To understand the application of the head of the household it is necessary to explain the concept first.

Before being called head of the household, it was called parent of the household. This was a discriminatory term[240] that implied that only the male figures of the household could be the heads which was proven inaccurate[241] through sociological studies.

A household can be defined as "a group of people (or a single person), sharing resources, expenditures and activities, on a more or regular basis"[242].

In other words, a household could be compared to a corporate group that has several employers and employees and, most of the times, has a central company – the parent company – that sets out a common goal (profit) and shares resources with the other companies in order to sustain the business activity.

In this case the parent company is the head of the household.

In sociological studies the head of the household was determined using several factors such as decision-making[243], income[244], age[245] and even custom[246].

Therefore, the head of household cannot be determined by only one factor.

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[239]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 22.

[240]POSEL, Dorrit — *Who are the heads of household, what do they do, and is the concept of headship useful? An analysis of headship in South Africa* [online]. Taylor and Francis Online. Vol. 18:5, 2001. [Accessed on June 29, 2022]. PP. 651-670. P. 654. Available in: <https://doi.org/10.1080/03768350120097487>.

[241]Idem. PP.652-654.

[242]CASIMIR, Gerda J.; TOBI, Hilde — *Defining and using the concept of household: a systematic review* [online]. International Journal of Consumer Studies. Wiley Online Library Vol. 35:5, August 10, 2011. [Accessed on June 29, 2022]. PP. 498-506. P. 501. Available in: <https://doi.org/10.1111/j.1470-6431.2011.01024.x>.

[243]POSEL, Dorrit — *Who are the heads of household…,* P. 600.

[244]Idem. P. 669.

[245]SUBBA, T. B. — *The head of the household: Some methodological considerations*. The Eastern Anthropologist. Vol. 49:1, 1996. PP. 83-90. P. 83. ISSN: - 0012-8686.

[246]Idem. PP. 85, 86.

By comparison, and considering the complexity of a value chain, the parent company cannot be determined by using only the "economic control" factor.

It is necessary to understand the types of control that the parent company can have, through two different approaches - the classic approach[247] and the new approach[248].

The classic approach is when the corporation has direct control and the subsidiary company has little control or no control over its own actions, because it is the parent company that makes the decisions for its subsidiaries.

In this approach the parent company is only liable for the damages in which it is actively involved.

In the new approach, the company has indirect control. The parent company is liable in this case because, although it does not control the subsidiary company, it shares its own competences and knowledge with it, which means that the parent company has those capacities and the damage occurs as a consequence of an omission.

There is a presumption that the parent company has more knowledge and experience than the subsidiary company which creates a duty of care for the main company.

Nowadays, the fact that there is a trend in which companies try to optimize their production processes, by locating the various stages across different locations/countries, it is easy to see that the classic approach is impossible to use. The new approach seems to be more adequate to the current reality.

Most parent companies do not directly control their subsidiaries precisely because they want to transfer liability risks to their subsidiaries, as it was explained in the Adams v Cape Industries plc. case-law.

Moreover, control cannot be restricted to a direct control perspective because, in case-laws like the Milieudefensie et al. v Royal Dutch Shell for example, the parent company can be liable for having power to avoid the damage and not doing it.

The parent company has the power and knowledge to avoid the damages.

It is important to have this in consideration because it shows that in order to consider a company as a parent company, there is a need to consider its position and influence in the

[247]LEADER, Sheldon, [et al.] — *Groupes de Sociétés et Droit du Travail: Nouvelles Articulations, Nouveaux Défis* — (Chapter) *Parent Company Liability and Social Accountability: Innovation from the United Kingdom*. Paris : DALLOZ. April 24, 2019. PP. 114-116. ISBN: 9782247181698.

[248]Idem.

corporate group. It is the power to intervene in the subsidiary companies, in order to avoid the damages, and not the economic control that makes a company liable.

A parent company has many advantages of having a subsidiary company and it is through its subsidiaries that the corporation achieves its main goal (the reason for its creation).

Therefore, subsidiary companies act according to the expectation of the parent company. Although each company has a different legal personality and capacity from the parent company, translated in a different role in the corporate group, these subsidiaries are created to work in the same line of business as the parent company so the goal, mentioned previously, is achieved.

Consequently, it is impossible to think that the parent company is liable for its subsidiaries actions because it has direct control over them.

Through a direct or indirect influence, the parent company has the capacity to apply its knowledge and experience to stop Human Rights and environmental harms.

Contrary to the EU Directive, that used the concept "established business relationship", the expectation argument can be used instead to justify the due diligence obligation that companies have through their value chains.

In addition, the parent company should have more liability for each connection that the corporation establishes because like in a household, the more family members there are, the more responsibility the head of the household has[249].

4.4.3 Application of the Head of the Household concept to Parent Companies

How can, in practice, the head of the household be applied to parent companies?

It can be applied through civil liability, to corporations that fail to fulfill their due diligence obligation.

The application of this concept will not only solve the scope issue of the EU Directive, because it will apply to all companies, but also the "established business relationship" issue because the head of the household creates a due diligence obligation of the company for its entire value chain based on the expectation explained before.

For example, even if the company worked with a subcontractor for a period of less than one year, it is still the corporation's responsibility to ensure that the Environment and Human Rights are being respected. The subcontractor only acted in a certain way, to obtain a specific result which was in accordance with the company's expectations.

[249]SUBBA, T. B. — *The head of the household…,* P. 87.

Like the French Law and the Swiss Initiative, it is possible to establish a duty of care with the concept of head of the household as the reference/standard of behavior for parent companies.

Similar to the French duty of vigilance law the parent company has a due diligence obligation, which is similar to the one[250] in the UNGPs, through its value chain.

Of course, this should be a transparent process, which means that similar to what is expressed through the French duty of vigilance law and the EU Directive, the company has to show that is effectively fulfilling its obligation[251].

However, the French duty of vigilance contains an obligation of result while the obligation expressed in the EU Directive and the Swiss initiative (which is in line with this proposal) is an obligation of process.

The burden of proof should be reversed with the presumption of liability of the parent company. This means that the parent company is liable, unless it can prove (with concrete prove)[252] that, although it did everything to avoid and mitigate the damages, that did not stop them from happening.

In this aspect, the EU Directive dictates that a company is liable if it doesn't fulfill its due diligence obligation[253].

According to this law, the only situations in which a company is not liable for not fulfilling its obligation is in cases where the damage occurs because of the company's partner actions or because it is unreasonable to require the company to prevent the event that led to the damage to happen, because it is inevitable or impossible to predict.

This can be interpreted as the burden of proof being on the company, and it has to be the corporation to demonstrate that its obligation has not been fulfilled because of one of the reasons mentioned before.

However, in case of non-compliance of the business partner, the EU Directive explains that the company should "refrain from entering into new or extending existing relations

[250]Due diligence or HRDD is only a mean by which the respect of the UNGPs can be achieve.

[251]"HRDD is more than a mere process, and refers to a standard of expected conduct to prevent a human rights impact."

[251]BUENO, Nicolas; BRIGHT, Claire — *Implementing Human Rights Due Diligence...*, PP. 13-15.

[252]Showing that the company tried to fulfill its due diligence obligation with, for example, expert reports, contracts, emails, testimonies, etc.

[253]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 22.

with the partner in connection to or in the value chain of which the impact has arisen"[254]. In addition, it is obliged to temporarily or permanently stop the business relationship.
In practice, this might bring a lot of losses for the corporation and it can lead to non-transparency.
Moreover, if every company has a due diligence obligation through its supply chain, such a severe sanction is not necessary because each company or business partner will be liable for its own actions. It is an unnecessary heavy measure.
Finally, it should be added that the presumption of liability of the parent company, mentioned above, similar to the UNGPs[255] and the Swiss Initiative, should be adapted to the size of the corporate group and parent company, because not all companies have the same economic power necessary to fulfill their obligations and it would be unfair to expect the same performance from a small/medium size corporation as a multinational.

[254]Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 of February, 2022/0051. Article 8(6). Also see: BRIGHT, Claire; SMITH, Lise — *The new European Directive...*, P.7.
[255]European Commission [et al.] — *Study on due diligence requirements…,* PP. 160, 217, 218.

5. Conclusion

The corporate veil doctrine was created by Company Law with the intention of attracting investment.

Nonetheless, through the years and with the introduction of the UNGPs, there was a change of paradigm and corporations no longer had just rights but also duties in relation to Human Rights and the Environment protection.

The reason for the creation of the doctrine is no longer accepted by the international community, in particular, after the events that occurred in the last years that showed how important it is to regulate corporation's behavior in order for them to not act recklessly.

Consequently, many piercing the veil theories were elaborated in order to create an exception to the application of the doctrine. But as it was explained in this dissertation, they have many gaps and are insufficient to solve the issues created with the application of the corporate veil doctrine.

Moreover, victims of corporate Human Rights and environmental harms should not have to depend on the Court's discretionary power to get justice. Allowing a legal gap like this brings legal uncertainty not only the claimants but also the defendants which, in these cases, are the companies.

As victims face many issues and barriers in order to get access to justice and remedies, it is necessary to create a mechanism that will effectively make parent companies accountable for their subsidiaries' actions, regardless of their location.

Countries like France, Switzerland and, more recently, the EU decided to create a concrete due diligence obligation for companies, that will allow to make parent companies liable for their own and their subsidiaries' actions.

However, these legal initiatives contain two main issues: they have a small scope and they don't solve the harmonization of the law issue.

These initiatives do not apply to every company, instead they need to fulfill certain requirements to be bided by the laws. This means that there are number of companies that are not obliged to respect and protect Human Rights and the Environment which seems unfair and pointless.

In addition, in the case of the French law and RBI they create legal provisions that are not applied equally in all countries.

In the EU Directive case, it is more concerning because the concepts issue of the law can lead to different interpretations and, consequently, application of the provisions in each Member States. In other words, depending on the country a company might be liable or not.

It is unfair to think that the liability of corporations and the justice for the Human Rights and environmental abuses victims depend on the country where the company is located. This is the main reason for the creation of a law with a bigger scope and the application of a concept that does not leave space for interpretation.

In addition, the due diligence observed in the UNGPs should be used as way of fulfilling the company's duty of care.

This can be done with the concept of the head of the household which will serve as a duty of care that needs to be fulfilled by having Human Rights and environmental due diligence.

Head in this sense represents the parent company and the household the corporate group. This company is considered the head because it sets out a common goal (profit) and shares resources with the other companies in order to sustain the business activity.

The head has the capacity to influence the other members of the household's (the subsidiaries) behavior.

As the new approach to control explains, the parent company has the capacity to share its competences and knowledge with the subsidiary companies, contractors and subcontractors.

It should not be relevant that each company has a different legal personality and capacity from the parent company, because most parent companies do not directly control their subsidiaries and yet they have an influence in their behavior. Subsidiary companies and other contractors and subcontractors act according to the expectations of the main company.

Consequently, parent companies have the power and knowledge to avoid Human Rights and environmental damages, but they do not, and because of that they are liable.

In sum, the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability due diligence should be revised in order to apply, through civil liability, the head of the household concept as a standard.

The concept should be applied to parent companies because, as a mother has a "duty of care" towards her child, which means she should always pay attention to the child and make sure he/she is healthy and safe, the parent company should have the same duty.

At the base of the concept of a head of the household there is due diligence obligation, which is an obligation of process and it covers the main company itself and its value chain.

As a result, there would be a presumption of liability of the parent company which means that the burden of proof would be reversed. This would allow victims to go to Court without having to prove anything.

The parent company would only be absolved if it could prove (with concrete prove)[256] that the damage occurred because of the company's partner actions or because it is unreasonable to require the company to prevent the event that led to the damage to happen, because it is inevitable or impossible to predict.

If the first situation happens, the company shouldn't suffer any losses or sanctions for its partner's actions.

It is also important to notice that, as it was mentioned before, the presumption of liability of the parent company, should be adapted to the size of the corporate group and parent company.

Finally, this presumption of liability of the head of the household should be applied through the European Union to all parent companies, because it would allow to implement the same rule to all States and harmonize the law.

This would open a door for victims of corporate Human Rights and environmental damages cases and would have a great impact internationally, which eventually could lead other countries to adopt the same type of approach.

[256]Showing that the company tried to fulfill its due diligence obligation with for example, expert reports, contracts, emails, testimonies, etc.

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