The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals

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Abstract

In 2017, France established a due diligence statutory obligation for French parent companies to monitor extraterritorial human rights and environmental abuses committed by their off-shore affiliates. Switzerland is also considering adopting a similar law for Swiss parent companies. These obligations are comparable to the duty of care that, according to recent case law, British parent companies owe towards their subsidiaries' neighbours. This article compares and contrasts the newly introduced French due diligence statutory obligation, the UK precedents, and two alternative Swiss legislative proposals on the due diligence and duty of care of parent companies.

Keywords: duty of care, due diligence obligation, human rights, multinational enterprises, France, Switzerland, UK

I. Introduction

Multinational enterprises conduct their businesses worldwide, but there is no body of law designed to regulate their transnational activities. International law has no prescriptive authority over companies, and domestic laws are in principle not applicable extraterritorially.[1] This issue led the international community to adopt a number of soft law instruments that declared the extraterritorial responsibility of companies for human

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[1] Carlos Manuel Vazquez, 'Direct vs Indirect Obligations of Corporations under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927; Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443.

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rights abuses. However, none of them is binding.[2] This raises a question of how to hold multinational enterprises accountable when they abuse human rights transnationally.

One avenue to achieve such goal is to establish liability regimes at the national level with extraterritorial reach to hold parent companies accountable for the human rights abuses committed by their affiliates.[3] The question is: how to frame a liability regime that would provide victims with effective remedies against multinational enterprises? This article provides a possible answer by comparing and contrasting the most advanced liability frameworks available to sue multinational enterprises: the UK, the French and the Swiss models. The UK and France have recently pioneered the introduction of liability regimes applicable to corporate groups abusing human rights. In both countries, the extraterritorial liability is based on a duty of care and a due diligence obligation that parent companies owe in respect to the torts committed by their affiliates. Although such frameworks are currently the most advanced, they both fail to guarantee effective remedies, because victims have to overcome an extremely high burden of proof to hold multinational enterprises to account.

Switzerland is also considering adopting two alternative legislative proposals introducing extraterritorial obligations for parent companies. If adopted, the Swiss model could be revolutionary because it uniquely splits the burden of proof between the victims and the companies, arguably providing claimants with a real opportunity to hold multinational corporations accountable. This article analyses first, the problems arising when multinational enterprises abuse human rights and second, the different solutions provided by France, the UK and Switzerland. It argues that the Swiss model would be the most advanced framework to hold multinational enterprises to account for extraterritorial human rights abuses.

II. The Problem of Business and Human Rights

Multinational enterprises are businesses including numerous affiliates[4] incorporated all over the world. Such corporations are in different relationships with each other. Typically, there is a parent company that has either direct or indirect control over several subsidiaries. There may also be corporations that are part of a supply chain. The law regulating the liabilities of each of these companies is national. Therefore, a multinational enterprise may well include a parent company incorporated in the UK with affiliates in Bangladesh, India, China and Brazil. The liability of each of these companies will be regulated respectively by UK, Bangladeshi, Indian, Chinese and Brazilian law. Trapped within its national dimension, the law fails to capture a fundamental aspect of

[2] See, e.g., OECD, *OECD Guidelines for Multinational Enterprises* (Organisation for Economic Co-operation and Development 2011); John Gerard Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2011) 29 *Netherlands Quarterly of Human Rights* 224.

[3] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 *Washington and Lee Law Review 1769*.

[4] The term 'affiliate' includes both subsidiaries and/or supply chains.

these multinational businesses: despite being a conglomerate of different domestic entities, they act as one in the international arena.[5]

The failure to capture the reality of how businesses operate at a global level creates a number of problems when stakeholders attempt to hold multinational enterprises accountable. First, those affiliates committing torts may not have sufficient assets to pay damages to victims as they may be under-capitalized.[6] Second, the standards set forth in national laws for suing a company would typically be different in multiple jurisdictions and, as a result, some victims may be able to hold a company accountable for damages while others may not.[7] In general, tort victims cannot expect that the same standards would apply to them across the globe. However, when a multinational enterprise abuses human rights, it seems particularly unjust for victims coming from some countries to have their rights denied, while in other jurisdictions victims are presumptively entitled to those rights. Multinational corporations may use these different legal regimes to their benefit and abuse human rights in those countries where victims are unable to defend themselves.[8]

Against this background, this section analyses the technical issues that prevent victims of human rights abuses from holding to account companies incorporated in Europe.

A. Limited Liability

A shareholder investing in a limited liability company is in principle liable only for the value of the shares owned in such a company. Shareholder(s) and corporation(s) are separate legal entities. Limited liability is one of the tools allowing multinational enterprises to avoid liability for extraterritorial torts, because it transfers the potential losses from the shareholder (i.e., the parent company), to the creditors, including tort victims. It creates an incentive for investors to pursue economically loss-making projects by way of transferring the risks related to their businesses to other stakeholders.[9]

Given the benefits that limited liability offers, it became apparent that corporations could abuse this legal rule. Therefore, with the emerging of limited liability, courts have also increasingly developed some doctrines to pierce the corporate veil. The common ground of all these theories is that under particular circumstances, the shareholder and its company could be considered as one person. It is beyond the purpose of this article to analyse the bases which allow courts to pierce the corporate veil in different European

[5] Joseph E Stiglitz, 'Multinational Corporations: Balancing Rights and Responsibilities' (2007) 101 *Proceedings of the ASIL Annual Meeting* 3; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press, 2007); Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here' (2003) 19 *Connecticut Journal of International Law* 1.

[6] Karen Vanderkerckhove, *Piercing the Corporate Veil* (Kluwer/Aspen, 2007) 1–23; Andrew Gamble and Kelly Gavin, 'The Politics of the Company', *The Political Economy of the Company* (Hart Publishing, 2001) 29–34; David W Leebron, 'Limited Liability, Tort Victims, and Creditors' (1991) 91 *Columbia Law Review* 1565; Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1985-1986) 11 *Journal of Corporation Law* 573.

[7] Cees van Dam, *European Tort Law* (2nd edn, Oxford University Press, 2013) 169–224.

[8] Niels Beisinghoff, *Corporations and Human Rights: An Analysis of ATCA Litigation against Corporations* (Peter Lang, 2009) 13–41; Vazquez, note 1; Ratner, note 1.

[9] David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, Oxford University Press, 2012) 776–781; Leebron, note 6; Blumberg, note 6.

jurisdictions, as multiple scholars have already addressed this issue at length.[10] It is sufficient to note that none of these doctrines would typically apply to multinational enterprises abusing human rights extraterritorially. Most of these theories were in fact tested in domestic courts before multinational companies existed in their current form, and nowadays the possibility to pierce the corporate veil is exceptional in European jurisdictions.[11]

B. Extraterritoriality

When a European company abuses human rights in a developing country, there is no international cause of action available to the victims. A claimant may sue a perpetrator for a tort corresponding to the violation of international law, but, in order to file a complaint, s/he must borrow the cause of action from a domestic tort law system.[12]

However, the causes of action in tort are typically applicable only territorially. Tort law applies when a human rights abuse happens, and the perpetrator and the victim are, in the same country. In this case, the victim can sue the perpetrator for abusing human rights based on the causes of action available in the national legal system. Instead, when the conduct resulting in an abuse of human rights occurs in multiple countries, the victim has no choice other than attempting to sue the perpetrator in a domestic court for conduct that took place (at least in part) extraterritorially.[13] There are two main private international law issues in this respect: first, whether or not domestic courts have jurisdiction over extraterritorial cases; and, second, which law would apply to human rights abuses occurring in a foreign land.

In Europe, European Union (EU) law regulates both issues through the Regulations Brussels I,[14] its Recast[15] and Rome II.[16]

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[10] Vanderkerckhove, note 6, 3–9; Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *The Yale Law Journal* 1879; Kershaw, note 9, 3–46; Leebron, note 6.

[11] See, e.g., UK cases *Prest v Petrodel Resources Limited and others* [2013] UKSC 34; *Woolfson v Strathclyde Regional Council* [1978] SC 90 (HL); *Adams and Others v Cape Industries Plc and Another* [1990] Ch 433; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council Bronze Investments Ltd v Same DHN Food Transport Ltd v Same* [1976] W.L.R. 1 852; *Jones and Another v Lipman and Another* [1962] W.L.R. 1 832; *Gilford Motor Company, Ltd v Horne* [1933] Ch 935.

[12] Vazquez, note 1; Ratner, note 1; van Dam, note 7 169–224.

[13] Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1; Menno T Kamminga, 'Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel', *What's Wrong with International Law?: Liber Amicorum A.H.A. Soons* (Brill-Nijhoff, 2015); Nicola Jägers and Marie-Jose van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law*; Philipp Wesche and Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*' (2016) 16 *Human Rights Law Review* 370; Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing, 2012); Liesbeth Enneking, 'Crossing the Atlantic – The Political and Legal Feasibility of European Foreign Direct Liability Cases' (2009) 40 *George Washington International Law Review* 903.

[14] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters 2001 (OJ L012).

[15] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) 2012 (OJ L351).

[16] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) 2007 (OJ L199).

Brussels I and its Recast regulate the issue of jurisdiction. Domestic courts have jurisdiction over extraterritorial cases as long as the defendant is a company incorporated in the territory of the home state.[17]

Rome II regulates the issue of applicable law but leaves a number of open questions as to its practical application to lawsuits brought against multinational enterprises. Such questions could be best illustrated by a hypothetical scenario. Assume that a parent company H is incorporated in the UK and has a subsidiary S incorporated in Ghana. S abuses human rights in Ghana. The victims file a lawsuit against H in the UK. The issue is what law applies to the human rights abuses committed in Ghana. According to Article 4 of Rome II, which lays out the rule of general application in transnational torts, UK judges should apply Ghanaian law as the *lex loci delicti*, i.e., the place of injury law.[18]

However, there are some exceptions applicable to extraterritorial cases involving multinational enterprises. First, Article 7 of Rome II lays out an exception for environmental cases. A victim of environmental degradation may choose the applicable law. The choice is between the place of injury law and '[..t]he law of the country in which the event giving rise to the damage occurre[d..]'.[19] It is unclear whether the latter could be the home state law in a case involving a multinational enterprise because this would depend on whether the event giving rise to the damage perpetrated by the corporate group in Ghana could be localized in the UK. However, in the example above, a victim coming from Ghana could arguably request to apply UK law.[20] Second, Articles 16 and 26 allow domestic courts to apply the *law of the forum* when foreign law is contrary to public policy or mandatory rules.[21] According to Recital 32 of Rome II, domestic courts may invoke the forum law exceptions only in rare circumstances because many controversial questions arise as to the meaning of public policy and mandatory rules.[22]

Therefore, in cases concerning multinational companies abusing human rights, domestic courts are likely to assert jurisdiction over parent companies incorporated in the home state and apply the law of the place of injury.

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[17] Trevor C Hartley, 'Choice-of-court Agreements, Lis Pendens, Human Rights and the Realities of International Business: Reflections on the Gasser Case', *Le droit international privé : esprit et méthodes : Mélanges en l'honneur de Paul Lagarde* (Dalloz-Sirey, 2005); Council Regulation (EC) No 44/2001, art 63.

[18] Regulation (EC) No 864/2007 (Rome II), art 4; Ivo Bach, 'Art 4 Rome II', *Rome II Regulation: Pocket Commentary* (Sellier, 2011); Jan von Hein, 'Article 4 General Rule', *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (Kluwer/Aspen, 2011).

[19] Regulation (EC) No 864/2007 (Rome II), art 7.

[20] Jan von Hein, 'Article 7 Environmental Damage', *Rome Regulations: Commentary of the European Rules of the Conflict of Laws* (Kluwer/Aspen, 2011); Angelika Fuchs, 'Art. 7 Rome II', *Rome II Regulation: Pocket Commentary* (Sellier, 2011).

[21] Regulation (EC) No 864/2007 (Rome II), art 16, 26.

[22] Arif Yascha, 'Overriding Mandatory Provisions and Administrative Authorisations According to the Rome II Regulation' (2011) 11 The European Legal Forum 113; Alberto Mattei, 'Prospects for Industrial Relations: Overriding Mandatory Provisions in the Transnational Labour Market' in Roger Blampain (ed), *Labour Markets, Industrial Relations and Human Resources Management: From Recession to Recovery* (Kluwer Law International, 2012); Veerle Van Den Eeckhout, 'Corporate Human Rights Violations and Private International Law. The Hinge-Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: a Facilitating Role for PIL or PIL as a Complicating Factor' (2012) 2 *Contemporary Readings in Law and Social Justice* 178; Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2008) 625–641; Pippa Rogerson, *Collier's Conflict of Laws* (4th edn, Cambridge University Press, 2013) 424–433; André Nollkaemper, 'Public international law in transnational litigation - prospects and problems in the courts of the Netherlands', *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000) 277–279; Regulation (EC) No 864/2007 (Rome II), rec 32.

III. The Due Diligence Obligation and the Duty of Care: The UK, French and Swiss Solutions

A possible solution to the business and human rights problem is for home states to hold parent companies accountable for a breach of a due diligence obligation to prevent tortious activities conducted by their corporate group. Such a due diligence obligation is linked to a duty of care that parent companies may owe directly towards the victims of the human rights abuses committed by an entity of their group. The due diligence obligation and duty of care are two distinct concepts. However, recent legislation and case law on the liability of parent companies for the torts committed by their affiliates have connected due diligence obligation and duty of care. A due diligence obligation of a parent company entails a duty of care that such a corporation owes to the victims of human rights abuses. At the same time, a duty of care entails a due diligence obligation of the parent company to oversee the activities conducted by its affiliates.[23]

The liability connected with a violation of the due diligence obligation depends on the parent company's failure to prevent damage caused by its affiliate. Therefore, the parent company and the affiliate may be liable for two separate torts: the former may be responsible for a failure to prevent its subsidiary from causing damage; the latter may be responsible for the damage it caused itself.[24] The UK, France and Switzerland have all implemented different versions of such due diligence obligation and duty of care of the parent company for the torts committed by its affiliates.

A. UK Case Law: The Parent Company Duty of Care

The UK addressed the parent company's direct liability for a breach of its duty of care in its case law. Although the direct liability cases left several unanswered questions, they nevertheless laid out the following main principles.

First, in the UK, the duty of care has been construed as a direct obligation which a parent company owes towards a stakeholder. It exists irrespectively of the liability of a subsidiary, although to prove a breach of a parent company's duty of care, litigators may often have to demonstrate the responsibility of its subsidiary.[25]

Second, a duty of care owed by a parent company towards a stakeholder entails a due diligence obligation by the parent to oversee the activities of the corporate group in order to prevent torts that could potentially damage such a stakeholder. Therefore, in the UK,

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[23] Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 *Business and Human Rights Journal* 179. For different approaches, see Skinner, note 3; Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317.

[24] Enneking, *Foreign Direct Liability and Beyond*, note 13; Enneking, 'Crossing the Atlantic – The Political and Legal Feasibility of European Foreign Direct Liability Cases', note 13; Robert McCorquodale, 'Waving Not Drowning: Kiobel Outside the United States' (2013) 107 *American Journal of International Law* 846.

[25] Enneking, 'Crossing the Atlantic – The Political and Legal Feasibility of European Foreign Direct Liability Cases', note 13; Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) 10 *Utrecht Law Review* 44; Andrew Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary' (2012) 71 *The Cambridge Law Journal* 478; Michael D Goldhaber, 'Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard' (2013) *UC Irvine Law Review* 127.

the due diligence obligation of parent companies to oversee the activities of their subsidiaries is a consequence of the duty of care.[26]

This section analyses the main precedents contributing to the construction of the current liability regime applicable to British parent companies for the abuses committed by their subsidiaries. There have been four main jurisdictional cases concerning the duty of care of a transnational business in UK courts: *Lubbe and others v Cape*,[27] *Lungowe v Vedanta*,[28] *Okpabi v Royal Dutch Shell plc*[29] and *AAA & Others v Unilever plc and Unilever Tea Kenya Limited.*[30] All of these cases concern multinational enterprises allegedly owing a duty of care towards tort victims. These cases related to the allegations of extraterritorial environmental degradation committed by UK corporate groups through their foreign subsidiaries in South Africa, Zambia and Nigeria, and the failure of a corporate group to prevent tribal violence in Kenya. All of these cases were decided only on the issue of jurisdiction. To date, there are no transnational cases decided on the merits of a parent company's duty of care. The issue in all of these cases was whether or not to dismiss a lawsuit on preliminary grounds. Therefore, UK courts had to decide first whether they could exercise jurisdiction over transnational torts, and second whether the claims were triable, or in other words, whether the claimants had any chance of success. Furthermore, two main domestic cases are relevant to understand how the duty of care works in the UK: *Chandler v Cape plc*[31]and *David Thompson v the Renwick Group plc.*[32] In both cases, an employee of a subsidiary sued the parent company for health damages related to the production of asbestos.

1. *Jurisdiction*

With regard to the issue of jurisdiction, in *Lungowe v Vedanta*, *Okpabi v Royal Dutch Shell plc*, and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*, either the Supreme Court, the Court of Appeal or the High Court confirmed that, under Brussels I, its Recast and the Court of Justice of the European Union's *Andrew Owusu v NB Jackson*,[33] the doctrine of *forum non-conveniens* had no place in lawsuits filed against parent companies incorporated in the UK.[34]

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[26] Cassel, note 23; Skinner, note 3; Cossart, Chaplier and Lomenie, note 23.

[27] *Lubbe and Others v Cape plc and Related Appeals* [2000] UKHL 41.

[28] *Lungowe & Ors v Vedanta Resources plc & Anor* [2016] EWHC TCC 975; *Lungowe & Ors v Vedanta Resources plc & Anor* [2017] EWCA Civ 1528; *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20.

[29] *Okpabi & Ors v Royal Dutch Shell plc & Anor (Rev 1)* [2018] EWCA Civ 191; *Okpabi & Ors v Royal Dutch Shell plc & Anor* [2017] EWHC TCC 89.

[30] *AAA & Ors v Unilever plc & Anor* [2018] EWCA Civ 1532; *AAA & Ors v Unilever plc & Anor* [2017] EWHC 371.

[31] *Chandler v Cape plc* [2012] EWCA civ 525.

[32] *Thompson v the Renwick Group plc* [2014] EWCA Civ 635.

[33] *C-281/02 Andrew Owusu v NB Jackson* [2005] ECR I (CJEU); CJS Knight, 'Owusu and Turner: The Shark in the Water?' (2007) 66 *Cambridge Law Journal* 288.

[34] *Forum non-conveniens* is still relevant with respect to foreign companies including subsidiaries of UK parent corporations.

2. Applicable Law

In order to assess the arguability of the claim, the courts also assessed what would be the law applicable to the cases. In *Lungowe v Vedanta*, *Okpabi v Royal Dutch Shell plc* and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*, the courts ruled that UK case law may be relevant to assess the accountability of a British parent company for the transnational torts committed by its Zambian, Nigerian and Kenyan subsidiaries.

Specifically, in *Lungowe v Vedanta*[35] and in *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*,[36] the courts stated as common ground that host state law would apply, without taking into any account the exceptions under Rome II. However, they argued, the host states (either Zambia or Kenya) and UK legal systems shared the same notion of common law duty of care. Therefore, UK case law would be highly relevant to assess the liability of the parent company.

In *Okpabi v Royal Dutch Shell plc*, the High Court concluded that there were arguable grounds to apply UK law based on the environmental and forum law exceptions laid out in Rome II. It further considered the possibility to apply Nigerian law and concluded that the common law duty of care was part of Nigerian law, and, therefore, the UK duty of care case law would be a relevant and persuasive authority in Nigeria. Therefore, the UK case law would apply to the case by virtue of either Rome II, or, alternatively, because of the commonalities between the Nigerian and British legal systems.[37]

3. Parental Liability

In order to determine the liability of a parent company for the torts committed by its subsidiary, the analysis of the following two relationships is of fundamental importance: the relationship between parent and subsidiary; and the relationship between parent company and tort victim. A fundamental notion to take into account in respect of these relationships is proximity, which was defined by Lord Oliver of Aylmerton as '[...a] convenient expression so long as it is realized that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists'.[38]

The Supreme Court in *Lungowe v Vedanta* ruled that 'the critical question is whether [the parent company ...] sufficiently intervened in the management of the Mine owned by its subsidiary […] to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants'.[39] The answer to this question is a matter of facts as there is no fixed test to apply to such cases. The Supreme Court disagreed with any categorization of cases in which parent companies would take control over their groups,[40] and argued that any parent company could potentially owe a duty of care towards any tort victim affected by its subsidiary.[41] It mentioned that the relevant

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35 *Lungowe v Vedanta* [2016], note 28; *Lungowe v Vedanta* [2017], note 28; *Vedanta v Lungowe* [2019], note 28.

36 *AAA v Unilever* [2017], note 30, paras 77–78.

37 *Okpabi & Royal Dutch Shell plc* [2017], note 29.

38 *Caparo Industries plc v Dickman and Others* [1990] HL A.C. 2 605 633.

39 *Vedanta v Lungowe* [2019], note 28, para 44.

40 *Okpabi v Royal Dutch Shell plc* [2018], note 29; *AAA v Unilever* [2018], note 30.

41 *Vedanta v Lungowe* [2019], note 28, para 51.

precedent a court should look at is *Dorset Yacht Co Ltd v Home Office*.[42] This case concerned the responsibility of the Home Office for failing to prevent fugitive prisoners from causing damage to third parties. In this case, the House of Lords analysed both the relationship between the Home Office and the prisoners and the relationship between the Home Office and the tort victims. It concluded that the Home Office had a controlling relationship over the prisoners, but it did not have a direct relationship towards the claimants that were just third parties holding properties in the vicinity of Brownsea Island where the prisoners were working. The main issue of the case was, therefore, whether the reasonable foreseeability of potential damages committed by the fugitives was a sufficient reason for the Home Office to owe a duty of care towards neighbouring third parties. The House of Lords ruled that the Home Office owed a duty of care towards the claimants who suffered from reasonably foreseeable damages inflicted by the fugitives. Although *Dorset Yacht Co Ltd v Home Office* did not establish a test to determine the existence of a duty of care, it mentioned two fundamental elements to take into consideration: proximity between the three parties (fugitives, Home Office, and tort victims), and reasonable foreseeability.[43] To understand the Supreme Court decision in *Lungowe v Vedanta*, it is necessary to look back at a few additional cases.

Traditionally, UK courts interpreted the duty of care as originating from the relationship that a tortfeasor, in this case a parent company, had directly with the claimant.[44] This was the case in *Caparo Industries plc v Dickman and Others*, where the House of Lords ruled an accounting company had no duty of care towards an investor that relied on its statement in making investment decisions. This case also affirmed the, so-called, pockets of case law approach, according to which, the existence of a duty of care depends on the analysis of different and specific categories of cases. This approach restricts the authority of each case to a specific category it belongs to.[45] The need for a direct claimant–respondent relationship is evident also in cases on parental liability such as *David Newton Sealey v ArmorGroup Services Ltd* where the High Court dismissed a request for summary judgement because by hiring and instructing its subsidiary's employee on multiple occasion, a parent company could voluntarily assume responsibility over him.[46] Therefore, what mattered to establish the duty of care was the relationship between parent company and employee. In this context, the courts used the term proximity to define a direct relationship between claimant and respondent.

However, in *Chandler v Cape plc*, the Court of Appeal ruled that the parent company owed a duty of care towards its subsidiary's employee because of the relationship that the parent company had with its subsidiary.[47] The Court revisited the concept of assumption of responsibility as attachment of responsibility. While traditionally the parent company

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42 *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

43 Ibid.

44 Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 *The Modern Law Review* 603; Tim Bullimore, 'Sins of the Father, Sins of the Son' (2012) 28 *Professional Negligence* 212; Dalia Palombo, 'Chandler v Cape: An Alternative to Piercing the Corporate Veil beyond Kiobel v Royal Dutch Shell' (2015) 4 *British Journal of American Legal Studies* 453.

45 *Caparo v Dickman*, note 38. See also Jane Stapleton. 'Duty of Care and Economic Loss: A Wider Agenda' (1991) Law Quarterly Review 249.

46 *David Newton Sealey v ArmorGroup Services Ltd* [2008] EWHC (QB) 233.

47 Petrin, note 44; Sanger, note 25; Palombo, note 44; Bullimore, note 44; *Chandler v Cape plc*, note 31, paras 62–66.

would have to assume responsibility towards the employee in order to owe a duty of care, in *Chandler v Cape plc*, the parent company's role within the group created a duty of care towards its subsidiary's employees. In this case, the proximity between claimant and respondent is not intended as a direct relationship between the two, as it was in *David Newton Sealey v ArmorGroup Services Ltd*, but rather as the chain of events that connects the respondent's failure to act with the damage suffered by the claimant.[48] Accordingly, in the context of a corporate group, the proximity between parent and tort victim arguably depends on the proximity between parent and subsidiary.

In *Chandler v Cape plc*, the Court found that the parent company assumed responsibility over its subsidiary on multiple bases, including an exchange of information between the parent company and the subsidiary; a group-wide empirical research on asbestos in the factories of the corporate group; guidance given by the parent company regarding the activities of the subsidiary; and the fact that the parent company set up the asbestos business and then subsequently sold it to its subsidiary. All of these elements contributed cumulatively to the narrative that the parent company was proximate to its subsidiary's employee, but none of the relevant factors alone seemed to establish such proximity.[49] The Court of Appeal also decided *David Thompson v the Renwick Group plc* by analysing the relationship between parent company and subsidiary. However, differently from *Chandler v Cape plc*, in *David Thompson v the Renwick Group plc* the Court of Appeal ruled that the parent company and its subsidiary were not close enough to establish a duty of care. It held that the cooperation between different companies in the same corporate group and a joint use of resources was not sufficient for the parent to owe a duty of care towards its subsidiary's employees.[50]

All of the jurisdictional cases mentioned above also assessed the arguability of the claims by analysing the relationship between parent company and subsidiary. However, while in *Lungowe v Vedanta*, the Supreme Court, Court of Appeal and High Court all ruled that the relationship between parent and subsidiary was arguably close enough for the parent to possibly owe a duty of care towards the tort victims damaged by its subsidiary, in *Okpabi v Royal Dutch Shell plc* and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*, the High Court and Court of Appeal held that the parent company and its subsidiary were not in a sufficiently close relationship for the former to arguably owe a duty of care in respect of the activities of the group. The difference between *David Thompson v the Renwick Group plc*, *Okpabi v Royal Dutch Shell plc* and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* on the one hand, and *Chandler v Cape plc* and *Lungowe v Vedanta*, on the other, is fact-based. However, the dichotomy between these rulings is telling about how undetermined the criteria to establish a duty of care of a parent company for abuses committed by its subsidiaries are in UK case law. Against this background, *Lungowe v Vedanta* suggests that future cases would depend on the overall trilateral relationship between parent, subsidiary and claimant, instead of on just two sides of such triangle. Furthermore, the Supreme Court

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48 Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 *Oxford Journal of Legal Studies* 33.

49 *Chandler v Cape plc*, note 31, paras 72–81.

50 *Thompson v the Renwick Group plc*, note 32, para 38; Uglješa Grušić, 'Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation' (2015) 74 *The Cambridge Law Journal* 30.

seems to depart from the pockets of case-law approach of *Caparo Industries plc v Dickman and Others*. It opened the door for UK courts to assert jurisdiction over potentially any transnational tort committed by a subsidiary of a UK parent company. This could arguably change the rulings in *Okpabi v Royal Dutch Shell plc and AAA & Others v Unilever PLC and Unilever Tea Kenay Limited*, which the Supreme Court criticized for their narrow looking categorization of the duty of care and which have both been appealed.

It is still unclear how UK courts will apply the duty of care precedents to the situation of a multinational enterprise, but, nevertheless, the issue will arguably be whether the relationship between parent, subsidiary and victim is proximate enough for the parent to reasonably foresee that its subsidiary would damage a third party.

B. French Law: The Parent Company Due Diligence Obligation to Monitor Extraterritorial Human Rights Abuses

In 2017, France passed the first law ever to establish a due diligence obligation for French parent companies to monitor the extraterritorial human rights and environmental abuses committed by their offshore affiliates.[51] The French Commercial Code includes two new articles *L 225-102-4* ('Article 4') and *L 225-102-5* ('Article 5'). Broadly, Article 4 sets up a binding due diligence obligation for parent companies to monitor their affiliates, and Article 5 establishes a corresponding direct liability in tort for those parent companies that fail to oversee the activities conducted by their affiliates.

1. The Due Diligence Obligation

Article 4 lays out the due diligence obligation[52] of parent companies, controlling a multinational corporate group with at least 10,000 employees,[53] to oversee the activities conducted by offshore companies, including both subsidiaries and supply chains with which it has an established commercial relationship. The law defines the due diligence obligation as a parent company's duty to set up a monitoring plan. Such a plan should identify, target and prevent any serious threat to human or environmental rights, health or security committed by any affiliate. Specifically, the parent company has to determine the risks arising in connection with the activities conducted in its supply chain, establish monitoring procedures that would regularly assess whether the enterprises of its supply chain comply with the law, lay out the actions that it will take to prevent any abuse, and institutionalize an internal mechanism for trade unions to signal any risk of abuse within the supply chain. The parent company must publish its monitoring plan and present it to its shareholders' general meeting.

The due diligence obligation of Article 4 is the first ever duty established by a law of general application requiring multinational enterprises to monitor the human rights abuses of their supply chains. This duty is a real breakthrough for the following

[51] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017 (JORF) 2017–399.

[52] In French *devoir de vigilance*, see R-C Drouin, 'Le Développement Du Contentieux à l'encontre Des Entreprises Transnationales : Quel Rôle Pour Le Devoir de Vigilance?' (2016) *Droit social* 246.

[53] The threshold of 10,000 employees is reduced to 5,000 when the companies directly or indirectly controlled by the parent company are all incorporated in France.

reasons. First, it applies not only when a parent company outsources its production through foreign subsidiaries, but also when such a parent company conducts its extraterritorial activities through foreign entities with which it has an established commercial relationship. Second, differently from any tort law duty that a parent company may owe towards third parties, this due diligence obligation refers explicitly to extraterritorial human rights and environmental abuses. Therefore, Article 4 establishes a transnational duty of the parent company to supervise its supply chain.[54]

2. *The Duty of Care: Direct Liability in Tort*

Under the French law, if a parent company violates its due diligence obligation, it will then owe a duty of care towards the victims of human rights abuses perpetrated by its affiliates. Article 5 lays out the direct liability of the parent company for a breach of its duty of care towards the victims.[55]

On the one hand, under Article 5 the duty of care of parent companies is far-reaching as it establishes an extraterritorial responsibility of French parent corporations. On the other hand, such liability of parent companies is limited to those cases when (a) the parent corporation breaches its due diligence obligation, i.e., it does not set up an effective monitoring plan, (b) because of such a breach, an affiliate in its supply chain was able to abuse health, security or human and environmental rights, and (c) such abuses resulted in damages. The parent company breaches its duty of care and is liable only if conditions (a), (b) and (c) are satisfied. The open question remains how French courts will interpret the relationship between these three elements and, therefore, the causality that a victim will have to prove to seek damages against the parent company.[56]

C. Legislative Proposals in Switzerland

Switzerland is considering two alternative legislative proposals to introduce an obligation to respect and of due diligence for Swiss multinational enterprises abusing human and environmental rights extraterritorially. The history behind the two proposals is convoluted. In March 2015, the Swiss Parliament considered, but eventually declined, a law laying out an accountability framework for Swiss parent companies outsourcing their production through foreign subsidiaries abroad.[57] However, the public reacted to such a discussion and proposed a constitutional *referendum* on this matter. The proposal set for in the referendum triggered a counter-proposal that is now the subject of a legislative ping-

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[54] Périn Pierre-Louis, 'Devoir de Vigilance et Responsabilité Illimitée: Qui Trop Embrasse Mal Étreint' (2015) *Revue trimestrelle de droit commercial et de droit économique* 215.

[55] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017–399, L 225-102-5.

[56] Delpech Xavier, 'Bientôt Un Devoir de Vigilance à La Charge Des Sociétés Mères et Des Donneurs d'ordre' (2015) Dalloz Actualité; Drouin, note 52; Pierre-Louis, note 54; Stéphane Brabant and Elsa Savourey, 'A Closer Look at the Penalties Faced by Companies' (2017) *Revue Internationale de la Compliance et de l'Ethique des Affaires* 50.

[57] 'Conseil National Session de Printemps 2015 Neuvième Séance 11.03.15 15h00 14.3671' (2015), https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=35082 (accessed 6 June 2016).

pong between the National Council (the equivalent of a House of Representatives) and the Council of States (the equivalent of a Senate).[58]

Therefore, there are two alternative proposals for a due diligence obligation for parent companies that could become law in Switzerland: a proposal for a constitutional referendum[59] that would include corporate accountability as part of the Swiss Constitution ('proposal'), and a watered-down counter-proposal for a due diligence law ('counter-proposal').[60] The proposal is wider in its scope, human rights protection and corporate liability, but would require long-lasting proceedings to change the Constitution, including a referendum, and may be subject to changes during the legislative process. The counter-proposal, although less ambitious in terms of the liability of parent companies, could become law by the end of 2019. However, the counter-proposal has limited the scope of the law only to the subsidiaries of multinational corporations with more than 500 employees and/or with a high turnover threshold. Furthermore, it applies only to those human rights or environmental abuses that cause bodily harms or damage to property. Instead, the proposal refers to any level of control that parent companies exercise over other corporations, including both ownership (holding shares in a subsidiary) or economic relationship (such as the control that a company exercises over its supply chain).

Both proposals clarify that the applicable law would be Swiss law. Furthermore, both proposals set out, first, a duty to respect and, second, a due diligence obligation for parent companies. As to the duty to respect, parent companies must ensure the respect of human rights and environmental laws within their corporate group. As to the due diligence obligation, parent companies must monitor the activities of their affiliates all over the world to prevent human rights or environmental law abuses. In both proposals, parent companies are directly liable for certain human rights and environmental abuses perpetrated by their foreign subsidiaries, unless they demonstrate that they have complied with their due diligence obligation. Accordingly, the due diligence obligation becomes a tool to reverse the burden of proof. Swiss parent companies have a duty to ensure the respect of human rights by their subsidiaries, and, in case of breach of such duty, they bear an extraterritorial direct liability in tort. However, if a Swiss company is able to demonstrate that it complied with its due diligence obligation, and nevertheless its subsidiaries managed to abuse human or environmental rights, then it will no longer bear direct responsibility.[61]

The most significant difference between the two proposals lies in the liability clause. While in both proposals this clause would allow victims to hold parent companies accountable if they did not adequately comply with their due diligence obligation, the counter-proposal would also require effective control of the parent company over the subsidiary. Furthermore, the counter-proposal adds an additional possibility for Swiss companies to avoid liability if they were unable to influence the conduct of their

[58] Commission des affaires juridiques du Conseil des Etats, '16.077 Droit de la société anonyme (projet 2)'; Commission des affaires juridiques du Conseil national, '16.077 Droit de la société anonyme'.

[59] 'Responsible Business Initiative', http://konzern-initiative.ch/initiativtext/?lang=en (accessed 26 April 2018).

[60] RK-N: Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt', Indirekter Gegenentwurf 2018 6.

[61] Cossart, Chaplier and Lomenie, note 23.

subsidiaries. This could open a Pandora's box in Swiss courts. As it pertains to the notion of effective control, the Legal Commissions of the Swiss National Council and the Council of States[62] clarified that it is not sufficient for parent companies to control a subsidiary on paper, but that such control must be effective in practice and that the burden to prove control is on the victim. This essentially means that even when a parent company owned a significant number of shares in a subsidiary, this would not necessarily entail effective control. The victim would still have to prove that such control existed in practice because the parent company effectively oversaw and intervened in the subsidiary's activities. As it pertains to the notion of influence, it is unclear what level of influence the parent company would have to exercise over its subsidiary to be responsible for its conduct. Essentially, victims would have to prove the liability of subsidiaries and the effective control of parent companies over such subsidiaries, while parent companies would avoid liability if they proved that they met their due diligence obligations, or they did not exercise a sufficient level of influence over the activities conducted by their subsidiaries.

IV. Looking Forward

The French law and the Swiss legislative proposals establish a parent company's obligation to oversee the respect of human and environmental rights by its affiliates. By contrast, the UK common law duty of care lays out a general responsibility of parent companies for damages caused by their subsidiaries. However, despite this main difference, these duties are similar: they all establish a direct liability framework for parent companies. The main problem for all of these models is to guarantee an effective remedy for the victims. However, it is clear by now that neither the French nor the UK model provides such a guarantee. Although it is theoretically possible to hold a parent company accountable for the extraterritorial human rights abuses committed by its foreign subsidiaries in France and the UK, the burden of proof on the victims is so high that, so far, in no transnational case has a parent company been held liable. Against this backdrop, this section argues that the Swiss legislative proposal and counter-proposal would represent a clear step forward in comparison with the French law and UK case law because they shift some of the burden of proof away from the victims to the parent company.

A. Extraterritoriality

There are two private international law issues relevant to the extraterritorial application of one country law to foreign territories: jurisdiction and applicable law. All three models successfully address jurisdiction. However, as it pertains to the applicable law, the French and Swiss models regulate this issue in relation to the extraterritorial due diligence obligations of parent companies, while UK case law relies on the general principles of private international law established under Rome II.

First, the issue is whether or not home state courts have jurisdiction over extraterritorial torts committed by a corporate group headquartered in such a home state. Brussels

[62] Commission des affaires juridiques du Conseil national, note 58; Commission des affaires juridiques du Conseil des Etats, note 58.

I provided a definitive answer to such question as it is now clear that European home states courts have jurisdiction over parent companies incorporated within their territory and can, therefore, adjudicate extraterritorial cases.[63] In Switzerland, which is not a member of the EU, the Lugano Convention regulates this issue and it prescribes the same rule as Brussels I with respect to the jurisdiction of Swiss courts over the parent corporations.[64]

Second, the issue is whether a home state court should apply domestic or foreign law to an extraterritorial tort. Rome II regulates the question of applicable law, but there is no straightforward answer regarding which law would apply to a multinational company abusing human rights extraterritorially.

UK courts have never applied the duty of care case law extraterritorially. *Lubbe and others v Cape plc* was decided on *forum non-conveniens* grounds and then settled, so the House of Lords did not need to analyse the issue of applicable law. In the cases of *Lungowe v Vedanta*, *Okpabi v Royal Dutch Shell plc* and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*, UK courts have not yet decided which law applies to the facts. All other relevant cases were territorial, with both the parent and subsidiary companies incorporated in the UK. It is, therefore, unclear how UK courts will decide on the issue of applicable law. However, in their *dicta*, UK courts asserted that the place of injury (host state) law might arguably apply to such cases. Nevertheless, they suggested that the UK duty of care case law would be a highly persuasive authority in host states that were former British colonies and are nowadays adopting a common law legal system.[65] However, this would obviously not allow the application of UK law to a subsidiary incorporated in a civil law jurisdiction.

The newly introduced Articles 4 and 5 of the French Commercial Code clarify that French multinational enterprises have an extraterritorial due diligence obligation to monitor the activities of their affiliates worldwide. According to Article 5, in case of breach of such obligation, the French parent company would be responsible under general French tort law.[66] This facilitates French judges in the application of Rome II, because the due diligence obligation is specifically designed to apply extraterritorially. Therefore, French judges might potentially interpret the French due diligence obligation as overriding foreign law in accordance with Article 16 of Rome II[67] and apply French tort law. However, there is no explicit reference in Articles 4 and 5 as to the applicable law and it would be for the judiciary to interpret the term 'extraterritoriality' as an implicit indication that French law overrides the otherwise applicable foreign law. Given that domestic courts rarely invoke public policy or mandatory rules,[68] it is unclear whether

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63 Council Regulation (EC) No 44/2001.

64 Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters 2007 (OJ L339).

65 *Lungowe v Vedanta* [2017], note 28, paras 122–126; *Okpabi v Royal Dutch Shell* [2017], note 29, paras 50–61.

66 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, L 225-102-5.

67 Jan von Hein, 'Article 16 Overriding Mandatory Provisions', *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (Kluwer/Aspen, 2011); Angelika Fuchs, 'Art. 16 Rome II', *Rome II Regulation: Pocket Commentary* (Sellier, 2011); Dickinson, note 22.

68 Jan-Jaap Kuipers and Sara Migliorini, 'Qu'est-Ce Que Sont Les Lois de Police? Une Querelle Franco-Allemande Après La Communautarisation de La Convention de Rome' (2011) 19 *European Review of Private Law* 187; Kenny Chng, 'A Theoretical Perspective of the Public Policy Doctrine in the Conflict of Laws' (2018) *Journal of Private International Law* 130.

they would consider Article 5 as establishing an exception in this sense. Another possibility, as some scholars have argued,[69] could be to interpret the French due diligence obligation as evidence that France would be manifestly more closely connected to the foreign tort than the host state. This argument could be made on the basis of Article 4(3) of Rome II.[70] However, French courts are unlikely to adopt such a view. Certainly, the introduction of Articles 4 and 5 to the French Commercial Code establishes a special connection between France and the extraterritorial torts committed by French multinational enterprises. However, to argue that for this reason France would be more closely connected to a tortious act than the host state where such act actually occurred, would be difficult.

Given that Switzerland is not a member of the EU, Rome II would not apply to Swiss companies. However, both Swiss proposals state that the applicable law would be Swiss irrespectively of any other law that may be applicable according to private international law rules.[71]

Therefore, French, UK and Swiss courts will most certainly assert jurisdiction over extraterritorial cases when the defendant is a parent company incorporated within their territories and the case is arguable. As it pertains to the issue of applicable law, both UK case law and the French Commercial Code do not provide legal certainty. Instead, Switzerland's current proposals would address the issue in a definitive way if adopted.

B. Duty of Care and Due Diligence Obligation

The duty of care and the due diligence obligation of parent companies are the bases of the French, UK and Swiss direct liability frameworks. However, the relationship between the duty of care that a parent company owes towards the victims of a tort committed by its affiliate, the due diligence obligation to oversee the activities of its corporate group, and the liability of such a parent company is different in the three models.

In the UK, the due diligence obligation arises only when litigators prove that the parent company owes a duty of care towards the tort victim. It is in fact because of such a duty of care that a parent company would have to oversee the activities of its subsidiary and prevent them from causing damage. A fundamental issue in this regard is whether or not parent corporations owe their duty of care towards non-employees. The question arises because a respondent, in this case a parent company, would typically owe a duty of care towards a claimant when they are in a relationship of proximity. However, it is unclear what proximity means in the context of a corporate group committing a tort. Certainly, employees have been considered in a proximate enough relationship with the parent company even if they were employed by its subsidiary, as demonstrated by *Chandler v Cape plc*.[72] But could a duty of care be extended also to third parties?

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[69] Étienne Pataut, 'Le devoir de vigilance – Aspects de droit international privé' (2017) *Droit social* 833.

[70] Regulation (EC) No 864/2007 (Rome II), art 4(3) 'Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'.

[71] RK-N: Eidgenössische Volksinitiative, note 60.

[72] *Chandler v Cape plc*, note 31, para 80.

In *Lubbe and others v Cape plc*, *Lungowe v Vedanta*, *Okpabi v Royal Dutch Shell plc* and *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*, the defendant was a multinational enterprise, the subsidiary was abusing human rights, and the claimants included non-employees. In all of these cases, the Supreme Court, the House of Lords, the Court of Appeal and the High Court mentioned the possibility to extend the duty of care to extraterritorial damage suffered by non-employees.[73] However, no UK court has yet decided the merits of a case concerning a multinational corporation abusing the human rights of non-employees. In *Lungowe v Vedanta*, the Supreme Court mentioned that the duty of care would apply to the subsidiary's neighbours irrespectively of whether or not they were employees. The open question is, however, who could be defined as neighbour in the context of multinational enterprises?

A possible argument in favour of also applying the duty of care to any victim may be as follows. *Chandler v Cape plc* clarified that the assumption of responsibility by the parent company towards its employees depends not on a voluntary act, but instead on the relationship between the parent company and its subsidiary. Therefore, once a parent company and its subsidiary are close enough to trigger the parent company's duty of care, it is immaterial whether or not the tort victim is an employee.[74] However, no court has yet taken this approach. As a result, it is still not clear what would be the possible use of the duty of care and the connected direct liability of the parent company in future business and human rights litigation. In any case, if victims can prove the existence of a holding company's duty of care, this would entail a due diligence obligation to monitor the activities of its subsidiaries.

According to the French Commercial Code, a parent company has a due diligence obligation to oversee the activities of all subsidiaries and enterprises with which it has an established commercial relationship. The sole condition is that such a corporate group shall have more than 10,000 or 5,000 employees (depending on whether or not the affiliates are incorporated in France). The French Commercial Code narrowly defines the due diligence obligation of a parent company as a specific duty to set up a monitoring plan. A duty of care comes into existence only if the parent company violates its due diligence obligation by adopting an ineffective or absent monitoring plan. French companies violate such due diligence obligation when they fail to effectively develop a plan aimed at preventing serious threats to human or environmental rights, health or security by their affiliates.[75] An open question would be what sort of serious threats to human or environmental rights, health or security will trigger the application of Articles 4 and 5.

The Swiss model is the most comprehensive one because it includes two parallel but inter-related duties: an obligation to respect human rights and environmental standards and one of due diligence. A duty of care comes into existence if the parent company breaches its obligation to respect. The due diligence obligation is instead a tool for holding corporations to demonstrate that they are not responsible for the abuses

[73] *Lubbe and Others v Cape plc and Related Appeals*, note 27; *AAA v Unilever* [2018], note 30; *AAA v Unilever* [2017], note 30; *Okpabi v Royal Dutch Shell plc* [2018], note 29; *Okpabi v Royal Dutch Shell plc* [2017], note 29; *Lungowe v Vedanta* [2016], note 28; *Lungowe v Vedanta* [2017], note 28; *Vedanta v Lungowe* [2019], note 28.

[74] Palombo, note 44.

[75] Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; Drouin, note 52.

committed by their affiliates. The scope of the obligation to respect changes in the proposal and the counter-proposal. The Swiss proposal applies to any company incorporated in Switzerland and it refers to 'internationally recognized human rights or international environmental standards'.[76] The counter-proposal, instead, replicates the French model as it applies only to those companies that have a significant number of employees, exceed a substantial turnover threshold and only in the context of human rights or environmental abuses that cause bodily harm or damage to property. The proposal is also addressed to all companies controlled by the parent, including companies in its supply chains, while the scope of the counter-proposal covers only subsidiaries.

Therefore, as it pertains to the recognition of a parent company's accountability, the French Commercial Code and the Swiss proposals start from the obligations of due diligence and respect, while the UK case law starts from the duty of care. In France and Switzerland, when parent companies breach their due diligence obligation, they owe a subsequent duty of care towards the victims detrimentally affected by such violation. Conversely, in the UK, when parent companies owe a duty of care towards a tort victim, they will have a due diligence obligation to oversee the activities of their subsidiaries in order to prevent them from causing damage.

C. The Liability of Parent Companies

The French Commercial Code requires claimants to prove the causal link between the parent company's breach of its due diligence obligation and the damage caused by a severe threat to human or environmental rights, health or security committed by its affiliates. There remains a number of uncertainties. First, it is unclear under which conditions the failure of a parent company to set out an efficient monitoring plan would contribute to the perpetration of human rights or environmental abuses. Second, it is unclear whether or not a company that provides a monitoring plan, which is disregarded by its affiliates, would be responsible for its failure to ensure effective implementation of such a plan.[77]

Conversely, both the UK and Swiss models base the accountability of parent companies on the relationship with their affiliates. However, while in the UK the relationship required between a parent and a subsidiary company is arguably one of proximity, in Switzerland it is of effective control (in the counter-proposal) and control (in the proposal).

In the UK, courts have increasingly established a duty of care because of the relationship between parent company and subsidiary. Traditionally, the relationship between the tortfeasor (in this case the parent company) and the victim (in most cases the employee) established a duty of care of the latter towards the former.[78] Since *Chandler v Cape plc* and *David Thompson v the Renwick Group plc*, however, it is also possible to establish a duty of care of a parent company towards its employee because of the relationship between the parent and its subsidiary.[79] This created uncertainty as to

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[76] 'Responsible Business Initiative' note 59.

[77] Cossart, Chaplier and Lomenie, note 23; Brabant and Savourey, note 56.

[78] *David Newton Sealey v ArmorGroup Services Ltd*, note 46; *Caparo v Dickman*, note 38; Petrin, note 44; Bullimore, note 44.

[79] *Thompson v the Renwick Group plc*, note 32; *Chandler v Cape plc*, note 31.

the level of influence that a parent company shall exercise over its subsidiary, and the overall relationship that is necessary between parent, subsidiary and victim to establish a duty of care.

In Switzerland, both proposals extend the liability that, under the Swiss Code of Obligations, employers owe for the tortious acts of their employees also to the liability of parent companies for the torts committed by their subsidiaries.[80] However, the counter-proposal would limit the application of such a liability framework only to the cases where a parent company exercises effective control over its subsidiaries. Furthermore, the counter-proposal allows Swiss parent companies to avoid liability if they demonstrate that they do not influence their subsidiaries. The concept of influence is likely to remand to the level of proximity that a parent company exercises over its subsidiary, and, therefore, it would be for Swiss courts to determine what level of closeness is good enough for the former to be liable for the actions of the latter. This may create similar uncertainty to the one that both victims and corporations face in the UK where recent cases focus specifically on the question of the level of influence required between a parent company and its subsidiary for the former to owe a duty of care towards the tort victims of the latter. Conversely, if Switzerland would adopt the proposal, Swiss companies would be responsible for the abuses committed within their supply chains irrespectively of the level of influence exercised in between different companies of the group.

D. Burden of Proof

Despite their differences, the UK, the French and the Swiss models all represent progressive approaches to the development of the due diligence obligation and duty of care of parent companies in relation to the human rights abuses committed by their foreign affiliates. However, the risk is to create an avenue theoretically available to hold multinational enterprises to account that does not result in a real possibility for victims to successfully sue European corporate groups for human rights abuses. In this respect, it is fundamental to take into consideration the burden that victims, who often have limited resources and information, must meet to prove their case.

UK case law demonstrated that the burden of proof for victims is high and, so far, insurmountable, in transnational cases. While it seemed possible to prove proximity between the parent company and its subsidiary when they were both incorporated in the UK, the transnational cases analysed above demonstrate how difficult is to prove vicinity between companies that are part of a huge multinational group.[81] This, however, may change given that the Supreme Court in *Lungowe v Vedanta* asserted jurisdiction in the victims' favour and opened up the possibility to hold any parent company accountable for extraterritorial torts directed at its subsidiary's neighbours. *Lungowe v Vedanta* has lowered the burden to prove the arguability of cases and clarified that at the jurisdictional stage, there is no need to have a trial on the relationship between parent company,

[80] 'Responsible Business Initiative', note 59; RK-N: Eidgenössische Volksinitiative note 60.

[81] *Lubbe and Others v Cape plc and Related Appeals*, note 27; *AAA v Unilever* [2018], note 30; *AAA v Unilever* [2017], note 30; *Okpabi v Royal Dutch Shell plc* [2018], note 29; *Okpabi v Royal Dutch Shell plc* [2017], note 29; *Lungowe v Vedanta* [2016], note 28; *Lungowe v Vedanta* [2017], note 28; *Vedanta v Lungowe* [2019], note 28.

subsidiary and tort victims. It is sufficient for victims to prove that the parent company may potentially owe a duty of care towards its subsidiary's neighbours. This will certainly facilitate victims of human rights abuses in future cases.[82]

In France, victims must also overcome a high burden of proof. Although no case law implementing the due diligence obligation is yet available, it may be almost impossible for victims to prove the causal link between a parent company's failure to monitor the activities conducted by its corporate group and the damage suffered.[83] It is worth mentioning that claimants are often unable to obtain the relevant information concerning the business practice of multinational enterprises. Therefore, a high burden of proof on the victim may *de facto* result in no real opportunity for claimants to successfully sue a parent company.

The Swiss proposals represent a real change of perspective in terms of the burden of proof. Although such legislative proposals have not yet being adopted, and it is, therefore, difficult to assess how such hypothetical law would be applicable in practice, it is telling that both the proposal and the counter-proposal include a clause splitting the burden of proof between the claimant and the respondent. In both proposals, victims will have to prove that the Swiss and foreign companies were in a relationship of control (being either general control in the proposal, or effective control in the counter-proposal), and that the foreign company abused human rights. However, the burden is on the Swiss corporation to prove that it met its obligations of due diligence, or, in the counter-proposal that it lacked influence over its foreign subsidiary. This is an innovative approach allowing corporations, which should have the relevant information concerning their business activities, to defend themselves against nuisance lawsuits, while at the same time, not overburn human rights victims with a high standard of proof that they are unlikely to meet.[84] As discussed above, if the counter-proposal becomes law, the Swiss model may also result in a number of concerns as it pertains to the level of details that victims will need to provide to prove a relationship of effective control between a parent company and its subsidiaries. Nevertheless, the Swiss model introducing a split burden of proof represents a noteworthy step in the right direction.

E. Justice in the Host States

There is also another element to take into consideration: whether victims could obtain justice by holding the subsidiary accountable in the host state. This element became relevant at the jurisdictional stage in UK case law and in one of the several versions of the Swiss counter-proposal, which includes a subsidiarity clause.

The Supreme Court in *Lungowe v Vedanta*[85] had not only to assert jurisdiction over the parent company but also over its subsidiary. It held that the most appropriate forum to bring the claim against the Zambian subsidiary would normally be Zambia. Furthermore, in order to avoid a duplication of judgements, if the case against the subsidiary would be

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82 Vedanta v Lungowe [2019], note 28 paras 6-14 and 42-62.

83 Xavier, note 56; Drouin, note 52; Pierre-Louis, note 54; Brabant and Savourey, note 56; Vedanta v Lungowe [2019], note 28 paras 6-14 and 42-62.

84 'Responsible Business Initiative',; RK-N: Eidgenössische Volksinitiative, note 60.

85 *Vedanta v Lungowe* [2019], note 28.

filed in Zambia, the case against the parent company should be equally litigated in Zambia. This, by itself, could have killed litigation in the UK. However, in the circumstances of the case, the Zambia judicial system would be unlikely to provide substantial justice to the victims and therefore, the Supreme Court asserted jurisdiction over both the British parent company and the Zambian subsidiary.

In Switzerland, the Legal Commission of the Council of States proposed to add a subsidiarity clause to the counter-proposal.[86] According to this clause, the parent company could be held liable only if holding the subsidiary to account would be impossible, difficult or with no apparent chance of success. The purpose of such clause is to avoid that victims will file complaints against Swiss companies when they could instead obtain redress against their foreign subsidiaries. Another alternative proposition, currently under consideration by the Legal Commission of the National Council, is to condition the litigation against Swiss parent companies to mandatory mediation at the OECD national contact points. The national contact points are domestic agencies offering their good offices, including mediation and conciliation, to victims who complain enterprises violate the OECD Guidelines for Multinational Enterprises. Forty-eight states, including Switzerland, have so far established a national contact point in their territories. When a corporate group is transnational, the national contact points of home and host states should cooperate and could even advise on companies incorporated in countries that have not yet adhered to the OECD Guidelines for Multinational Enterprises.[87] The idea in both the UK and Switzerland seems to be that the parent company and the home state jurisdiction should be addressed only when remedies are unavailable in the host state. On the one hand, this could limit the application of UK case law and Swiss law. On the other hand, transnational litigation against parent companies for human rights abuses committed by their subsidiaries is already a difficult and expensive option; it is, therefore, likely that victims who choose to file a transnational lawsuit have little to no chance of redress against the subsidiary in the host state.

V. No Perfect Model

This article acknowledges that neither UK case law, nor French law, nor Swiss initiatives set out a perfect model that could be adopted to ensure the accountability of European parent companies for extraterritorial human rights abuses committed by their subsidiaries or supply chains. All of these laws and proposals have some potential pitfalls which practical implications are difficult to assess in the abstract as it will be for the judiciary in these three countries to overcome or exacerbate such problems.

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86 Commission des affaires juridiques du Conseil des Etats, note 58.

87 OECD, note 2; 'National Contact Points for the OECD Guidelines for Multinational Enterprises – OECD', http://www.oecd.org/investment/mne/ncps.htm (accessed 1 June 2016); Leyla Davarnejad, 'In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises' (2011) *Journal of Dispute Resolution* 351; John Gerard Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) 66 Corporate Social Responsibility Initiative Working Paper; Ashley L Santner, 'A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future', (2011) 43 *The George Washington International Law Review* 375.

One could imagine a human rights-oriented interpretation of these duties which could be far-reaching in all jurisdictions. In the UK, courts could recognize that parent companies owe a duty of care towards any tort victim affected by the activities of their groups. Such a wide duty of care could also cover extraterritorial torts affecting non-employees. In France, one could envision courts interpreting a parent company's due diligence obligation as a duty to, not only monitor, but efficiently prevent any company in its supply chain from abusing human rights and environmental law. Victims would still have to prove causation between a breach of the parent company's obligation and an abuse. However, it would be easier to prove causation between the failure to prevent a violation and such violation, rather than to prove causation between a failure to publish a monitoring plan and an abuse. In Switzerland, judges could interpret the notion of influence of the counter-proposal in light of the spirit of the law, whose purpose is to ensure accountability of parent companies. They could include influence as part of the test on due diligence and assess the real-life possibility of parent companies preventing the abuses committed by their subsidiaries. It is also still possible that the original proposal will become the law in Switzerland, which would leave no doubt as to the liability of Swiss parent companies.

Conversely, one could also envision a conservative approach limiting the direct liability of parent companies. UK courts could require an extremely close relationship between parent and subsidiary companies to recognize the existence of a duty of care. As it pertains to France, the judiciary could interpret the obligation to draft and publish a monitoring plan in its literal meaning and, therefore, never hold responsible those parent companies that publish a monitoring plan despite the human rights and environmental law abuses occurring in their supply chain. One could further envision a restrictive interpretation of the causation link between the breach of the due diligence obligation and the damages caused by a subsidiary. In Switzerland, one could also envision a strict and literal interpretation of the notion of influence and effective control essentially reconducting it to the level of proximity that the parent company exercises over its subsidiaries. This would reproduce a similar problem to the one of UK precedents, where the critical issue is the relationship between parent and subsidiary in order to determine whether the former is accountable for the conduct of the latter. Even in this case, however, the Swiss counter-proposal would still represent a substantial step forward, because victims and corporations would share the burden of proof.

The larger issue at stake is whether domestic legislation and court decisions can effectively regulate the transnational activities of corporations. This is a task that could arguably be better achieved at the international level. It is, therefore, understandable that these domestic models all provide sub-optimal solutions. However, given the current state-centric structure of international law, which fails to recognize the powerful role of non-state actors, including companies, at the transnational level,[88] the possibility to provide victims of abuses with effective remedies in domestic courts becomes the preferred avenue to hold multinational enterprises to account.

[88] Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005); Markos Karavias, *Corporate Obligations under International Law* (Oxford University Press, 2013).