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SYMPOSIUM ON NEW PATHWAYS TOWARD SUPPLY CHAIN ACCOUNTABILITY

HUMAN RIGHTS OR PRIVATE RIGHTS? – EFFECTIVE PROTECTION OF VICTIMS IN GLOBAL SUPPLY CHAINS

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The business and human rights movement has made significant gains recently. After years of struggle, courts are increasingly embracing the idea of holding multinational corporations accountable for human rights abuses and environmental damage in countries of the Global South. Legislators are supplementing this with supply chain laws that impose due diligence obligations on multinationals, often backed by administrative sanctions. Civil liability for damages is less often provided, but hailed as a particular achievement in terms of the protection of victims. However, a closer look at civil liability in recent supply chain legislation adopted in Europe raises the question of whether the hallmark of such liability may actually be its greatest weakness. Supply chain liability is regularly linked to the breach of a due diligence obligation in relation to human rights abuses or environmental damage. This is typically based on international conventions that were not written for corporations and are difficult to apply in individual cases. In contrast, this essay argues that it is better to link supply chain liability to a violation of private rights, such as personal injury or property damage. This fits better with existing tort systems and ultimately benefits victims. The hallmark of supply chain liability should not be the link to human rights, but the establishment of duties of care across legal entities.

The Rise of Supply Chain Legislation

In addition to notable developments in case law (e.g., on extraterritorial jurisdiction and due diligence obligations of parent companies), the adoption of supply chain legislation has been one of the greatest successes of the business and human rights movement. While earlier laws, for example in California, the United Kingdom, and Australia, focused primarily on transparency, more recent laws, such as those in Germany, France, and the Netherlands, enshrine obligations to act and enable their enforcement through sanctions.[1] These supply chain laws address two issues that have made enforcement against multinational corporations particularly difficult in the past.[2] They emphasize the direct obligations of multinationals, preventing them from hiding behind the corporate veil or the purported independence of business partners. And they emphasize the responsibility of courts and agencies with jurisdiction over multinationals to enforce those obligations. This makes it harder for these

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[1] Carsten Koenig, *An Economic Analysis of Supply Chain Liability*, 7–11 (Working Paper, Apr. 2024).

[2] *See, e.g.*, Richard Meeran, *Perspectives on the Development and Significance of Tort Litigation Against Multinational Parent Companies*, *in* HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE (Richard Meeran & Jahan Meeran eds., 2021).

corporations to benefit from enforcement failures in jurisdictions where they, their subsidiaries, or their independent contractors operate.

The most significant milestone on this path, not least because of its broad scope, is the European Union's recently adopted Corporate Sustainability Due Diligence Directive (CSDDD).[3] A special feature of the Directive is that it provides for civil liability for damages. Previously, this was only possible in Europe under the French Duty of Vigilance Law of 2017.[4] The right to claim damages under future legislation transposing the CSDDD has been hailed as a particular achievement in terms of victim protection. However, the fact that this right is designed as a civil remedy for a human rights abuse could make it difficult to enforce.

The Problematic Focus of Civil Liability on Human Rights

Most of the cases typically discussed in the context of business and human rights have not been based on a human rights abuse in the strict sense (i.e., a violation of a human right as set forth in an international convention). Rather, they have been litigated as traditional tort cases, most often involving allegations of negligent physical harm.[5] Examples include the U.S. Bhopal case,[6] the UK *Cape*,[7] *Vedanta*,[8] and *Okpabi*[9] cases, the Dutch *Akpan* case,[10] and the German *KiK* case.[11] Notable exceptions are cases based on the U.S. Alien Tort Statute (ATS), such as *Kiobel*,[12] because the ATS requires a violation of international law. Supply chain laws are taking a similar approach. The due diligence obligations they impose are not intended to prevent personal injury, but to motivate corporations to act in accordance with human rights and environmental law. This reflects the normative origins of supply chain laws in the business and human rights movement and, in particular, their alignment with the UN Guiding Principles[13] and the OECD Guidance.[14] However, it also creates an additional hurdle for victims when it comes to civil liability for damages.

The focus of supply chain legislation on human rights as enshrined in international conventions can be illustrated by the CSDDD.[15] The final version, as adopted in June 2024, establishes obligations with respect to actual and potential adverse human rights impacts and environmental impacts.[16] These impacts are defined in Article 3(1)(b) and (c) and in the Annex to the CSDDD by reference to international human rights and environmental instruments. Importantly, the CSDDD indirectly commits multinational corporations to respect the

[3] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (July 5, 2024) [hereinafter CSDDD].

[4] Code de Commerce, Art. L225-102-5 (Fr.).

[5] *See, e.g.*, Ekaterina Aristova, Tort Litigation Against Transnational Corporations (2024).

[6] In re Union Carbide, 634 F. Supp. 842 (S.D.N.Y. 1986).

[7] Adams v. Cape [1990] Ch. 433; Lubbe v. Cape [2000] WLR 1545; Chandler v. Cape [2012] EWCA Civ. 525.

[8] *Vedanta Resources PLC v. Lungowe* [2019] UKSC 20.

[9] *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3.

[10] Gerechtshof Den Haag, Judgment, ECLI:NL:GHDHA:2015:3587 (Dec. 18, 2015).

[11] Landgericht Dortmund, Judgment, ECLI:DE:LGDO:2019:0110.7O95.15.00 (Jan. 10, 2019).

[12] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[13] UN Guiding Principles on Business and Human Rights (2011).

[14] OECD Due Diligence Guidance for Responsible Business Conduct (2018).

[15] Civil liability under the French Duty of Vigilance Law is linked to "serious harm to human rights and fundamental freedoms, the health and safety of individuals and the environment." *See* Code de Commerce, *supra* note 4, Art. L225-102-4. The fact that, unlike in the CSDDD, the health and safety of individuals is also mentioned could allow an interpretation as proposed in this essay.

[16] CSDDD, *supra* note 3, Art. 1(1)(a).

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fundamental rights enshrined in these instruments, although the instruments themselves are not binding on corporations.

For human rights impacts, the rather complicated definition distinguishes between rights that are explicitly mentioned in the Annex (e.g., the right to life and the prohibition of torture) and those that are not. For the latter, CSDDD Article 3(1)(c)(ii) imposes additional requirements such as that the human right "can be abused by a company or legal entity" and that the company "could have reasonably foreseen the risk that such human right may be affected." The definition of adverse human rights impacts also requires an "abuse" of a human right, which is not defined in the CSDDD, but should be interpreted "in line with international human rights law."[17]

If a related due diligence obligation is breached (e.g., because a company fails to take appropriate measures to prevent a human rights impact) the competent supervisory authority may impose a sanction.[18] If a due diligence obligation is breached intentionally or negligently and this results in damage to a legal interest of a natural or legal person that is intended to be protected by the relevant human right, that person will be able to claim full compensation for the damage in accordance with the law of the EU member state in which the defendant company is established.[19]

The requirement to prove a human rights abuse in conflict with international conventions can create a significant hurdle for victims. Take, for example, the Rana Plaza collapse, which was a key driver of supply chain legislation. About 1,130 people died and some 2,500 were injured when a textile factory housed in a building unsuitable for heavy garment equipment collapsed. In a personal injury case, a victim would have to prove that they were injured and that this was due to the defendant's negligence, which can be difficult enough. For a CSDDD claim, however, they would have to show that their injury was caused by the defendant's negligent breach of a due diligence obligation (e.g., their duty to take appropriate preventive measures) with respect to an actual or potential human rights impact. Again, this requires the victim to show that the defendant violated a human right as enshrined in one of the international conventions listed in the Annex of the CSDDD. In a case similar to Rana Plaza, the victim's best case would probably be to argue that the defendant negligently failed to ensure that the factory operator provided "safe and healthy working conditions" within the meaning of Article 7(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[20] Alternatively, they could rely on the relevant International Labour Organization Conventions,[21] but these are not listed in Annex 1, Section 1 of the CSDDD, so they would also have to show that the additional requirements of CSDDD Article 3(1)(c)(ii) are met. While the Rana Plaza factory may appear from today's perspective as a prime example of an unsafe workplace, it is not self-evident that the victim would be able to prove a human rights abuse under ICESCR Article 7(b).

One difficulty is that ICESCR Article 7(b) was drafted as a voluntary commitment by states, not as a requirement on corporations. It was never intended that the provision would be directly applied in private disputes. Rather, it was assumed that states would implement the provision through national law and specify it in such a way that it could be enforced by their regulatory agencies and courts. The resulting lack of legal clarity was lamented by businesses during the drafting process of the CSDDD, but it is likely to have even worse implications for victims. This is because they bear the burden of proof for damage claims and, at least in the early stages of CSDDD litigation, there are no precedents on which to rely. There is no case law on the implications of ICESCR Article 7(b) for corporations, as the provision has never been applied between private parties. Moreover, the

[17] *Id.*, Rec. 32, sent. 3.

[18] *Id.* Art. 27.

[19] *Id.* Art. 29.

[20] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

[21] Convention (No. 155) Concerning Occupational Safety and Health Convention (1981); Promotional Framework for Occupational Safety and Health Convention, No. 187 (2006).

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wording ("safe," "healthy") is very broad and difficult to apply to individual cases where specific safety measures need to be evaluated in terms of benefits and costs.

Another challenge is that courts may be reluctant to consider every unsafe workplace as a human rights abuse. It seems more likely that they will want to reserve this category for the most egregious violations and introduce some sort of threshold. This may be met in some cases, but not in others, even though the harm caused by behavior that is not classified as a human rights abuse may be just as severe. Furthermore, corporations may defend themselves even more vigorously against allegations of human rights abuses than they do against ordinary tort cases. Even the suspicion of a human rights abuse carries significant reputational risks that can have a lasting negative impact on a company's business prospects. Companies may therefore find it difficult to accept such an allegation, even if they would be willing to pay compensation to satisfy an ordinary tort claim.

Of course, this does not mean that it is impossible to prove a human rights abuse as referred to in the CSDDD and international law. In a case like *Rana Plaza*, for example, a court may well find a violation of ICESCR Article 7(b). The point is that linking civil liability to international human rights conventions makes it unduly burdensome for victims to obtain compensation.

The Private Rights Alternative

Looking at the cases from *Bhopal* to *Okpabi*, it seems clear that private law could have provided an effective alternative route for victim redress. It would have been sufficient to address the two main problems of tort litigation against multinational corporations: the lack of jurisdiction of courts in the home countries of these corporations[22] and the lack of accountability of multinationals for the activities of foreign subsidiaries and suppliers.

It is puzzling that the traditional approach of tort law is abandoned by the CSDDD for cross-jurisdictional disputes, when it is otherwise seen as a sensible mechanism for compensating harm. If a factory collapses in the United States or Europe, it is irrelevant for the purposes of compensation whether a human rights abuse was committed. Rather, victims can simply file a tort claim for personal injury. If an employee is injured at work, they might also be able to benefit from workers' compensation, occupational accident insurance, or other social security systems. In any case, it will not take much effort to establish the claim.

Tort law is based on the culpable violation of private rights. While the protected interests may be more limited than under international human rights law, life and health are usually included. A distinction may also be made between different forms of fault. For physical injury, negligence is usually sufficient. The U.S. *Restatement of Torts* puts it this way: "An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability . . . ."[23] The Principles of European Tort Law (PETL) contain the same idea: "A person to whom damage to another is legally attributed [*e.g.* because they have caused it by conduct constituting fault] is liable to compensate that damage."[24] Civil liability under the CSDDD requires all these elements (i.e., violation of a protected interest, causation, fault), but also a violation of a due diligence obligation under CSDDD Articles 10 and 11 and a resulting human rights abuse.[25]

It could be argued that holding multinationals liable for every ordinary tort, rather than just the most egregious violations is going too far. Requiring a human rights abuse would then be a means of limiting liability. However, the same goal could be achieved by varying the standard of care according to the risk of harm in each case. In the event of unlikely or minor harm (e.g., property damage), fewer safety precautions could be required than in the event of

[22] *See, e.g.*, Tibisay Morgandi, *Parent Company Liability,* Forum Non Conveniens *and Substantial Justice*, 11 Camb. Int'l L.J. 118 (2022).

[23] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 6 (2010).

[24] Principles of European Tort Law, Art. 1(101); *see also* Draft Common Frame of Reference (DCFR), Art. VI.-1(101).

[25] *Cf.* CSDDD, *supra* note 3, Art. 29(1).

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highly probable or major harm (e.g., severe physical injury, loss of life). Due diligence need not mean the same thing in all situations, but can be a flexible concept. There is no evidence in the case law that courts have been overly generous in traditional tort litigation.[26] Victims may find it reassuring that this avenue remains open: supply chain legislation does not preclude claims based on other legal grounds.[27] This will continue to include general tort law. Indeed, given the high hurdles to liability under supply chain laws such as the CSDDD, traditional tort claims may often be more promising.

From a tort law perspective, the main problem has traditionally been the difficulty in holding multinational corporations accountable for injuries that occur in the area of responsibility of subsidiaries and independent suppliers. Tort law generally accepts the division of enterprises into separate legal entities and assigns to each an independent liability. Obligations to protect victims from harm caused within the sphere of responsibility of other entities have been rare. However, at least in some jurisdictions, the doctrine has made significant progress in recent years.[28] The groundbreaking innovation of cases such as *Chandler v. Cape*, *Vedanta*, and *Okpabi*, for example, lies precisely in the establishment of duties relating to activities that are primarily the responsibility of other legal entities (mostly subsidiaries).[29] It is to be expected that this development has not yet reached its end point. Supply chain laws such as the CSDDD could contribute to further progress because they formulate specific due diligence obligations with respect to the activities of subsidiaries and independent business partners in the supply chains of multinational corporations. These obligations could re-emerge in general tort law as ordinary duties of care.[30] This could give rise to liability that, although linked to a breach of due diligence obligations under a supply chain law, would be based on general tort law and would not require a human rights abuse.

Conclusion

There is no question that human rights abuses should be called out as such. However, using human rights abuses as the basis for compensating harm could prove counterproductive for victims. It is a very high bar for a victim to prove a violation of an international human rights convention. From a victim protection perspective, it would therefore be better to base compensation on the violation of a private right rather than a human rights abuse, as is usually the case in tort law. It is difficult enough to justify due diligence obligations across legal entities. This is where supply chain laws make an important contribution, because they emphasize the responsibility of multinationals for the activities of their suppliers. However, the link to a human rights abuse introduces an additional layer of complexity that risks undermining this achievement. It is therefore important that victims and courts also continue to consider solutions based on general tort law.

[26] *Cf.* Meeran, *supra* note 2.

[27] *See, e.g.*, CSDDD, *supra* note 3, Art. 29(6).

[28] *See, e.g.*, Carsten Koenig, *The Rise of Corporate Cross-Entity Liability: Which Doctrine for What Purpose?*, 35 Eur. Bus. L. Rev. 343 (2024).

[29] Tibisay Morgandi, *Liability for Greenwashing in Company Sustainability Reports: A Novel Application of the English Tort Law Doctrine of Assumption of Responsibility*, 118 AJIL Unbound 274 (2024).

[30] *Cf.* Doug Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 Bus. & Hum. Rts. J. 179 (2016).

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