# Civil liability under sustainability due diligence legislation: A quiet revolution?

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## Introduction

Despite the growing recognition of human rights and environmental considerations in the context of corporate governance and responsibilities, the dismal performance of businesses in this area has continued to be a source of concern.[[1]](#footnote-2) A new wave of sustainability due diligence legislation – culminating with the legislation of the EU proposed Corporate Sustainability Due Diligence Directive (CSDDD)[[2]](#footnote-3) – is seeking to address this unacceptable reality, aiming to establish an effective regime for ensuring respect for human rights and the environment.

This article reminds that despite positive developments in common law civil litigation relating to transnational human rights and environmental violations, these can be somewhat difficult to establish, particularly in relation to harms committed by third parties. This article then demonstrates the advantages brought by the recent statutory civil liability regimes adopted under sustainability due diligence regulations, which impose mandatory sustainability due diligence obligations while providing a civil liability regime where a corporation failed to conduct due diligence (or did so unreasonably) or failed to mitigate and prevent identified harms. These advancements, we claim, could potentially revolutionise existing regimes on civil liability in the context of transnational and environmental harms, and significantly improve victims’ access to justice and remedies. How effective this ‘revolution’ will be, will depend on the details of each legislation and lawmakers’ willingness to go beyond lip service and provide claimants with effective tools for protecting their rights.

This Article proceeds in four parts. Part A introduces this paper’s hypothesis and the significance of the research. Part B critically assesses traditional civil liability routes which have been utilised in various jurisdictions by victims of business-related human rights violations. We aim by that to expose the strengths and weaknesses of the traditional route and magnify the need for parallel statutory civil liability routes based on mandatory sustainability due diligence legislation. Part C discusses two leading, recent examples of sustainability due diligence legislation. Through the analysis of these examples, we will answer whether indeed this new regulatory model is expected to provide an effective solution to the longstanding barriers currently standing in the way of victims of multinational corporations’ (MNCs) transnational harms. Part D will summarise with a few concluding remarks.

## Current civil liability regimes and their deficiencies

In the past few decades, we have witnessed a wave of lawsuits against MNCs for civil damages. Typically, these civil cases relate to damage to livelihoods, personal injuries and economic losses, often occurring because of environmental harms or the pursuit of corporate objectives at the expense of people’s human rights, that cause *inter alia* pollution, damage to land, or illegal eviction.

Numerous procedural and substantive obstacles continue to prevent victims from accessing an effective remedy through court litigation, including issues associated with access to information, and disproportionate cost of legal proceedings.[[3]](#footnote-4) Substantive obstacles present even deeper problems and are more difficult to resolve. These relate to the law governing disputes and are partly borne out of the inconclusiveness among jurisdictions on the fundamental question of whether MNCs are subject to internationally recognised human rights and environmental laws.[[4]](#footnote-5) The UN Guiding Principles on Business and Human Rights (UNGPs) did not resolve this conundrum and to date, there has not been such recognition, even in the type of instruments we discuss in part 3 of this Article.

Consequently, outside the cases brought under Alien Tort Statute (ATS) litigation, which we address in part B.2 of this Article, it is difficult, and perhaps ill advised to bring civil claims against corporations before national courts based on the violation of international human rights *per se.*[[5]](#footnote-6) This has forced victims to look for alternatives elsewhere, mainly under the tort of negligence, or, in the US context, AATS litigation, often employing creative ways, though rarely successful. Moreover, most questions of law on civil liability have been addressed as part of jurisdictional procedural enquiries, which require a lower evidentiary burden, usually a plausibility test, and should not involve a mini-trial on the issue. Most international human rights litigation involving MNCs have not been decided on the merits, and some were settled in private. As a result, there is no coherent and conclusive body of law that has developed and adapted the traditional principles of tort and civil liability to the context and challenges of international human rights litigation.[[6]](#footnote-7)

Be it as it may, from a policy perspective, a strong and effective framework of tort law that addresses human rights and environmental wrongs will no doubt push forward the remedial goals of the UNGPs and respect for international human rights and environmental standards.[[7]](#footnote-8)

The following part concretises this discussion by providing a deeper analysis of transnational tort law litigation, revealing some of the barriers currently standing in the way of victims of MNCs’ human rights and environmental harms. Due to limited space, our review will focus on common law jurisdictions.

### International tort litigation under common law

Much has been written on the celebrated landmark decision of *Donoghue* v *Stevenson*, where the House of Lords recognised that a producer of goods may owe a duty of care to a consumer even in the absence of a contract between the parties.[[8]](#footnote-9) Announcing the ‘neighbour principle’, Lord Atkin stated that a party must take reasonable care to avoid acts or omissions which could be reasonably foreseen, and are likely to injure her neighbour. The ‘neighbour’, according to the Court, is a person who is closely and directly affected by the acts of the tortfeasor that ought to have reasonably contemplated as being so affected when directing her mind to the acts or omissions which are called in question.[[9]](#footnote-10) The Court in *Caparo Industries Plc* v. *Dickman* elaborated on the duty of care requisite and announced a three-step test which the claimant must satisfy when assessing whether the alleged tortfeasor owed a duty of care to the claimant. First, whether the harm was reasonably foreseeable. Second, that there was a relationship of proximity between the parties. Third, that it is fair just and reasonable to impose a duty of care.[[10]](#footnote-11)

The reasonable foreseeability of harm prong advanced by *Caparo* is the least controversial in the context of international human rights litigation. Often the victim will be able to show without much trouble that a corporation knew or ought reasonably to have known of the risks that are attached to its operations or which may occur within its value chain. It is also inconceivable that a corporation that subcontracts in areas where there is a weak rule of law and human rights governance, could not reasonably foresee that its business associates may undercut wages, use child labour, and even employ workers in slavery akin conditions.[[11]](#footnote-12) Although the victim is not visible to the corporation, and however remote the harm and wherever it sits on the corporation’s business value chain, the harm will reasonably be foreseeable.

Initially, there were a few attempts to liberally invoke the third prong of *Caparo* in order to allay the risk of opening the floodgates by enabling an indefinite group of litigants to bring civil claims against corporations.[[12]](#footnote-13) However, in recent years, there has been a greater recognition that having a strong remedial system in place for victims to utilise reflects widely accepted international norms. It is accepted within the international community that violations of human rights should not go unpunished, and that respect for fundamental human rights is in their individual and collective interest.[[13]](#footnote-14)

Moreover, corporations are increasingly signing up for the UNGPs and other corporate social responsibility initiatives through codes of conduct and internal policies which apply to their entire operational cycle, and their relationships with contractors and other business associates. Many corporations have also committed to the remediation of adverse impacts they may cause.[[14]](#footnote-15) Thus, although it cannot be ruled out that a corporation could utilise the *Caparo* fairness defence, to date it has not been invoked, and it will be incredibly damaging for corporations, in the current political climate to rely on such a defence.

The more challenging aspect of the *Caparo* test is for the claimant to satisfy the proximity requirement. Lord Oliver in *Caparo* stated that ‘proximity is, no doubt a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances in which, pragmatically, the courts conclude that a duty of care exists’.[[15]](#footnote-16) In international human rights tort litigation, the proximity requirement is often established in circumstances where the corporation is closely and directly affected by the act of the corporation. These cover situations, for instance, where the tort is committed as a result of the act or, exceptionally, omission of the corporation, to prevent harm caused by a third party.[[16]](#footnote-17) Or where the corporation is complicit in the commissioning of the tort.

Another layer of complex situations is where the harm is committed by the subsidiary of the corporation. In *Chandler* v*. Cape Plc* the court points out that, under some circumstances, a parent company may be adjudged to have assumed a duty of care for the health and safety of its subsidiary’s employees. According to these indicia, the claimant should first demonstrate that the parent and subsidiary are in relevant respect the same. Secondly, it must be established that the parent had superior knowledge of the health and safety protocols relating to the relevant industry. Thirdly, it should be demonstrated that the corporation knew or ought to have known about the unsafe conditions of the system of work. Fourthly, it should be shown that the subsidiary’s employees have expected the parent to use its superior knowledge for the employee’s protection.[[17]](#footnote-18)

This assumption of responsibility correlates directly to the parent’s active role in the work environment of the subsidiary and the degree of reliance that the victim has put on that conduct. The satisfaction of these indicia proved to be essential in *Lungowe v Vedanta* where the victims sought to expand the proximity relationship from that which is owed by the parent to its subsidiary’s employees, to one which recognises proximity in relation to victims who lived in the vicinity of the operation of the subsidiary, and where the harm occurred in a different jurisdiction.

However, in the *Alfred Akpan* *v Shell* case, the Dutch court only found the subsidiary liable for the harm caused to people living within the vicinity of the oil pipes and oil facilities managed by it, but not the parent company.[[18]](#footnote-19) The Court reasoned that under Nigerian tort law (being the applicable law to the dispute), applying *Chandler’s* indicia, the proximity requirement was not established where the victims were not the employees of the subsidiary, and did not concern a domestic claim, as was the case in *Chandler*. Moreover, the Court reasoned that it would be unjust and unreasonable to hold the parent company responsible for an indefinite number of potential claimants living in the vicinity of the oil field.[[19]](#footnote-20)

Thus, although applying the *Chandler* conditions*,* the Dutch Court absolved the parent from owing a duty of care to the victims, relying on *Chandler’s* indicia as the starting point and not as the end.[[20]](#footnote-21) It is worthwhile remembering *Caparo’s* formulation, where the court emphasised that proximity should not be viewed as a strict definition but rather as a test which allows the court to determine pragmatically the situations where a duty of care should be recognised.[[21]](#footnote-22) This was the case in *Lungowe* *v* *Vedanta* *Resources,* where the UK Supreme Court found that there is an arguable case that a parent company may owe a duty of care to third parties, where it can be shown that the corporation took active steps by informing its subsidiary about the maintenance of proper standards of environmental control.[[22]](#footnote-23) The parent in *Vedanta* did not merely lay down but also ‘implemented those standards by training, monitoring and enforcement, as sufficient on their own’ to show that it is ‘well arguable’ that the parent assumed a responsibility of duty of care towards the victims.[[23]](#footnote-24)

This is a significant victory for victims in international human rights litigation. It is now acknowledged that the proximity requirement could be satisfied between a parent corporation and a group of victims harmed by its subsidiary, who are outside the immediate sphere of influence of the corporation. This decision expands the situations envisaged under *Chandler* beyond the employees of the parent’s subsidiary to situations where the parent company takes active control in supervising or implementing human rights and environmental policies by its subsidiary, or proclaims in published material that it exercises such supervision even when in fact it does not do so.[[24]](#footnote-25) The latter effectively covers situations where the parent company may be held liable as a result of its omission to prevent harm committed by a third party.[[25]](#footnote-26) The Court did not find anything special about the parent and subsidiary relationship, and ultimately the test concerned whether the parent company owed a duty of care to the victims.[[26]](#footnote-27)

The same reasoning was followed by the Court of Appeal of the Hague with the outcome of cases against Shell in respect of environmental damage in Nigeria’s Niger Delta region and climate change.[[27]](#footnote-28) There, the Court stated that if a parent company knows or ought to have known that its subsidiary is unlawfully harming third parties in an area in which the parent company interferes with the subsidiary, then the parent’s starting point is a duty of care to those third parties to intervene.[[28]](#footnote-29)

Thus, in principle, a court could recognise a duty of care outside the parent/subsidiary situation, for example where the harm is committed by a third party, even in the context of supply or value chains. However, the prospect for their success might not be as clear as victims would hope for. This is because under the English tort of negligence, there is no general duty to prevent harm committed by a third party to others.[[29]](#footnote-30) For a duty to exist, the clearest path is therefore to show that the corporation assumed a duty of care to the claimant.[[30]](#footnote-31) This assumption of responsibility is a matter which the claimant will have to prove, relying on factors which show either a control relationship sufficiently close in the context of the violation that the corporation was aware of the risk. In addition, the claimants will need to show that they represented, via policy or actions, that they assumed the responsibility of the protection of the ‘others’ from the harmful conduct of the third party.

Another recognised exception to the third-party situation is where the corporation negligently creates a danger or permits the creation of a source of danger, ‘and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer’.[[31]](#footnote-32) As explained by Lord Justice Coulson in *Begum* v *Moran UK Ltd*, the law is fast developing in this area of law. This should also affect the development of common law tort liabilities of corporation arising in the context of the corporation’s value chain. The High Court in *Begum v Moran UK Ltd* found that it is arguable that a shipowner who sold a vessel in circumstances where it was foreseeable that it would be broken up in a place where working practices are known to be notoriously unsafe, owes a duty of care to victims who have suffered harm as a result of working in those conditions.[[32]](#footnote-33) The court stated that this is not an entirely new basis of tort liability but rather an ‘unusual’ extension of existing categories where a duty has been found[[33]](#footnote-34).

Ironically, whilst under the civil liability parallel routes we explore in the next part, a corporation which complies with its human rights and environmental obligations may avoid civil liability even in relation to harm which occurs along its value chain, under the common law route, which we analysed above, acting responsibly by conducting due diligence along the value chain, operational cycles, and contract with third parties, may, in fact, bring the corporation within the situations which common law considers as satisfying the proximity requirement through the assumption of responsibility. In other words, there is arguably a disincentive for the corporation to want to know about what occurs on their value chain.

Perhaps a better civil liability route, aside from the ones we raise in part C, is to first recognise that corporations are subject to internationally recognised human rights and then develop a common law civil remedy for the reparation of the harm. Such recognition is also symbolically crucial for the victims[[34]](#footnote-35). Unfortunately, in England and Wales, tort law does not provide specific named torts for ‘human rights violations *per se*.[[35]](#footnote-36) Due to the incremental nature of common law, it is a theoretical possibility that an English court will develop specific torts for human rights violations. In practice, however, such a development is extremely unlikely in the absence of policy intervention from parliament. Yet, there has not been a time more compelling in the face of corporate increasing power, and their impact on society and environment, where such recognition is more needed in order to bring common law into tandem with social development, and the need to address injustice[[36]](#footnote-37). This development is contingent on first recognising that corporations have an obligation to respect internationally recognised human rights.

There has been a welcomed development in Canada following the decision of Nevsun, which concerned a civil claim brought by three Eritrean workers in British Columbia against Nevsun Resources Ltd, a Canadian company. The claimants sought damages for breach of customary international law prohibitions against forced labour, slavery, cruel inhuman or degrading treatment and crimes against humanity.[[37]](#footnote-38)Notably, the claimants relied on tort law in seeking damages for domestic torts including conversion, battery, unlawful confinement, conspiracy and negligence.[[38]](#footnote-39) They claimed that they were indefinitely conscripted through Eritrea’s military service into a forced labour regime where they were required to work at a mine in Eritrea which is 60% owned by Nevsun Resources Ltd through subsidiaries. Nevsum sought to strike the customary international law claims based on British Columbia’s Supreme Court Civil Rules permitting pleadings to be struck if they disclose no reasonable claim in the sense that it is plain and obvious that the claims have no reasonable prospect of success or are unnecessary.[[39]](#footnote-40)

The Canadian Supreme Court found that while states were historically the main subjects of international law, this ‘state-centric template’ had long-since evolved, and the rapid emergence of human rights signifies a revolutionary shift in international law to a ‘human-centric conception of global order’.[[40]](#footnote-41) Therefore, according to the Canadian Supreme Court international human rights norms are applicable to private actors. In deciding whether the claim against Nevsum should proceed before Canadian Courts, the Court found that it is not plain and obvious that ‘corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable, and universal norms of international law.’[[41]](#footnote-42) Key to the ability to bring direct domestic civil liability claims under common law for breach of customary international law, is that customary international law is incorporated into and forms part of the Canadian common law. Unless, there is a domestic regulation to the contrary.[[42]](#footnote-43) This also means that it is unclear whether the claimant would have been able to bring civil claims under Canadian common law in relation to breaches of international human rights which have not acquired the status of customary international law.

Although the *Nevsum* case concerned a determination of a motion to strike request by Nevsum and was not decided on the merits, it is revolutionary in the sense that the Canadian Supreme Court acknowledged that corporations may be found directly liable for international human rights violations that have acquired the status of customary international law, and Canadian courts could potentially develop a civil common law remedy under Canadian law for corporate violations of customary international law.[[43]](#footnote-44) This would potentially be a far more effective remediation regime than has been developed under the tort of negligence, which, as we showed, its scope is constrained by an inflexible and underdeveloped requirement of proximity.

### ATS litigation

ATS litigation concerns a civil law action in tort under the Law of the United States. The Statute provides that ‘the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.[[44]](#footnote-45) The early years of ATS litigation involved lawsuits brought by victims who had suffered harm at the hand of other individuals. Such was the case in *Kadic v. Karadžić* where the claimant established the federal court’s jurisdiction by bringing a claim under ATS litigation alleging that the defendant breached the law of nations by committing or aiding and abetting torture, rape, and genocide.[[45]](#footnote-46) Mr Karadzic claimed that only states were subject to international law. The second circuit rejected this submission arguing that certain international norms apply to non-state actors, and that in any case individuals could be found liable for aiding and abetting state actors in the violation of international law.[[46]](#footnote-47) This potential for accessorial liability brought a wave of cases against corporations under the ATS, by victims who tried to take advantage of what seemed to be a civil liability route enabling extra-territorial claims in a jurisdiction which is plaintiff-friendly such as the U.S.[[47]](#footnote-48)

However, the Supreme Court in *Sosa v Alvarez-Machain* held that the ATS is purely jurisdictional.[[48]](#footnote-49) In other words, it does not create new substantive obligations. This is a significant finding because for the ATS to have any effect, the court should develop private law remedies for torts committed in breach of the law of nations. *Sosa* further held that ‘the jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time’.[[49]](#footnote-50) Thus, whilst the door was still ajar for recognising private remedies for the breach of the law of nations, the court cautioned that this is subject to ‘vigilant door keeping, and thus open to a narrow class of international norms today’.[[50]](#footnote-51) This stipulation does in principle potentially clash with the *Erie* v *Tompkins* doctrine, which basically limited the court’s ability to create a general federal common law.[[51]](#footnote-52) However, *Erie* did not categorically ‘bar any judicial recognition of new substantive rules, no matter what the circumstances are, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way’.[[52]](#footnote-53)

 Justice Sotomayor in *Jesner* v. *Arab Bank* understood *Sosa* to impose a two-step enquiry, which will guide the enquiry when recognizing private causes of action.[[53]](#footnote-54) First, a court must determine whether the particular international law norm alleged to have been violated is accepted by the civilised world and defined with a specificity comparable to the features of the 18th-century paradigms, i.e. the violation of safe conduct, infringement of the rights of ambassadors, and piracy. Only if the norm is ‘specific, universal, and obligatory’, may federal courts recognise a cause for its violation.[[54]](#footnote-55) Second, if that threshold is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion. In relation to the latter, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering such a new cause of action, because it may interfere with foreign relations, or other statutory regimes, which are best left for the Congress to regulate.

For example, in the case of *Jesner* v. *Arab Bank* the US Supreme Court concluded, applying the second enquiry, that a foreign corporation is not subject to ATS litigation, , fearing that the imposition of such an obligation runs contrary to one of the objectives of the ATS, namely to avoid diplomatic rifts between the US and other nations. Whilst the plurality opinion also stated in strong terms that foreign corporations are not liable for civil actions for breach of the law of nations under international law, this very question was not conclusively decided by the Supreme Court.[[55]](#footnote-56) Though, it is worth noting that the US Court of Appeal for the second circuit in *Kiobel* decided that corporations are not subject to the law of nations, and therefore victims cannot bring tort causes of action for breach of customary international law under the ATS.[[56]](#footnote-57) The Court stated that the assessment of the nature and scope of liability under ATS is subject to international law. It went on to conclude that no international tribunal until now has found a corporation to be in breach of the law of nations.[[57]](#footnote-58)

On appeal to the US Supreme Court, the parties were directed to supplement briefs addressing the following question: ‘Whether and under what circumstances the Alien Tort Statute allows courts to recognise a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States’.[[58]](#footnote-59) The Supreme Court, relying on statutory construction, reasoned that ‘when a statute gives no clear indication of an extraterritorial application, it has none’.[[59]](#footnote-60) The Supreme Court also elaborated that in order to displace this presumption against extraterritoriality, the claimants must show that the claims touch and concern the territory of the United States with sufficient force.[[60]](#footnote-61) However, on the facts of *Kiobel* the majority reasoned that the plaintiffs did not displace the presumption against extraterritoriality because their claims ‘occurred on the soil of a foreign sovereign state and none of the conduct took place within U.S. jurisdiction’.[[61]](#footnote-62) In *Kiobel*, however, the Court managed to avoid a ruling on whether corporations are subject to international law.

As a result of the extraterritorial limitations made by *Kiobel*, a successful path through ATS litigation looks to be incredibly narrow. Perhaps it is safe to argue that where all relevant factors to the dispute are outside US jurisdiction, the ATS will not have an extraterritorial application. Moreover, even where the allegations touch and concern the territory of the US, they must do so with ‘sufficient force’, which makes displacing the presumption against extraterritoriality a very difficult task indeed. For example, in the case of *Cardona v. Chiquita Brands International, Inc.* the eleventh circuit, relying on *Kiobel,* dismissed a claim made under the ATS in relation to complicity of the appellant in relation to torture, death, and personal injury occurring in Columbia.[[62]](#footnote-63) The Court reasoned that based on the facts of the case there was not anact constituting a tort which ‘touched or concerned the territory of the United States with any force’.[[63]](#footnote-64) This is so, despite the defendant being a US corporation. The Court stated that the mere presence of the corporation in the US did not displace the presumption against extra territoriality.[[64]](#footnote-65) It appears from the case law post *Kiobel* that, in order to satisfy the test, the Court must find a link between the alleged unlawful conduct and the US corporate presence.[[65]](#footnote-66)

There have been however successful cases, such as in *Al Shimari,* where the claimants managed to convince the court that the allegations touched and concerned the US with sufficient force.[[66]](#footnote-67) In the latter case, the court concluded that a number of factors were sufficient to displace the presumption, such as, *inter alia*, the fact that theunlawful torture of prisoners in Iraq occurred with the knowledge of the US based firm, and was committed by US citizens who were employed by the defendant.[[67]](#footnote-68)

The above analysis confirms that despite the door of ATS litigation still being ajar, in practice it has been barbe-wired by the decisions in *Kiobel* and *Arab Bank* to the extent that it would not be cost efficient to pursue such claims in situations where there are no strong links between the dispute and the US, and if pursuit is possible, only in relation to U.S. based corporations. Even in relation to the latter, the ‘touch and concern’ test applied in *Kiobel* requires more than ordinary corporate activities.[[68]](#footnote-69) In *Nestle v Doe,* the Court held that ‘activities common to most corporations such as domestic financial transactions and lobbying were insufficient to overcome the presumption against extraterritorial application.’[[69]](#footnote-70)

### Interim conclusion

The biggest challenge to civil litigation, whether in the UK, U.S. or other common law jurisdictions, is the inability to point to a binding obligation stipulated in law that holds corporations accountable for the violation of internationally recognised human rights. This makes the civil claims based entirely on common law incredibly complex, and costly. Even when they succeed, they offer piecemeal and targeted solutions which are reactive to the needs of the individual case. It is indisputable that some business managers will stand in the line and conform with internationally recognised human rights and environmental standards due to the threat of civil litigation, however, the incentives to conform are not great enough and will not have the much-required wider culture change, much needed in order to remove the threat of adverse human rights on peoples.

Holding corporations to account in situations which have not been recognised and which seem to affect their conduct along the entire value chain, requires a policy decision which is more likely to be justified (and accepted by all stakeholders) if made by the lawmaker. This will be a significant step because it should pave a clearer and more efficient civil liability route than the ones which have existed under common law or ATS litigation.

One promising way forward, we claim, is found in a recent emerging trend, which may overcome some of the difficulties discussed above: the legislation of sustainability due diligence laws. This new type of laws could potentially support future claimants on several levels. To begin with, where MNCs are obliged to publicly identify their sustainability risks, it will be harder for them to defend the lack of effective prevention and mitigation of identified harms before courts. This could be meaningful in addressing issues such as causal link, or claims regarding MNCs’ lack of awareness and control over the harm.

Secondly, in some cases, sustainability due diligence laws are accompanied by civil liability mechanisms, explicitly permitting victims the right to seek justice in the courts of the MNCs’ home state. If designed properly, this addition could revolutionise victims’ access to justice and remedies, removing the barriers discussed above.

Thirdly, again, in some cases (notably the CSDDD), the title ‘sustainability due diligence’ is misleading: the legal obligations found in the more ambitious examples go far beyond mere duties to identify risks and include also explicit obligations to prevent risks from materialising and mitigate harms where such have occurred.

In short, it could be that under the unassuming and somewhat technocratic title of ‘due diligence’, quietly hides a revolutionary legal instrument that will transform the access to justice and remedy for MNCs victims. In the following part, we will assess this emerging parallel route. We will ask whether indeed the modern model of sustainability due diligence legislation is bringing a ‘quiet revolution’ for victims’ access to justice and remedy in the context of transnational human rights and environmental harms.

## Sustainability due-diligence legislation: an effective parallel route for civil liability?

Arguably, one of the main drivers of the civil liability regime is the growing consensus about the need to prioritise the actualisation of the right to an effective remedy as part of steps to address sustainability risks posed by adverse impacts of business activities on people and the planet. The right to remedy, as recognised in wide-ranging international human rights treaties, connotes bringing perpetrators to justice and provision of reparation to victims.[[70]](#footnote-71) However, as was seen in part B, barriers to access effective remedies remain a challenge for right holders seeking to hold corporations to account for human rights abuses.[[71]](#footnote-72)

The landscape is changing with the growing list of jurisdictions legislating sustainability due diligence as part of measures aimed at addressing sustainability risks arising from negative impacts connected to business activities.[[72]](#footnote-73) The common thread cutting through the due diligence frameworks provided for under these legislations are mandatory provisions on sustainability due diligence, but mostly with a fragmented approach to civil liability.[[73]](#footnote-74)

The first set of due diligence laws was limited to disclosure of information about steps taken by companies to address human rights risks within their supply chain, without a mechanism for providing civil remedies for victims of harm resulting from failure to conduct due diligence.[[74]](#footnote-75) Notable examples of such limited laws include the recent German Supply Chain Due Diligence Act 2021,[[75]](#footnote-76) the Dutch Child Labour Due Diligence Law 2019,[[76]](#footnote-77) the Australian Modern Slavery Act 2018,[[77]](#footnote-78) UK Modern Slavery Act 2015,[[78]](#footnote-79) and the California Transparency in Supply Chain Act 2010[[79]](#footnote-80) among others.

However, due diligence legislative frameworks are rapidly evolving across jurisdictions, in some cases, with remarkable emphasis on civil liability mechanisms as a parallel route for remediation of negative impacts of business activities on the society and the environment.[[80]](#footnote-81) Examples include the current French Duty of Vigilance Law 2017,[[81]](#footnote-82) the (currently negotiated) EU’s CSDDD[[82]](#footnote-83) and other upcoming legislative frameworks in Belgium,[[83]](#footnote-84) Austria,[[84]](#footnote-85) and Netherlands[[85]](#footnote-86) among others.

Our analysis below will focus on two leading examples of sustainability due diligence legislation, which may shed some light on the potential impact and promise that the new model of sustainability due diligence legislation may hold. First, we will discuss the French Duty of Vigilance Law, which was the first in this new wave of modern sustainability due diligence laws, and under which the first case to be based on such legislation was launched and recently decided. We will then turn to discuss the proposed CSDDD, which will significantly increase the scope of existing laws in terms of covered entities and legal obligations. These examples, we hope, will shed light on the potential that this type of legislation may hold, in addressing access to justice and remedy for victims of transnational harms.

###  Civil liability in practice – insights from the French duty of Vigilance Law

The French Duty of Vigilance Law (Vigilance Law) which came into force in March 2017[[86]](#footnote-87) is perhaps the forerunner of current or imminent sustainability-related due diligence legislation which provides for a civil liability mechanism. It is also the early model based on which modern version sustainability due diligence laws were drafted and adjusted, including the EU CSDDD which we will discuss further below.

The Vigilance Law requires very large companies (5000 employees and above) to publish in their management report a vigilance plan on the reasonable measures taken to identify risks and prevent potential serious violations of human rights and fundamental freedoms, human and environmental health and safety. This applies not only in relation to the company's own activities, but also those of its subcontractors and suppliers with whom it has an established commercial relationship[[87]](#footnote-88). Unlike the EU or German models, the French law is not limited to violations of specifically listed human rights and environmental harms, and covers any significant harms to human rights and the environment.[[88]](#footnote-89)

The Vigilance Law provides for two pathways for enforcement and access to remedy: any interested party can seek (i) an injunction from the court to order the corporation to comply with the law; and (ii) damages for the corporation’s failure to comply with its vigilance obligation causing preventable harm[[89]](#footnote-90). Arguably, the Vigilance Law might have raised the bar for corporate accountability, allowing victims a direct route to courts and remedies. However, the first case decided by the French Court under the Vigilance Law seems to highlight gaps in its civil liability mechanism or its implementation within the context of access to remedy for right holders.

#### Friends of the Earth Paris and Others v. TotalEnergies SE.

The case was instituted by six NGOs based in Uganda and France seeking an order from the Paris Civil Court (the Court) to compel TotalEnergies to comply with its duty of care under the Vigilance Law, by suspending works in relation to the East Africa Crude Oil Pipeline (EACOP) and Tilenga projects in Uganda and Tanzania respectively due to their alleged negative impacts on the environment and local populations.[[90]](#footnote-91) Further, the Plaintiffs sought an order of the Court to compel the Defendant to disclose within its next vigilance plan steps taken to identify and manage the social and environmental impacts of the Tilenga and EACOP projects.[[91]](#footnote-92)

Following an initial jurisdictional challenge, resolved in favour of the Plaintiffs, the Court ultimately held the Plaintiffs’ case to be inadmissible citing two key technical grounds. First, the Court held that Plaintiffs’ claim was materially different from the issues raised in the formal notice served on the Defendant by the Plaintiffs.[[92]](#footnote-93) In this connection, the Court clarified that the purpose of the formal notice was to enable possible amicable settlement of disputes out of Court.[[93]](#footnote-94) Second, the Court held that it cannot grant an interim relief: as the existence of serious damage was not established, the judge cannot conclude that the plan and preventive measures were insufficient.[[94]](#footnote-95) According to the Court, the interim order procedure would only permit limited inquiry aimed at ascertaining whether a vigilance plan has been put in place and meets the criteria set out in the law.[[95]](#footnote-96)

There are several lessons that could be learned from the *TotalEnergies* decision. First, reacting to the Court’s ruling, a Senior Campaigner at the Friends of the Earth (one of the Plaintiffs) commented:

‘We strongly deplore this decision. Once again, the French courts have missed an opportunity to put an end to the multiple violations taking place in Uganda and Tanzania. It is essential that this summary judgment procedure, which allows for faster judgments, be effective in order to achieve the central objective of this law: to prevent human rights violations and environmental damage before they occur. Judicial delays are piling up, and every passing month is wasted time in putting an end to the serious human rights violations caused by Total’s mega-oil project in Uganda and Tanzania, and preventing an environmental and climate disaster from occurring.’[[96]](#footnote-97)

The statement quoted above inherently reflects the losing party’s disappointment, and it should be read in this light. This statement nevertheless also encapsulates the exceedingly protracted and frustrating journey – spanning a total of four years – that transpired from the commencement of the lawsuit, through litigation before four different courts, until a dismissal was ultimately reached, grounded on procedural reasons. As stated by the Plaintiffs, the passage of time presents a significant problem given the urgency of CSDD violations. Combined with the inherent financial costs of lengthy litigation, it could be regarded as a barrier on access to justice.[[97]](#footnote-98)

Secondly, the Court is critical of the French law’s lack of clarity and the difficulty in complying with the due diligence requirement without specific standards and instructions. A similar criticism was made also in the literature more widely regarding CSDD laws,[[98]](#footnote-99) and, perhaps, coming from the Court’s mouth, it will now find more traction.

Thirdly, the *TotalEnergies* decision points at the importance of relevant procedural steps, notably the notice requirement. Given the drastic outcome in this case, future litigants are unlikely to forget this lesson and its importance.

Finally, some may question whether the Court’s adherence to clear procedural requirements did lead to a result that is conflicting the law’s main aims and objective. More specifically, it could be questioned whether this ought to constitute sufficient grounds for inadmissibility of the Plaintiffs’ action, especially given the fact that this case has already been litigated for a number of years, and in light the urgency involved in stopping environmental and human rights harms.

In light of the interim relief sought by the Plaintiffs, asking the court to order the Defendant to suspend the EACOP and Tilenga projects pending the determination of the substantive suit, due to alleged negative impacts on the environment and local populations, the normative question may be asked whether the ends of justice would have been served had the French Court granted an interims order suspending the project for a specified duration to prevent continuation of alleged negative impacts.

Overall, the decision might have put into perspective the often competing tendencies between rigid and technical application of the law versus the imperative of access to substantial justice for right holders, which is arguably the underpinning philosophy of the business and human rights agenda. In two emblematic cases, the UK Supreme Court (UKSC) seems to have favoured substantial justice for victims of human rights abuses by multinational corporations over technical application of the letters of the law.[[99]](#footnote-100)

In particular, in *Vedanta Resources vs Lungowe*, in its determination of the appeal filed by Vedanta Resources against the decisions of the UK High Court and Court of Appeal on jurisdiction, the UKSC held that although the UK Court did not have jurisdiction to hear the claimants’ suit, the UK Court should assume jurisdiction because, among other reasons the claimants may not get substantial justice in Zambian Courts[[100]](#footnote-101). The case was instituted by Zambian Plaintiffs to seek damages against Vedanta Resources and its Zambian subsidiary operating the Zchanga mine for alleged pollution of watercourses over the course of 15 years which resulted in harm to residents’ health, livelihood and land.[[101]](#footnote-102) The UK Supreme Court toed the same path in the case of *Okpabi & Ors vs Royal Dutch Shell* which involved a suit against Royal Dutch Shell for environmental pollution and related human rights abuses.

Similar tendency towards ‘judicial activism’ was seen in Canada with the decision in the *Nevsun Resources vs Araya* case where the Canadian Supreme Court seemingly created a ‘new tort of breach of customary international law’ which according to the Court was applicable to corporations.[[102]](#footnote-103) The case involved a suit filed by three Eritreans seeking damages against Nevsun Resources and its Eritrean subsidiary which allegedly subjected the plaintiffs to forced labour, torture, slavery in the construction of its mine.[[103]](#footnote-104)

#### Access to justice as the hallmark of the civil liability mechanism

Other material challenges with ensuring compliance with the vigilance obligation or holding corporations accountable for a breach of this obligation under the Vigilance Law have been identified by authors. For example, the burden of proof under French law is still on the claimants ‘to prove a fault by the company and a causal link between the fault and the damage they have suffered’.[[104]](#footnote-105) Further, the law merely imposes an obligation of process and not of results as the law does not insist on corporations achieving certain outcomes; failure to draw any red line or try to address the asymmetries in power, information and resources between MNCs and the affected rightsholders.[[105]](#footnote-106) Finally, the Vigilance Law covers only very few, and very big companies (5000 employees and above), leaving most actors outside of its scope.

The above issues, as exemplified by the Vigilance Law and its application in practice, appear to suggest that while the civil liability mechanism provided for under specific current and upcoming sustainability due diligence legislations present right holders with alternative routes for access to remedy, there are concerning gaps which should be prioritised for action by the relevant stakeholders and regulatory, policy and law-making bodies.

As discussed further below, the EU institutions are minded of these issues and address these to a certain extent. Indeed, there is some optimism that the proposed CSDDD may serve as an operative benchmark for the Vigilance Law when it comes into force.[[106]](#footnote-107) The following part will address the CSDDD and address these issues in turn.

### Civil liability mechanism under the CSDDD

The civil liability framework under the CSDDD is commendable for key provisions which have direct positive implications for access to remedy for victims of business-related human rights impacts including those in the Global South. For instance, by the combined reading of Article 22(5) and recital 61 of the Commission’s proposed draft of the CSDDD, Member States shall ensure that the liability provided for in provisions of national law transposing the civil liability provisions of the CSDDD overrides the law applicable to dispute under private international law rules.[[107]](#footnote-108)

By implication, the CSDDD seeks to address access to remedy challenges faced by victims where the applicable law to a civil liability claim is prejudicial to the claimant.[[108]](#footnote-109) An example of such prejudicial circumstances is the decision of the German Court in the *KiK* case.[[109]](#footnote-110) The claimants instituted the suit seeking damages against KiK for alleged failure of KiK’s overseas supplier to ensure occupational safety at its textile factory located in Pakistan. The claimants alleged that the supplier’s failure led to the factory fire incident causing harm to the claimants.[[110]](#footnote-111) The Court dismissed the claim mainly on the ground that it had become statute barred under the applicable Pakistani law having been filed two years after the cause of action arose.[[111]](#footnote-112)

Further, the provisions of the CSDDD on civil liability potentially allow victims of business-related human rights impacts in the Global South to institute civil liability claims against EU-domiciled parent companies of overseas subsidiaries responsible for the adverse human rights impacts. This is already obtainable under certain jurisdictions such as the UK (see above discussion on the *Okpabi* and *Vedanta* cases*,* referenced above) and similarly operational in France under the Duty of Vigilance Law with at least five civil liability suits already instituted before French Courts.[[112]](#footnote-113)

In a related dimension, the CSDDD perhaps disincentivises the tendency for MNEs and their overseas subsidiaries to cause adverse human rights impacts with impunity and without remediation given the possibility of cumulative liability in respect of such adverse impact. Specifically, Article 22 (3) & (4) provide that the civil liability regime under the CSDDD shall be without prejudice to civil liabilities which are otherwise accruable under relevant national law (within and outside the EU) or the EU Environmental Liability Directive. This includes laws that provide for liability in situations not covered by or providing for stricter liability than under the Proposed Directive. It appears that this implies that a victim of business-related human rights abuses in the Global South can institute a civil liability suit in the local jurisdiction, against the subsidiary of an EU-domiciled parent company, and still institute a similar civil liability claim against the parent before the appropriate courts in the home State of the parent company.

The intended harmonisation of sustainability due diligence laws under the Proposed CSDDD holds remarkable prospects for victims of human rights abuses resulting from failure by in-scope companies to comply with sustainability due diligence obligations to the extent that it provides for a civil liability framework. The devil, however, is always in the details and how effective this mechanism will be, will depend on several factors. The below discuss a representative, yet a non-exhaustive list of the issues that can impact the effectiveness of civil liability mechanisms under sustainability due diligence legislation, as demonstrated by the CSDDD example.

#### Burden of proof

First, there is the issue of the burden of proof. As discussed above, the French Duty of Vigilance Law 2017 already provides for a civil liability regime, under which victims of adverse human rights impacts resulting from the failure of an in-scope company to comply with the duty of vigilance obligation can bring a civil liability claim, either for an injunction or for remediation of damages caused.[[113]](#footnote-114) However, the civil liability regime under the French Duty of Vigilance Law places burden of proof on victims. This is problematic due to several reasons. As explained elsewhere:[[114]](#footnote-115)

‘The more remote in the supply chain the damage, the harder it may be for the claimant to prove that the damage has occurred as a result of a breach of the Viligance Obligations and that there is a causal link between such a breach and the resulting damage. It is also to be expected that the claimant would have to prove that the Vigilance Law is applicable to her/his situation. This includes proving that the defendant enters into the scope of the Vigiliance Law and that the damage occurred within the ambit *rationae personae* of the Vigiliance plan.’

According to the Commission’s draft of the CSDDD, the question of burden of proof was reserved for determination under relevant national laws,[[115]](#footnote-116) some of which may decide to reverse it and place it on the company. The EU Parliament’s Committee on Legal Affairs version goes even further, proposing that where the claimant has provided ‘elements substantiating the likelihood of a company’s liability’, but in need of further evidence that lies in the control of the company, the court will be able to order the discloser of such evidence by the company.[[116]](#footnote-117) The latter proposed solution seems balanced; lowering the initial threshold imposed on victims to the mere demonstration of ‘likelihood’, and allowing them easier access to documents and information which are often under the control of the MNC.

Also, others have mentioned, with respect to the question of the burden of proof, the issue of access to effective and meaningful legal representation. Ngangjoh-Hodu et al mention the significant financial costs that are involved in meeting the burden of proof, *inter alia* in terms of requiring effective legal counselling and gaining access to information and documentation.[[117]](#footnote-118) Here, the Parliament’s Legal Affairs Committee proposes to alleviate this problem by allowing victims’ to be represented by NGOs and trade unions.[[118]](#footnote-119) This proposal alsoseems reasonable, and given the CSDDD’s purpose and objective, it is hard to think of reasons to deny it. Whether allowing victims to be represented by NGOs, on its own, will fill the gap of access to effective legal representation remains questionable.[[119]](#footnote-120) Lawmakers will do well to dedicate further thought to this issue.

#### Who is covered?

Another noteworthy point is related to the CSDDD’s scope, which will determine how wide the pool of potential defendants will be. While the French law covers only ‘mega’ companies (5000 employees and above), the Commission has proposed a significantly lower threshold: companies with more than 500 employees and turnover of more than EUR 150 million. In ‘high risk’ sectors, the CSDDD will cover companies with 250 employees and above, with a minimum net turnover of EUR 40 million. The EU Parliament’s Legal Affairs Committee is advocating for an even wider coverage: 250 employees and above, with a net turnover of EUR 40 million and over. In ‘high risk’ sectors, the Parliament Legal Affairs Committee is asking for a very minimal threshold: 50 employees, and EUR 8 million net turnover.

As can be seen, it seems certain that it is no longer only the ‘super-large’ companies who will be subjected to civil liability, but also SMEs (especially of the Parliament’s version is accepted). The pool of potential European defendants, therefore, is expected to grow significantly.

#### What is the scope of the obligations?

Another point to notice concerns the scope of the CSDDD obligations, i.e. the types of violations that the CSDDD will address and will be subject to potential civil litigation. Examples of lawmakers’ ambition in this respect vary to a great extent: The above-discussed French Vigilance Law provides a very generous model, covering *any* significant harm to human rights and the environment. EU lawmakers, on the other hand, have decided to follow the more limited example of the German Supply Chain Act, where only the breach of specific, listed provisions of a number of international treaties will be regarded as covered ‘adverse impacts’ (i.e. potentially subject to litigation).

Differences in ambition are noticeable also in the different versions promoted by the EU institutions. The Commission and the Council have both proposed fairly modest lists of treaties (especially in the context of environmental protection[[120]](#footnote-121)). The EU Parliament Legal Affairs Committee’s list is far wider, including *inter alia* impacts resulting from breaches of international treaties on climate change, corruption, and, importantly, also the European Convention on Human Rights.[[121]](#footnote-122) The versions presented by the three EU institutions are significantly different, and the result of their negotiations will be crucial: it will determine the effectiveness of CSDDD and its usability for future claimants.

#### Potential ‘contractual assurances’ defence?

The effectiveness of the civil liability frameworks under sustainability due diligence legislation will be determined also in light of the legal defences and exceptions that it will allow regulated companies. The CSDDD’s effectiveness has been questioned in this respect, on account of the quasi-due diligence defence that it affords in-scope companies. While Article 22(1) provides that businesses shall be liable for damages resulting from failure to fulfil obligations specified under Articles 7 & 8 with respect to preventing potential adverse impacts and bringing actual adverse impacts to an end respectively, Article 22(2) effectively has somewhat eroded the deterrence effect of the civil liability regime.[[122]](#footnote-123) Essentially, Article 22(2) of the Proposed Directive excuses a company from liability for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, where the company has taken the due diligence steps referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5) including contractual assurances from business partners to comply with the company’s code of conduct.[[123]](#footnote-124)

Contractual assurances and associated audit/verification processes as referenced in the CSDDD, have been described by some as having limited efficacy in achieving improved outcomes for people and insufficient to prevent and address human rights impacts.[[124]](#footnote-125) Others have warned that this possible defence will lead to ‘checkbox compliance’, effectively transferring the responsibility to ensure compliance to MNCs’ business parties.[[125]](#footnote-126) Further, it has been argued that contractual clauses are unsuitable to deliver change due to the failure of contracts to also require the companies that impose them to commit to addressing any of their own practices – such as purchasing practices – that can make it difficult or impossible for their suppliers or other partners to meet the human rights standards expected of them.[[126]](#footnote-127)

While it is acknowledged that the foregoing pertains to liability for damages caused by an adverse impact arising because of the activities of an indirect partner with whom the company has an established business relationship, it nonetheless represents an unusual exemption from liability in a manner that is not compatible with the letter and spirit of the UNGPs.

Although the actions prescribed under Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5) including contractual assurances from business partners to comply with the company’s code of conduct satisfy the due diligence requirements under UNGP17, it does not however exculpate businesses with respect to remediation or cooperating in the remediation of adverse human rights impacts which they have caused or contributed to.[[127]](#footnote-128)

Rather than the current approach adopted in the CSDDD, which allows companies to avoid liability by use of codes of conduct and certification, it has been recommended that an approach which adopts limitations on liability drawn from ordinary tort principles, such as foreseeability, causation and reasonableness.[[128]](#footnote-129)

## Concluding remarks: will new sustainability due diligence legislations revolutionise victims’ access to justice and remedy?

As discussed in Part B of this article, despite encouraging developments in some jurisdictions, current rules on civil liability are imposing difficulties on victims of MNCs’ transnational human rights and environmental harms. This article opened by asking whether the answer to this deficiency can be found in a new regulatory trend: the adoption of sustainability due diligence laws. Our initial hypothesis was that under the unassuming title of ‘due diligence laws’ in fact hides a significant development in the field of transnational civil liability, which could potentially facilitate access to justice and remedy for MNCs victims.

Our conclusion from the above analysis is twofold: First, the new civil liability route offered by due diligence legislation could indeed provide a more structured, and a better suited, solution for addressing transnational civil liability. The marrying of due diligence obligations with civil liability mechanisms provides a useful combination; the two instruments are mutually supportive: without civil liability, the due diligence process remains a toothless exercise. Equally, without sustainability due diligence legislation, the civil liability option will remain limited. The due diligence is further supporting civil liability litigation by providing a clearer causal link: where the risks have been identified as part of the due-diligence process, it should not be difficult to establish that the MNC was aware of its operation causing them and of its obligation to prevent them. Moreover, as part of the CSDDD legislative process, the Commission is advocating that liability will apply not only vis-à-vis harms that were identified in the due diligence process but also harms that *should have been* identified.[[129]](#footnote-130) On *hindsight analysis*, it is much harder for the MNC to prove that a significant harms to the environmental or human rights should not have been identified.[[130]](#footnote-131)

On the other hand, how effective the linking of due diligence obligations with a civil liability mechanism will be, will depend on the details of each legislation, its scope, coverage, and the completing procedural rules that it will opt for. Lawmakers should not assume that the mere addition of a civil liability mechanism to sustainability due diligence rules will resolve the longstanding difficulties faced by victims on their quest for remedies and access to justice.

1. \*Alphabetic order. The authors would like to thank the anonymous reviewers and the editors for their valuable comments, and Mr Acland Bryant for his excellent editorial assistance. Any mistakes or inaccuracies are solely the responsibility of the authors.

 World Benchmarking Alliance ‘Corporate Human Rights Benchmark – Key findings’ 2020 p3 <[https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-FindingsReport.pdf> accessed 03 October 2022](https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-FindingsReport.pdf%3E%20accessed%2003%20October%202022). [↑](#footnote-ref-2)
2. European Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022 COM (2022) 71 final 2022/0051 (COD). [↑](#footnote-ref-3)
3. Juan Jose Alvarez Rubio & Katerina Yiannibas, *Human Rights in Business: Removal of Barrier to Access to Justice in the European Union – Executive Summary* (Institute for Democratic Governance 2017) <http://humanrightsinbusiness.eu/wp-content/uploads/2016/09/EXECUTIVE_SUMMARY_HRB_Research_Results.pdf> (accessed 29 March 2023), 11-17. [↑](#footnote-ref-4)
4. *Jesper v Arab Bank* 584 U.S. (2018), 13; Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 621 F 3.d, 118. [↑](#footnote-ref-5)
5. See Richard Meeran, ‘Tort Litigation Against Multinational Corporations for Violations of Human Rights: An Overview of the Position outside the United States’ (2011)3(1) City University of Hong Kong Law Review 1, 3. However, see *Nevsun Resources Ltd. v. Araya* 2020 SCC 5, ( 28 February 2020), para. 4 < <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do>> accessed 29 March 2023, were liability for breach of customary international may be developed in common law under domestic law. [↑](#footnote-ref-6)
6. For instance, few of the cases which were brought before the English court concerned the joinder of the out of jurisdiction subsidiary with proceedings against the parent under Article 3.1(3) of practice direction 6B, which required a showing that ‘there is between the claimant and the parent a real issue which it is reasonable for the court to try. This involved a showing that the parent company was negligent, and as part of the enquiry that they owed a duty of care to the claimant. See *Vedanta Resources PLC and another v Lungowe* and *others* [2019] UKSC 20, paras 61; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 On appeal from: [2020] EWCA Civ 191, para 153. [↑](#footnote-ref-7)
7. On pushing the goals of the UNGPs see Doug Cassel ‘Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence’ (2016)1(2) Business and Human Rights Journal 179. [↑](#footnote-ref-8)
8. *Donoghue v Stevenson* [1932] AC 562, at 580. [↑](#footnote-ref-9)
9. Ibid. [↑](#footnote-ref-10)
10. *Caparo* *Industries* *Plc* v. *Dickman* [1990] 2 AC 605. [↑](#footnote-ref-11)
11. See Guardian Article on the Claims brought against Tesco in the UK by Mae Sot immigrant workers. <https://www.theguardian.com/world/2022/dec/19/how-big-brands-like-tesco-are-drawn-to-wild-west-of-global-supply-chain>. [↑](#footnote-ref-12)
12. *Friday Alfred Akpan et al v Royal Dutch Shell PLc et al* Case C/09/337050/HA ZA 09-150 [District Court of The Hague, 30 January 2013]. [↑](#footnote-ref-13)
13. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 [↑](#footnote-ref-14)
14. AngloAmerican, ‘Group Human Rights Policy’ (2021) <https://www.angloamerican.com/~/media/Files/A/Anglo-American-Group/PLC/sustainability/approach-and-policies/hr-policy-document-english-oct-2021.pdf>. [↑](#footnote-ref-15)
15. *Caparo* *Industries* *Plc* v. *Dickman* [19n90] 2 AC 605, 633. [↑](#footnote-ref-16)
16. *Michael and Another v Chief Constable of South Wales Police* [[2015] UKSC 2](https://www.bailii.org/uk/cases/UKSC/2015/2.html), Para 97. Common law does not generally impose liability for ‘pure commissions’. See Hopkins R., ‘Civil Liability for Human Rights Violations: A Handbook for Practitioners’, Bonavero Institute of Human Rights, October 2022, para 28. Available on <https://www.law.ox.ac.uk/sites/default/files/2022-10/9._civil_liabilities_for_human_rights_violations_england_and_wales.pdf> last accessed on 30 July 2023. Though the term ‘pure omissions’ should be understood along the line that the law often imposes a duty not to make things worse, by rarely imposes a duty to make things better. See Begum (on behalf of Md Khalil Mollah) v Maran (UK) Ltd [2021] EWCA Civ 326, per Coulson LJ, para 60. [↑](#footnote-ref-17)
17. *Chandler* v. *Cape PLC*, No. [2012] EWCA Civ 525, para 80. [↑](#footnote-ref-18)
18. *Friday Alfred Akpan et al v Royal Dutch Shell PLc et al* Case C/09/337050/HA ZA 09-150 [District Court of The Hague, 30 January 2013]. [↑](#footnote-ref-19)
19. This reflects the third prong of the famous English Court of Appeal Decision in [*Caparo Industries Plc* v *Dickman*](http://www.bailii.org/uk/cases/UKHL/1990/2.html) [1990] 2 AC 605. It is worthwhile pointing out that the Dutch court did not hesitate in the same proceedings to find that subsidiary owed a duty of care to the claimants and found it liable under the tort of negligence. See David Ong, ‘Regulating environmental responsibility for the multinational oil industry: Continuing challenges for international law’ (2015)11(2) International Journal of Law in Context 153, 166. [↑](#footnote-ref-20)
20. Cassel (n 7) 196-197 [↑](#footnote-ref-21)
21. *Caparo* *Industries* *Plc* v. *Dickman* [1990] 2 AC 605. [↑](#footnote-ref-22)
22. *Vedanta v Lungowe* (n 6), paras 61. See also *Okpabi v Royal Dutch Shell* (n 6), para 153. [↑](#footnote-ref-23)
23. See generally *Okpabi v Royal Dutch Shell* (n 6), para 153; and *Vedanta v Lungowe* (n 6), para 61. [↑](#footnote-ref-24)
24. *Vedanta v Lungowe* (n 6), para 53. [↑](#footnote-ref-25)
25. Hopkins (n 17), para 51. [↑](#footnote-ref-26)
26. *Vedanta v Lungowe* (n 6), para 54. [↑](#footnote-ref-27)
27. *Fidelis Ayoro Oguru et al v Shell Petroleum Nv, Royal Dutch Shell Plc, Shell Petroleum Development Company Of Nigeria Ltd*, Case numbers C/09/365498 / HA ZA 10-1677 (case a) + C/09/330891 / HA ZA 09-0579 (case b), ( January 29, 2021) available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:132&showbutton=true>; *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, District Court The Hague, ( 26 May 2021), English translation at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2021:5339>. [↑](#footnote-ref-28)
28. Ibid. *Fidelis Ayoro Oguru et al v Shell Petroleum Nv, Royal Dutch Shell Plc* (n 28) paras 3.30—3.31. [↑](#footnote-ref-29)
29. *Smith* v *Littlewoods* [1987] AC 241. [↑](#footnote-ref-30)
30. *Vedanta v Lungowe* (n 6), ParaS 53-54. [↑](#footnote-ref-31)
31. Per Lord Goff in *Smith* v *Littlewoods* (n 30). [↑](#footnote-ref-32)
32. *Begum (on behalf of Md Khalil Mollah) v Maran (UK) Ltd* [2021] EWCA Civ 326, para 60-64 [↑](#footnote-ref-33)
33. Ibid, *Begum v Maran*, para 65. [↑](#footnote-ref-34)
34. Graham Virgo, ‘Characterisation, Choice of Law and Human Rights’, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 325, 335 [↑](#footnote-ref-35)
35. Hopkins (n 17) para 7. [↑](#footnote-ref-36)
36. Lord Justice Scarmann reasoned that ‘There is here no novelty: but merely the application of the principle ubi jus ibi remedium’ [for every wrong, the law provides a remedy]. *Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871, at p. 884 (H.L.) [↑](#footnote-ref-37)
37. [↑](#footnote-ref-38)
38. *Nevsun Resources Ltd. v. Araya* (n 5). [↑](#footnote-ref-39)
39. *Nevsun Resources Ltd. v. Araya* (n 5) para 63-64. [↑](#footnote-ref-40)
40. *Nevsun Resources Ltd. v. Araya* (n 5) para 106-107 [↑](#footnote-ref-41)
41. *Nevsun Resources Ltd. v. Araya* (n 5) para 113. It is important to note that four justices out of a court composed of nine justices in a dissenting opinion argued that corporations may not be civilly liable in Canada for a breach of customary international law norms, (Brown and Rowe JJ. Dissenting in part and Moldaver and Côté JJ. Dissenting). [↑](#footnote-ref-42)
42. *Nevsun Resources Ltd. v. Araya* (n 5). Supreme Court agreeing with the Appeal court. para 20. [↑](#footnote-ref-43)
43. *Nevsun v Araya* (n 5) para 122. See also Malcolm Rogge, ‘*Nevsun* Puts Canada’s Corporate Decision Makers in *The Human Rights* *Zone*’ (2020) Working Paper No 70, Corporate Responsibility Initiative, p 2. [↑](#footnote-ref-44)
44. 28 US Code & 1350. also called the Alien Tort Claims Act (ATCA). [↑](#footnote-ref-45)
45. 70 F.3d 232 (2nd. Cir. 1995). [↑](#footnote-ref-46)
46. Ernest A Young, ‘Universal Jurisdiction, the Alien Tort Statute, and the Transnational Public-Law Litigation After *Kiobel*’ (2015)64 Duke Law Journal 1023, 1052. [↑](#footnote-ref-47)
47. See Amicus brief by the United Kingdom, and the Netherlands before the Supreme Court in *Kiobel v Royal Dutch Petroleum* (n 4). See also Young, ibid, 1098. US courts give the plaintiff procedural advantages which are not available in other systems. Furthermore, US court unlike many other jurisdictions is able to award punitive damages. [↑](#footnote-ref-48)
48. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), 714 [↑](#footnote-ref-49)
49. *Sosa* v. *Alvarez-Machain*, ibid. [↑](#footnote-ref-50)
50. *Ibid*. [↑](#footnote-ref-51)
51. *Erie R. Co. v Tompkins* 304 U.S. 64 (1938). [↑](#footnote-ref-52)
52. *Sosa* v. *Alvarez-Machain* (n33). [↑](#footnote-ref-53)
53. Jesner v Arab Bank, Plc, No 16-499, 584 U.S. (2018). [↑](#footnote-ref-54)
54. Kiobel v. Royal Dutch Petroleum (n 4) (quoting Sosa (n 50, 732). [↑](#footnote-ref-55)
55. *Jesner v Arab Bank* (n38). [↑](#footnote-ref-56)
56. *Kiobel* v. *Royal Dutch Petroleum* 456 F.Supp.2d 457 (2006). [↑](#footnote-ref-57)
57. Ibid. [↑](#footnote-ref-58)
58. Ibid. [↑](#footnote-ref-59)
59. Ibid, 1661. [↑](#footnote-ref-60)
60. Ibid, 1663. [↑](#footnote-ref-61)
61. Ibid, 1662. [↑](#footnote-ref-62)
62. C*ardona v. Chiquita Brands International, Inc.,* 760 F.3d 1185 (11th Cir. 2014). [↑](#footnote-ref-63)
63. Ibid, 10. [↑](#footnote-ref-64)
64. Ibid. [↑](#footnote-ref-65)
65. See *Baloco v. Drummond Co*., 767 F.3d 1229, 1238 (2014). [↑](#footnote-ref-66)
66. *Al Shimari v. CACI Premier Technology*, Inc., 758 F.3d 516 (4th Cir. 2014), 528-529. [↑](#footnote-ref-67)
67. *Ibid.* 528. [↑](#footnote-ref-68)
68. *Nestle U.S.A., Inc. v. Doe*, 141 S.Ct. 1931 (2021). [↑](#footnote-ref-69)
69. *Nestle U.S.A., Inc. v. Doe* (n 70). See Stephan Statsko, ‘the Expectation Game: The Alien Tort Statute, Corporate Liability, and the International Law Forum After Nestle’ (2022) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115075>. [↑](#footnote-ref-70)
70. Gabrielle Holly and Claire Methven O’Brien ‘Human Rights Due Diligence Laws: Key Considerations Briefing On Civil Liability For Due Diligence Failures’ (2021) The Danish Institute for Human Rights, 7. [↑](#footnote-ref-71)
71. UN Working Group on Business and Human Rights ‘Raising the Ambition – Increasing the Pace: UNGPs 10+ A Roadmap for the Next Decade of Business and Human Rights’ (2021), 30; Axel Marx, Claire Bright, Jan Wouters et al ‘Access to legal remedies for victims of corporate human rights abuses in third countries’ (2019) Study commissioned by the European Parliament's Sub-Committee on Human Rights, 14-16. [↑](#footnote-ref-72)
72. Some of the due diligence laws currently in force include the French Duty of Vigilance Law 2017, the German Supply Chain Act 2021, the United States’ Uyghur Forced Labour Prevention Act 2021, the UK Modern Slavery Act 2015, the Australian Modern Slavery Act 2018, the Dutch Child Labour Due Diligence Law, Norwegian Transparency Act 2021, the California Transparency in the Supply Chain 2010, the EU Sustainable Finance Disclosure Regulation. Upcoming legislations include the imminent proposed EU Corporate Sustainability Due Diligence Directive, Austria’s Supply Chain Act Motion, Belgium’s Proposal on Duty of Vigilance, Spain’s Bill on the Protection of Human Rights, Sustainability and Due Diligence in Transnational Business Activities. [↑](#footnote-ref-73)
73. Ibid. [↑](#footnote-ref-74)
74. For instance, issue-specific legislations such as supply chain-focused legislation including those currently in force in England, Germany, Australia and the United States and the upcoming Canadian supply chain legislation fail to match due diligence requirements with procedure for their enforcement, especially from the point of view of harmed individuals. [↑](#footnote-ref-75)
75. Act on Corporate Due Diligence Obligations in Supply Chains of 16 July 2021 <https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile>. [↑](#footnote-ref-76)
76. Dutch Child Labour Due Diligence Law 2019 <https://www.amfori.org/sites/default/files/amfori-2020-26-02-Dutch-Child-Labour-Due-Diligence-Law.pdf>. [↑](#footnote-ref-77)
77. Australia Modern Slavery Act 2018 <https://www.legislation.gov.au/Details/C2018A00153>. [↑](#footnote-ref-78)
78. UK Modern Slavery Act 2015 <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>. [↑](#footnote-ref-79)
79. California Transparency in Supply Chains Act of 2010 <http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.pdf>. [↑](#footnote-ref-80)
80. Nicolas Bueno and Claire Bright ‘Implementing Human Rights Due Diligence through Corporate Civil Liability’ (2020)69 ICLQ 789, 800-806. [↑](#footnote-ref-81)
81. Art. L. 225-102-4 of the French Commercial Code (French Duty of Vigilance Law) [↑](#footnote-ref-82)
82. CSDDD (n 2). [↑](#footnote-ref-83)
83. Belgian Proposal on Duty of Vigilance introduced before the Belgian Chamber of Representatives in April 2021 <https://www.lachambre.be/FLWB/PDF/55/1903/55K1903001.pdf> . [↑](#footnote-ref-84)
84. Austrian Motion for a Resolution on Supply Chainconcerning a Supply Chain Act for a social, human-rights-compliant and sustainable production methods submitted to the Austrian Parliament 25 March 2021 <<https://www.parlament.gv.at/dokument/XXVII/A/1454/fnameorig_935996.html>> [↑](#footnote-ref-85)
85. Dutch Proposal on Responsible and Sustainable International Business Conduct submitted to the Dutch House of Representatives by coalition parties on 2 November 2022. [↑](#footnote-ref-86)
86. France Duty of Vigilance Law (n 84). [↑](#footnote-ref-87)
87. See Article 1 of the Art. L. 225-102-4 of the Commercial Code (French Duty of Vigilance Law). [↑](#footnote-ref-88)
88. While the EU and the German versions include a fairly limited list of treaties that define the scope of ‘environmental’ and ‘human rights’ harms, the French law covers all ‘severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks’. [↑](#footnote-ref-89)
89. France Duty of Vigilance Law (n 84), Articles 1 and 2. [↑](#footnote-ref-90)
90. See *Friends of the Earth Paris and Others v. TotalEnergies* SE No. RG 22/53942 - No. Portalis 352J-W-B7G-CXB4, M No.: 2/MC,(Tribunal Judiciaire de Paris, 28 February 2023) <<https://www.amisdelaterre.org/wp-content/uploads/2023/02/decisiontj-paris-totalouganda-28fev2023.pdf>> accessed 24 March 2023. [↑](#footnote-ref-91)
91. Ibid, 6. [↑](#footnote-ref-92)
92. Ibid, 23. [↑](#footnote-ref-93)
93. Ibid, 19. [↑](#footnote-ref-94)
94. Ibid, 20. [↑](#footnote-ref-95)
95. Ibid. [↑](#footnote-ref-96)
96. [↑](#footnote-ref-97)
97. Yenkong Ngangjoh-Hodu, Tarcisio Gazzini, Avidan Kent, Kristian Siikavirta & Parveen Morris, ‘The Proposed EU Corporate Sustainability Due Diligence Directive and its Impact on LDCs’ (Finnish Ministry of Foreign Affairs, 2023), 90. [↑](#footnote-ref-98)
98. Yenkong Ngangjoh-Hodu et al (n 100), notably chapter 4 (Environment and Climate Change). [↑](#footnote-ref-99)
99. *Vedanta Resources Plc and another v Lungowe and others* [2019] UKSC 20 (UK Supreme Court) and *Okpabi and others v Royal Dutch Shell* [2021] UKSC 3 (UK Supreme Court). [↑](#footnote-ref-100)
100. Ibid (*Vedanta Resources*) at para. 95. [↑](#footnote-ref-101)
101. Ibid at para. 1. [↑](#footnote-ref-102)
102. *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (Supreme Court of Canada) at para. 105-112; See also, Barnali Choudhury, ‘Enforcing International Human Rights Law Against Corporations’ (July 26, 2023) available at SSRN: [https://ssrn.com/abstract=4522094](https://ssrn.com/abstract%3D4522094) [↑](#footnote-ref-103)
103. Ibid (*Nevsun Resources*) paras 11-13. [↑](#footnote-ref-104)
104. Surya Deva ‘Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?’ (2023) Leiden Journal of International Law, 19. See generally Elsa Savourey and Stéphane Brabant ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption’ (2021)6 Business and Human Rights Journal 141–152. [↑](#footnote-ref-105)
105. Ibid. [↑](#footnote-ref-106)
106. Emilie Vasseur et al. ‘Business and Human Rights: first French case-law on the Duty of Vigilance – judges adopt a cautious approach to avoid judicial interference in corporate management’ Mayer Brown, 14 March 2023 < <https://www.eyeonesg.com/2023/03/business-and-human-rights-first-french-case-law-on-the-duty-of-vigilance-judges-adopt-a-cautious-approach-to-avoid-judicial-interference-in-corporate-management/>> accessed 24 March 2023. [↑](#footnote-ref-107)
107. CSDDD (n 2). [↑](#footnote-ref-108)
108. Stephane Brabant et al ‘Enforcing Due Diligence Obligations the Draft Directive on Corporate Sustainability Due Diligence (Part 2)’ Verfassungsblog, March 2022. [↑](#footnote-ref-109)
109. [LG Dortmund](https://openjur.de/nw/lg_dortmund.html), judgment of 10.01.2019 - 7 O 95/15 <https://openjur.de/u/2155292.html> accessed 25 October 2022 mentioned in Stephane Brabant et al (n 113). [↑](#footnote-ref-110)
110. Ibid, paras 4-17. [↑](#footnote-ref-111)
111. Ibid, para 45. [↑](#footnote-ref-112)
112. *Friends of the Earth France, Survie, et al v Total,* filed in October 2019 and borders on the allegations of Total’s non-compliance with its legal obligations to prevent human rights abuses and environmental damage in the context of its Tilenga oil mega-project in Uganda; ProDESC and the *European Centre for Constitutional and Human Rights (ECCHR) v EDF* filed in October 2020 and borders on alleged failure by the Respondent to comply with its duty of vigilance; *International Federation for Human Rights (FIDH), the French League for Human Rights (LDH) v Suez* filed in June 2021; and *Notre Affaire à Tous, Sherpa, ZEA, Eco Maires and France Nature Environnement (FNE) v Total* filed in January 2020 and is the first climate litigation case in France aimed at raising the climate ambitions of a multinational oil company; and (OPIAC, COIAB, FEPIPA and FEPOIMT), as well as French and American NGOs (Canopée, CPT, Envol Vert, Mighty Earth, Notre Affaire à Tous, France Nature Environnement and Sherpa) v Casino Group. [↑](#footnote-ref-113)
113. France Duty of Vigilance Law (n 84), Art. 225-102-5. Note that although this provision on remediation has been declared unconstitutional by the French Constitutional Court, it remains part of the Law. [↑](#footnote-ref-114)
114. Lise Smit et al. ‘Study on due diligence requirements through the supply chain’ (European Commission, 2023), 68. [↑](#footnote-ref-115)
115. CSDDD (n 2), Recital 61. [↑](#footnote-ref-116)
116. European Parliament Committee on Legal Affairs, Draft report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, (7 November 2022), proposed Article 22(2)1(e). [↑](#footnote-ref-117)
117. Yenkong Ngangjoh-Hodu et al (n 100), part 7.2. [↑](#footnote-ref-118)
118. European Parliament Committee on Legal Affairs (n 121), proposed Article 22(2)1(d). [↑](#footnote-ref-119)
119. Yenkong Ngangjoh-Hodu et al (n 100), part 7.2. [↑](#footnote-ref-120)
120. Yenkong Ngangjoh-Hodu et al (n 100), part 4.3. [↑](#footnote-ref-121)
121. See the European Parliament Committee on Legal Affairs (n 121), 141-142. [↑](#footnote-ref-122)
122. CSDDD (n 2). [↑](#footnote-ref-123)
123. CSDDD (n 2). [↑](#footnote-ref-124)
124. Shift ‘The EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive: Shift’s Analysis’ (2022) <https://shiftproject.org/resource/eu-csdd-proposal/shifts-analysis/>, 4-6. [↑](#footnote-ref-125)
125. Gabrielle Holly et al, *Legislating for impact: Analysis of the proposed EU corporate sustainability due diligence directive* (2022) at https://www.humanrights.dk/publications/ legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence. [↑](#footnote-ref-126)
126. Shift (n 130), 6. [↑](#footnote-ref-127)
127. United Nations General Principles on Business and Human Rights, (2011), UNGP 17. [↑](#footnote-ref-128)
128. Gabrielle Holly et al (n 131), 22. [↑](#footnote-ref-129)
129. See paragraph 56 of the CSDDD’s preamble (n 2). [↑](#footnote-ref-130)
130. The reader should note that there is no consensus on this matter, and the EU Council is advocating to remove the words ‘should have been identified’ from the CSDDD text. See Yenkong Ngangjoh-Hodu (n 100), part 4.5. [↑](#footnote-ref-131)