

## ARTICLES

# BUSINESS AND HUMAN RIGHTS AS A GALAXY OF NORMS

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### ABSTRACT

*In the last several years, there has been an increasing tendency to view the impacts of transnational business operations through the lens of human rights law. A major obstacle to holding companies accountable for the harms that they impose, however, has been the separate legal identity of corporate subsidiaries and of contractors in a company's supply chain. France's recently enacted duty of vigilance statute seeks to overcome this obstacle by imposing a duty on companies to identify potential serious human rights violations by their subsidiaries and by companies with which they have an "established commercial relationship." Failure to engage in such vigilance can subject a company to liability for damages resulting from such failure.*

*This Article situates the new French duty of vigilance within a broader set of norms that can be characterized as the Business and Human Rights Galaxy. This Galaxy consists of five rings that represent standards and expectations ranging from classic enforceable "hard law" to voluntary principles generated by private parties, multi-stakeholder initiatives, and international organizations. The provisions in these rings are related in fluid and dynamic ways and exert varying degrees of gravitational influence on one another. Thus, for*

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*instance, what are conventionally regarded as forms of hard law may draw on voluntary private standards in setting expectations for behavior, and soft law norms may be incorporated into legally enforceable contract provisions between companies and their suppliers. This Article suggests that appreciation of these dynamics can furnish guidance in interpreting the novel duty of vigilance that the new French statute establishes. In particular, the common law duty of care and the United Nations Guiding Principles on Business and Human Rights can illuminate the nature and scope of the duty of vigilance. At the same time, the introduction of the new French statute into the Business and Human Rights Galaxy means that it too has the potential to influence provisions in other rings of the Galaxy.*

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I. INTRODUCTION

Business enterprises over the past few decades increasingly operate in multiple countries around the globe, manufacturing their products and acquiring resources in jurisdictions where they find the best returns on investment. Those returns are affected by the costs of complying with regulations regarding matters such as working conditions, employee compensation, and the impact of operations on the environment and local communities. Wide variations in the strength of these regulations across the world thus create incentives to conduct activities in countries where legal requirements are least demanding. This creates a “governance gap” with respect to “the prevention of, and accountability for, direct or indirect corporate human rights abuses in

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host states and the provision of redress to victims of such abuses.”<sup>1</sup> This enables companies to reap financial benefits from their operations without being responsible for many of the adverse impacts of their activities.

One way to close this gap would be for companies that control multiple entities in various countries to be subject to regulation by the countries in which they are incorporated and have their headquarters. These, generally, are jurisdictions in which regulatory obligations are more demanding.<sup>2</sup> A major obstacle to this, however, is the insulation of a parent company from liability for the harms inflicted by its subsidiaries or by companies that are part of its supply chain.<sup>3</sup> The doctrine of limited liability based on separate legal identity provides that, notwithstanding their status as members of a corporate family, subsidiaries are distinct entities that bear sole responsibility for their operations.<sup>4</sup> Similarly, suppliers are simply third parties who are engaged in contractual relationships with parent companies. The result has been to limit recovery to the assets of the subsidiary or supplier. Perhaps even more important, it also subjects any claims to review in the legal system in the jurisdiction in which these entities are incorporated.<sup>5</sup> In developing countries that lack a robust judicial system and rule of law, this can create substantial obstacles to any redress.

In 2017, France took a major step toward reducing this impediment to accountability by enacting a statute that imposes a “duty of vigilance” on companies with a substantial presence in France.<sup>6</sup> Such companies

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1. PENELOPE SIMONS & AUDREY MACKLIN, *THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE* 9 (2014).

2. *See generally id.*

3. Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769 (2015); Régis Bismuth, *La responsabilité (limitée) de l’entreprise multinationale et son organisation juridique interne – Quelques réflexions autour d’un accident de l’histoire*, L’ENTREPRISE MULTINATIONALE ET LE DROIT INTERNATIONAL, SFDI, PARIS, PEDONE 429 (2017) (Fr.).

4. Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 199 (2009) (“This governing principle [of limited liability] of the parent-subsidiary relationship has influenced corporate law throughout the fifty states, and most practitioners, judges, and commentators take it for granted.”).

5. Skinner, *supra* note 3, at 1787-99.

6. Code de Commerce [C. com.] [Commercial Code] art. L. 225-102-4, [https://www.business-humanrights.org/sites/default/files/documents/Texte%20PPL\\_EN-US.docx](https://www.business-humanrights.org/sites/default/files/documents/Texte%20PPL_EN-US.docx) (Fr.). Article 1 of the new Code provides that the law applies to “any company that employs, at the end of two consecutive years, at least five thousand employees within itself, as well as within its direct or indirect subsidiaries headquartered on French territory, or at least ten thousand employees within itself, as well as within its direct or indirect subsidiaries headquartered on French territory or abroad.” Stéphane Brabant & Elsa Savourey, *French Law on the Corporate Duty of Vigilance*, a

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are required to establish and implement a “vigilance plan.”<sup>7</sup> This plan must include:

[R]easonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls . . . as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.<sup>8</sup>

A plan must include the following measures:

1. A mapping that identifies, analyses and ranks risks;
  2. Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;
  3. Appropriate action to mitigate risks or prevent serious violations;
  4. An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations’ representatives of the company concerned;
  5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.
- The vigilance plan and its effective implementation report shall be publicly disclosed[.]<sup>9</sup>

Companies that fail to meet their vigilance obligation will be responsible for the damage that “the execution of these obligations could

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Practical and Multidimensional Perspective, 50 *Revue Internationale de la Compliance et de l'éthique des Affaires* (2017); Claire Bright, *Creating a Legislative Level-Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?*, SSRN (Aug. 8, 2018), <https://ssrn.com/abstract=3262787>; Anne Triponel & John Sherman, *Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law*, Int'l Bar Ass'n (May 17, 2017), <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3>.

7. Code de commerce [C. com.] [Commercial Code] art. L. 225-102-4, [https://www.business-humanrights.org/sites/default/files/documents/Texte%20PPL\\_EN-US.docx](https://www.business-humanrights.org/sites/default/files/documents/Texte%20PPL_EN-US.docx) (Fr.).

8. Id.

9. Id.

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have prevented.”<sup>10</sup> The French Constitutional Court held that authority in the statute for a court to impose a civil penalty of between €10–€30 million was unconstitutional, because the scope of the duty was not sufficiently precise as the basis for a fine.<sup>11</sup> It otherwise upheld the law. Parties who claim harm resulting from breach of the duty of vigilance may file a claim under French tort law.<sup>12</sup> Since the duty is an obligation of process (*obligation de moyens*) and not of outcomes (*obligation de résultat*), a plaintiff has the burden of proving that failure of the law led to the harms that occurred.<sup>13</sup>

The statute thus represents a potential major step in holding transnational companies responsible for operations by entities with which they are closely associated, notwithstanding those entities’ separate legal identity.<sup>14</sup> As the Constitutional Court’s decision suggests, however, the law leaves important issues open for interpretation. Its novelty means that there is no jurisprudence with respect to a comparable statute that may be helpful in interpreting the law. This does not mean, however, that there are no sources of guidance available, or that the law that develops around the statute should proceed in a self-contained way.

10. *Id.* art. 2.

11. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-750DC, March 23, 2017 (Fr.), <https://www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm> (French law on the duty of vigilance of parent corporations and contracting companies).

12. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1240 (Fr.). According to article 1240 of the French Civil Code, a person who causes damage to another person by his/her act or omission is bound to provide remedy when fault is established.

13. Assemblée Nationale, *PPL relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre no. 2578* (Feb. 11, 2015), <http://www.assemblee-nationale.fr/14/propositions/pion2578.asp> (explanatory statement in support of the French law, according to the United Nations Guiding Principles on Business and Human Rights (UNGPs) adopted unanimously by the Human Rights Council of the United Nations in June 2011 and according also to the OECD Guidelines for Multinationals as revised in 2011. The draft legislation was designed to impose a “duty of vigilance” on multinational enterprises. It was framed to cover both parent companies in France and major French purchasers of goods manufactured in global supply chains, to establish a degree of liability for multinational corporations acting in France or abroad, and to secure some compensation for the victims in case of human rights violations and damage to the environment.).

14. The German Ministry for Economic Cooperation and Development also is reportedly in the process of drafting similar legislation applicable to German companies and their foreign subsidiaries and contractors, which would “require companies to carry out internal supply chain risk assessments, appoint a compliance officer to monitor compliance with the law’s requirements, as well as establish an effective complaints mechanism for foreign workers.” *German Development Ministry Drafts Law on Mandatory Human Rights Due Diligence for German Companies*, BUS. & HUMAN RIGHT RES. CTR. (Feb. 12, 2019), <https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies>.

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This Article suggests that the French law should be seen as part of what we call a Business and Human Rights “Galaxy” of norms that has been emerging over the past several years.<sup>15</sup> Various norms in this Galaxy can offer guidance on how the French duty of diligence should be construed and applied.

The Oxford English Dictionary defines a galaxy as a “system of millions or billions of stars, together with gas and dust, held together by gravitational attraction.”<sup>16</sup> As we describe below, the Business and Human Rights Galaxy is comprised of numerous norms that take the form of measures such as statutes, regulations, reporting requirements, common law duties, private voluntary standards, corporate codes of conduct, non-governmental organization (NGO) best practices, international organization handbooks and checklists, and other sources. As we will describe, these norms can be conceptualized as occupying distinctive concentric rings around a core ring of enforceable “hard” law. The metaphor of a galaxy underscores that the norms in each ring, and the rings themselves, exert various degrees of gravitational force on one another. This can blur sharp distinctions between enforceable “hard” law on the one hand and voluntary standards and “soft law” on the other.

As we discuss below, this Galaxy may contain multiple potential sources of guidance in interpreting the French duty of diligence. Of particular note, we suggest that duties of care and vigilance occupy a similar position in the Galaxy that mediates between voluntary and enforceable obligations. Recognizing the existence of this Galaxy, and the ways in which norms within it may inform the understanding of the duty of vigilance, illuminates how international law on the human rights impacts of business operations is emerging as a distinctive domain.

Part II of this Article will first situate the French duty of vigilance in the context of the concept of human rights due diligence articulated in the United Nations Guiding Principles on Business and Human Rights. Parts III and IV will then describe the norms that occupy positions in the five concentric rings of the Business and Human Rights Galaxy. Finally, Part V will suggest how norms in various rings of this Galaxy may provide guidance on how the duty of vigilance should be interpreted and applied.

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15. *See infra app.* at 59-61.

16. *Galaxy*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/galaxy> (last visited Mar. 31, 2019).

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### II. THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The U.N. Guiding Principles on Business and Human Rights (UNGP) were unanimously adopted by the U.N. Human Rights Council in 2011.<sup>17</sup> That same year, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises were revised to incorporate these Principles.<sup>18</sup> In just a few years, an international consensus has been coalescing around these instruments as expressions of the basic norms that define responsible corporate behavior.

The UNGPs declare that the fundamental responsibility of business organizations is to respect human rights. The Commentary to Article 11 says that this responsibility is “a global standard of expected conduct for all business enterprises wherever they operate,” which “exists over and above compliance with national laws and regulations protecting human rights.”<sup>19</sup> The commentary to Article 12 says that an authoritative list of “the core internationally recognized human rights” is set forth in the International Bill of Rights and the International Labor Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work. The former consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.<sup>20</sup> Article 13 of the UNGPs says that the responsibility to respect human rights requires that companies: “(a) [a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur,” and “(b) [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>21</sup>

A crucial means of fulfilling these responsibilities is the conduct of “human rights due diligence.”<sup>22</sup> The commentary to Article 18 of the UNGPs says:

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17. UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, HR/PUB/11/04 (2011) [hereinafter UNGP]; LES PRINCIPES DIRECTEURS DE L’OCDE À L’INTENTION DES ENTREPRISES MULTINATIONALES, OECD (2011).

18. Les principes directeurs de l’OCDE à l’intention des entreprises multinationales (2011), [www.oecd.org/fr/investissement/mne/2011102-fr.pdf](http://www.oecd.org/fr/investissement/mne/2011102-fr.pdf).

19. UNGP, *supra* note 17, art. 11, Commentary.

20. *Id.* art. 12, Commentary.

21. *Id.* art. 13.

22. *Id.* art. 17.



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The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations.<sup>23</sup>

The commentary emphasizes that due diligence is an ongoing process:

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.<sup>24</sup>

A requirement of due diligence reflects the assumption that preventing harms is preferable to imposing liability after harms are inflicted, and that corporations are in the best position to determine how to do so. Companies have substantial resources devoted to assessing business risk and performance, as well as legal compliance, which can be employed to anticipate the harms that may occur as a result of their operations.

Due diligence is particularly crucial in fragile states or in areas of weak governance, when local regulations are confusing, vague, or even nonexistent due to the weakness of the legislative branch. In addition, the application of these local laws may be susceptible to unpredictability due to lack of judicial independence and/or corruption of the judiciary. The result in such cases is inadequate protection for victims of human rights violations.

Human rights due diligence may appear to resemble diligence for legal compliance purposes, in that both attempt to ensure that a company acts in accordance with social expectations. There are at least two important differences, however, that illuminate the way in which human rights due diligence involves greater uncertainty for a company. First, the focus of such diligence is not the risk to the company but to

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23. *Id.* art. 18, Commentary.

24. *Id.*



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stakeholders who are affected by its operations.<sup>25</sup> Identifying relevant stakeholders is challenging in some cases, given the wide ripples that a company may generate from its activities. To whom does the company have a duty—that is, how far does the circle of stakeholders extend? What kind of priority should each group have, and how should a company balance stakeholder interests if they are not harmonious?

Second, legal compliance due diligence assesses risk with respect to explicit enforceable rules. While there may be some disagreement about how these rules should be interpreted, there are agencies and courts that are authorized to provide guidance on what the rules require and prohibit.<sup>26</sup> While some ambiguity may remain, a company nonetheless has a reasonably clear understanding of what constitutes a violation of its legal obligations. By contrast, human rights typically are expressed in broad and general terms, and there is no single source that provides authoritative guidance on what they mean.<sup>27</sup> While there are egregious cases of clear rights violations, a company otherwise may find it difficult to know whether its operations contravene its duty to respect human rights.

For these reasons, it is useful to think of business and human rights norms not as a hierarchy of binding provisions, but as a Galaxy comprised of multiple forms of guidance with differing legal effects, formulated by both public and private entities. These forms may consist of legislation, case law, industry standards, corporate codes of conduct, guidelines established by international bodies and NGOs, supplier contracts, loan agreements, and other types of instruments. Some elements of the Galaxy are applicable in particular industries or regions, while others pertain to certain types of harms. Some set forth reporting obligations, others stipulate certain procedures, while still others prescribe substantive behavior. In these respects, we can see the Galaxy as an example in the business and human rights domain of what has been called “transnational governance.”<sup>28</sup>

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25. Stéphane Brabant, Elsa Savourey & Charlotte Michon, *The Vigilance Plan, Cornerstone of the Law on the Corporate Duty of Vigilance*, 50 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ETHIQUE DES AFFAIRES (2017) (Fr.).

26. A first critical analysis and assessment of the first published compliance plans has just been made public by the Business and Human Rights Association. Study relative to corporate enforcement of the law on the duty of diligence (“devoir de vigilance”). EDH & B&L, APPLICATION DE LA LOI SUR LE DEVOIR DE VIGILANCE (Apr. 2018), [https://www.e-dh.org/userfiles/Edh\\_2018\\_Etude\\_FR\\_V8.pdf](https://www.e-dh.org/userfiles/Edh_2018_Etude_FR_V8.pdf).

27. RHONA K. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 153-54 (2014).

28. See generally JAN-CHRISTOPHE GRAZ ANDREAS NOLKE, TRANSNATIONAL PRIVATE GOVERNANCE AND ITS LIMITS (2008); GOVERNANCE ACROSS BORDERS: TRANSNATIONAL FIELDS AND TRANSVERSAL

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This conceptual framework highlights the way in which human rights norms are expanding and taking shape in an interconnected field in which traditional distinctions between “hard” and “soft” law, and between voluntary and mandatory responsibilities, are blurring. Regardless of its formal status, each element in the Galaxy has the potential to exert a certain amount of gravitational force on others. This situation means that corporate boards of directors and counsel must attend not simply to currently enforceable legal obligations, but to trends in other parts of the Galaxy that shape stakeholder expectations. These expectations may pose financial and reputational risks for companies even if they are not legally enforceable. To the extent that consensus emerges around these expectations, they also may provide an indication of future statutory or common law regulations as sources of legal obligations. Furthermore, so-called public “soft law,” or unenforceable voluntary private standards, may acquire the status of “hard law” through incorporation into contracts, adoption in legislation, or reliance on them in defining a common law duty of care. Companies that seek to anticipate and minimize risk therefore must appreciate the interrelated nature of the norms that comprise the Business and Human Rights Galaxy, and the ways that liability is expanding within it.

### III. CONCENTRIC RINGS IN THE GALAXY<sup>29</sup>

One way to conceptualize the Business and Human Rights Galaxy is as a series of concentric rings of norms that expand outward from: (1) a ring of legal responsibility for violations of substantive rights; to rings that include (2) legal responsibility for compliance with non-financial reporting requirements; (3) legal responsibility for compliance with a standard of behavior that requires identifying and minimizing the risk of rights violations, such as the common law duty of care and the French statutory duty of vigilance; (4) private voluntary standards and codes of conduct; and (5) guidelines contained in instruments developed by international organizations such as the U.N. and the ILO. The

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THEMES 17-19 (Leonhard Dobusch, Philip Mader & Cigrid Quack eds., 2013); HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS 30 (Thomas Hale & David Held eds., 2011); NETWORKED GOVERNANCE, TRANSNATIONAL GOVERNANCE AND THE LAW 262 (Mark Fenwick, Steven Van Uystel & Stefan Wrba eds., 2014); TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION 139 (Marie-Laure Djelic & Kierstin Sahlin-Andersson eds., 2006); Milton C. Regan, Jr. & Kath Hall, *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, 84 FORDHAM L. REV. 2001 (2016); Milton C. Regan, Jr., *Lawyers, Globalization, and Transnational Governance Regimes*, 12 ANN. REV. L. & SOC. SCI. 133 (2016).

29. See *infra app.* at 59-61.

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Appendix to this article contains figures that depict these rings, as well examples of specific types of norms in each that reflect their considerable growth from 2000-2019. As we will describe, violations of responsibilities in the first three rings are the basis for civil and, in some cases, criminal liability. The cluster of norms in each ring of the Galaxy has the potential to affect norms in other rings. Sources of expectations and liability thus are diverse and are related in complex ways rather than in a hierarchical order.

While the Galaxy provides a general description of business and human rights norms, it also provides a useful way of analyzing norms that are relevant to specific countries, commercial sectors, and types of human rights risks. Companies that operate in multiple jurisdictions must be aware of the different galaxies that are relevant to their operations, as well as how the extraterritorial scope of some of the norms can affect the interrelationship among the different rings.

### *A. Ring One: Legal Responsibility for Outcomes*

This first cluster includes provisions that impose liability for outcomes—violations of human rights. These include domestic criminal law, such as the U.S. Trafficking Victims Protection Reauthorization Act (TVPPRA)<sup>30</sup> and the U.S. law prohibiting peonage and slavery,<sup>31</sup> international criminal law relating to crimes against humanity,<sup>32</sup> and statutory civil liability.<sup>33</sup>

The French law on the duty of vigilance<sup>34</sup> is located in Ring One, because it is the first of its kind to create a legal obligation for corporations to adopt plans of vigilance and provides for mechanisms of civil liability (similar to torts law in common law countries) in the event a plan is not adopted, published and sufficient to prevent and mitigate risks to human rights and others specified by the law.

The U.K. Modern Slavery Act, for example, prohibits slavery, servitude, forced labor, and trafficking in such activity, with criminal penalties for violating its terms.<sup>35</sup> Provisions of human rights conventions

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30. 22 U.S.C. §§ 7101-14 (2018).

31. *See generally*, 22 U.S.C. §§ 6901-7002 (2016).

32. *See* Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90.

33. The U.S. law on peonage and slavery, for instance, provides for civil liability to victims. *See* 18 U.S.C. § 1595 (2018).

34. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4, <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation> (Fr.).

35. *See generally* Modern Slavery Act 2015, c.30 (Eng.), <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

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that countries incorporate into domestic law also provide a source of potential liability.<sup>36</sup> States that ratify many such conventions have an obligation to secure enjoyment of the rights in them by adopting appropriate domestic legislation that imposes obligations on private parties to respect human rights, and to provide penalties for violation of such rights.<sup>37</sup>

Administrative regulations also may impose substantive responsibilities with respect to outcomes. One such regulation, for instance, is the U.S. government's prohibition on human trafficking by federal government contractors.<sup>38</sup> The rule requires federal contractors performing work on contracts that exceed \$500,000 outside of the United States to certify that neither they nor any of their suppliers are engaged in any trafficking activities.<sup>39</sup> Contractors must take steps to prevent any prohibited activities, and to terminate any subcontractor who engages in them.<sup>40</sup> Any contractor in violation of the rule may be suspended or debarred from government contracts.<sup>41</sup>

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36. Countries in the Council of Europe, for instance, generally have incorporated into domestic law the obligations contained in the European Convention on Human Rights. *See, e.g.*, Human Rights Act 1998, c. 42 (Eng.).

37. With regard to the International Covenant on Civil and Political Rights, for instance, see U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/add/13 (May 12, 2004), <https://www.refworld.org/docid/478b26ae2.html> (“[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”).

38. Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4,967 (Jan. 29, 2015) (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, and 52).

39. Combatting Trafficking in Persons, 48 C.F.R. §§ 22.1703, 22.1705 (2012).

40. *Id.* § 22.1703.

41. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 448 (June 2018), <https://www.state.gov/documents/organization/282798.pdf> (“DOJ and other federal law enforcement agencies continued to investigate allegations of debt bondage and excessive recruitment fees required of third-country nationals working on certain U.S. government contracts abroad, but no federal criminal prosecutions of employers or labor contractors resulted from these investigations in FY 2017. DoD took action against noncompliant employers or labor contractors from U.S. programs resulting in twenty-two suspensions, six debarments, one job termination, and one compliance agreement”); *see also* Neil Gordon, *POGO Identifies Defense Contractor Recently Sanctioned for Human Trafficking Abuses*, PROJECT ON GOV'T OVERSIGHT (Aug. 21, 2018), <https://www.pogo.org/investigation/2018/08/pogo-identifies-defense-contractors-recently-sanctioned-for-human-trafficking-abuses/> (“POGO has identified two companies that are not U.S.-based that were impacted by the law; they were recently sanctioned by the government for violating U.S. restrictions on human trafficking. An official in the Pentagon's watchdog told POGO that Tamimi Global Company and Texas Gulf Global General Trading & Contracting Company were

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### B. *Ring Two: Legal Responsibility for Reporting*

The second concentric cluster consists of non-financial legal reporting requirements. The California Transparency in Supply Chains Act,<sup>42</sup> for instance, requires retailers and manufacturers with \$100 million or more in total worldwide revenues that do business in the state to report on their efforts to identify and prevent human trafficking in their supply chains.<sup>43</sup> The remedy for a violation of the Act is injunctive relief by the State Attorney General, although the Act says that nothing in the legislation is intended to limit the availability of remedies for violation of other state or federal law.<sup>44</sup>

The Act requires only that a company disclose its efforts with regard to trafficking and slavery, and does not require the adoption of any specific policies regarding these practices. Nonetheless, as one law firm suggested, “fair trade activists are likely to be aggressive in using the statute to shame corporations that have deficient anti-human trafficking programs.”<sup>45</sup>

A similar provision, the U.K. Modern Slavery Act, went into effect in 2015.<sup>46</sup> Unlike the California Act, it imposes disclosure obligations on any company with revenue of more than £36,000,000 that does business in the United Kingdom.<sup>47</sup> The Act provides not only for disclosures similar to those under the California Act, but also extends the penalty for persons convicted of holding anyone in slavery or servitude, or engaging in human trafficking, from fourteen years to life imprisonment.<sup>48</sup>

Another example of a targeted disclosure requirement is the Extractive Industry Transparency Initiative (EITI), an effort to address corruption in the extractives industry.<sup>49</sup> Companies in this industry face

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two of the companies referred to, although not by name, in a recent State Department report.”). The two aforementioned companies were suspended/debarred, but the government is not publishing information because of open criminal investigations.

42. California Transparency in Supply Chains Act, S.B. 657, 2010 Cal. Stat. 556 (codified at CAL. CIV. CODE § 1714.43).

43. CAL. CIV. CODE § 1714.43(a) (2) (A).

44. *Id.* § 1714.43(d).

45. SHEPPARD MULLIN, *Human Trafficking and Your Supply Chain: New Disclosure Requirements for Companies Doing Business in California* (Oct. 7, 2011), <https://www.sheppardmullin.com/publications-articles-1366.html>.

46. Modern Slavery Act 2015, c.30 (Eng.).

47. *Id.* § 54(9) (stating that the Secretary of State can make a determination of revenue).

48. *Id.* § 5(3).

49. While corruption involves a number of distinct issues beyond the scope of this Article, the U.N. Office of the High Commissioner for Human Rights suggests that it can be connected in several ways to human rights abuses. It can lead to violation of a state’s responsibility “to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full

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the risk that their activities may contribute to human rights abuses by corrupt governments in the countries in which they operate. The EITI is a set of reporting standards published by a coalition of companies, governments, and NGOs.<sup>50</sup> It requires companies to disclose payments to governments and governments to disclose the amounts that they receive from these sources.<sup>51</sup> Recent revisions require disclosure of payment information by individual project.<sup>52</sup> Adoption of the EITI standard is discretionary, and implementation is the responsibility of individual countries that subscribe to it. As a result, the EITI requirements must be adopted into national law so that the extractive companies that operate within the country are subject to it. National laws or regulations and the process for certifying them are independently validated by the EITI before the country is deemed to be EITI compliant, and countries must maintain adherence to all the EITI rules in order to retain their compliant status. The EITI currently has designated thirty-one countries as compliant, which includes Kazakhstan, Peru, and a significant number of African countries.<sup>53</sup> The United States, however, withdrew in November 2017 as an “implementing country” under the EITI, on the ground that it is unable to comply with all its requirements.<sup>54</sup> The United States stated that it would remain one of seventeen “supporting countries” of the EITI.<sup>55</sup> Compliant countries must seek revalidation every three years.<sup>56</sup>

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realization of the rights recognized in the [International] Covenant [on Economic, Social and Cultural Rights].” Corruption can also result in discrimination in the provision of such services in favor of those who can furnish bribes and other benefits to government officials. As the U.N. notes, “[t]he economically and politically disadvantaged suffer disproportionately from the consequences of corruption, because they are particularly dependent on public goods.” EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org> (last visited Apr. 5, 2019).

50. *How We Work*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/about/how-we-work> (last visited Apr. 5, 2019).

51. *Guide to Implementing the EITI Standard*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/guide> (last visited Apr. 5, 2019).

52. *Project-Level Reporting in the Extractive Industries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/document/projectlevel-reporting-in-extractive-industries> (last visited Apr. 5, 2019).

53. *Implementation Status*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/countries> (last visited Apr. 5, 2019).

54. Bill Chappell, *US Withdraws from Anti-Corruption Group’s Oil and Petroleum Rules*, NAT’L PUB. RADIO (Nov. 3, 2017, 3:18 PM), <https://www.npr.org/sections/thetwo-way/2017/11/03/561908947/u-s-withdraws-from-anti-corruption-oil-and-petroleum-group>.

55. *Id.*

56. *Id.*

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Broader reporting requirements are contained in provisions such as the EU Non-Financial Reporting Directive<sup>57</sup> and the U.K. Companies Act.<sup>58</sup> The former requires that companies publish reports on the policies that they implement with respect to environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery, and diversity on company boards in terms of age, gender, and educational and professional background.<sup>59</sup>

The U.K. Companies Act requires companies to issue a Strategic Report “to inform members of the company and help them assess how the directors have performed their duty . . . to promote the success of the company.”<sup>60</sup> It provides that a company listed on a stock exchange “must, to the extent necessary for an understanding of the development, performance or position of the company’s business,” include in its Report:

information about—

- (i) environmental matters (including the impact of the company’s business on the environment),
- (ii) the company’s employees, and
- (iii) social, community issues, and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies.<sup>61</sup>

The Guidance Report on the Act issued by the Financial Reporting Council (FRC) has clarified that the Act mandates disclosures that relate to information that is material.<sup>62</sup> In addition, the agency has opined that it “does not believe that it would be best practice for an unquoted company to prepare a strategic report which omitted, for example, information on a material human rights issue simply because

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57. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L330) 1.

58. Companies Act 2006, c.46 (Eng.), [http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga\\_20060046\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf).

59. Directive 2014/95/EU, *supra* note 57.

60. The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013, SI 2013/1970, art. 3, ¶ 414C(1) (Eng.) [https://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi\\_20131970\\_en.pdf](https://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi_20131970_en.pdf).

61. *Id.* ¶ 414C(7)(b).

62. *Guidance on the Strategic Report*, FIN. REPORTING COUNCIL (July 2018), <https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf>.



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there was no explicit legal or regulatory requirement to address such matters.”<sup>63</sup>

*C. Ring Three: Legal Responsibility for Process*

The third ring of the Galaxy imposes legal responsibility for taking steps to identify and minimize foreseeable harms from business operations. The common law duty of care and the French statutory duty of vigilance can be seen as occupying this ring. The Child Labor Due Diligence Law in the Netherlands also can be seen as occupying this ring. It requires a company registered in the Netherlands, or that delivers goods or services to the Netherlands twice or more a year, to make a one-time disclosure of the due diligence it has undertaken to determine if child labor is occurring in its supply chain.<sup>64</sup> Any company that learns that there is a reasonable presumption that child labor is being used in its supply chain is expected to prepare an action plan to prevent this.<sup>65</sup>

Two features of the common law duty of care make it an especially useful source of guidance in interpreting the requirements of the new French statutory duty and of due diligence requirements such as set forth in the Netherlands law.<sup>66</sup> First, requirements of the duty of care are sensitive to context, which provides the flexibility to take into account a range of considerations. This is useful in light of the wide variety of business organizations and the diverse nature of their operations. Second, the duty of care occupies an intermediate place in the Galaxy between enforceable and non-enforceable norms. It constitutes an enforceable obligation to anticipate and take precautions against risks, which is framed in broad and open-ended terms. This means that the task of determining the steps necessary to fulfill the duty may draw guidance from norms in other rings of the Galaxy, especially if they address specific types of risks.

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63. *Id.* at 89-90.

64. *Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law*, MVO PLATFORM (Apr. 14, 2017), <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.

65. *Id.*

66. See, e.g., Beatrice Parance & Elise Groulx, *Regards croisés sur le devoir de vigilance et le duty of care* [Comparative law analysis of Duty of vigilance and Duty of Care], 145 JOURNAL DE DROIT INTERNATIONAL 21 (2018) (Fr.); Claire Bright, *Le devoir de diligence de la société mère dans la jurisprudence anglaise* [The duty of diligence of the parent corporation in English jurisprudence], DROIT SOCIAL 828 (2017) (Fr.); Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalisation Work for All*, 2 BUS. & HUM. RTS. J. 317 (2017).

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The *responsabilité civile quasi-délictuelle* (tort liability) in French law is equivalent to tort law in common law countries. The French liability is built around the standard of the reasonable person. The threshold requirement is that an actor has a duty of care to those affected by his or her actions.<sup>67</sup> If this duty exists, she or he may be liable when her/his negligence causes injury to others.<sup>68</sup> The existence of a duty and its obligations are assessed on a case-by-case basis, with case law clarifying their boundaries.

Human rights lawyer and scholar Douglass Cassel has noted the dynamic character of the common law duty of care, which evolves according to what is “fair, just, and reasonable, in accordance with community expectations and common sense, and reflective of altering social conditions and standards.”<sup>69</sup> U.K. law provides a useful example of the elements of this duty.<sup>70</sup> As declared in the 1990 House of Lords—now Supreme Court—case of *Caparo Industries Plc v. Dickman*, its existence and scope is subject to three requirements: (1) foreseeability, (2) proximity, and (3) the fairness and reasonableness of imposing a duty.<sup>71</sup>

The foreseeability element asks whether a reasonable person would have foreseen that injury would occur from her actions or omissions.<sup>72</sup> Proximity requires that there be a sufficiently close relationship between the victim and the person who caused the injury.<sup>73</sup> The fairness and reasonableness element incorporates elements from the other two requirements: the more foreseeable the consequences and closer the relationship, the more likely that it is fair and reasonable to find that an actor had a duty of care. This step also requires consideration of whether any public policy concerns should prevent or limit the imposition of a duty. The duty of care under a reasonable person standard thus is a behavioral standard akin to an *obligation de moyens* (an obligation to provide the means) to prevent liability.

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67. PHILIPPE BRUN, *RESPONSABILITÉ CIVILE EXTRA-CONTRACTUELLE* [EXTRA-CONTRACTUAL CIVIL LIABILITY] 292 (5th ed. 2018) (Fr.).

68. CLERK & LINDSELL ON TORTS ¶¶ 8-01 to 8-214 (21st ed. 2014).

69. Douglas Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 BUS. & HUMAN RIGHTS J. 179, 189 (2016).

70. Professor Cassel has provided a thorough analysis of the ways in which formulations of a duty of care may formally diverge among common law jurisdictions, but he acknowledges that it is not clear that these differences lead to significantly different results. *See id.* at 189-95.

71. *Caparo Industries Plc v. Dickman*, [1990] 2 AC 605, 617-18 (HL) (Eng.).

72. *Id.* at 640.

73. *Id.* at 617-18.

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To date, common law jurisdictions have not recognized a general duty of parent companies to take steps to minimize the risks of harm inflicted by subsidiaries or suppliers, such as the French law requires.<sup>74</sup> Such a step is distinct from a willingness in some cases to “pierce the corporate veil” in cases on the ground that a subsidiary does not have a meaningful independent legal identity and the parent company is using it to commit a wrong.<sup>75</sup>

Courts in the United Kingdom and Canada have accepted the possibility, however, of imposing liability on parent corporations for the actions of subsidiaries in circumstances involving conduct by the parent that creates expectations with respect to its responsibility. In *Chandler v. Cape*, for example, a victim suffering from asbestosis, and who had worked in the asbestos plant of one of Cape’s subsidiaries no longer in existence, filed suit against the parent company for damages for his injury.<sup>76</sup> The tribunal recognized a duty of care owed by the parent company to the employee, applying the criteria established in *Caparo v. Dickman*.<sup>77</sup>

The court stated:

The configuration of the asbestos factory dated back to the time when Cape introduced its Pluto board manufacturing business into the Cowley Works. By installing its business there, it must have implicitly undertaken a duty of care to ensure that its business was carried on without risk to the employees in the other business of Cape Products carried on at the Cowley Works. In due course, it required Cape to purchase this business.<sup>78</sup>

The court continued, “Cape moreover had superior knowledge about the asbestos business. It was in a substantial way of business and

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74. See Cassel, *supra* note 69, at 181.

75. *Adams v. Cape Industries Plc* [1990] Ch 433 (CA) (Eng.). In this opinion, the English Court of Appeal had to assess which circumstances would allow lifting the corporate veil over Cape’s subsidiaries, thus ignoring the subsidiaries’ autonomy. While, in the case at hand, the Court of Appeal ruled that the circumstances for lifting the veil were not met and that the subsidiary was to remain distinct from the parent company, the court enumerated three alternative criteria which would allow for lifting the social veil of a subsidiary: (i) whether the subsidiary is fictitious, (ii) whether the company constitutes a unique economic entity, and (iii) the mandate. This basis for liability is not, however, the focus of this Article.

76. *Chandler v. Cape plc* [2012] EWCA Civ 525 [1], 1 WLR 3111 (Eng.).

77. *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (Eng.).

78. *Chandler*, EWCA Civ 525 [75].

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its resources far exceeded those of Cape Products. Dr. Smither was doing research into the link between asbestos dust and asbestosis and related diseases.”<sup>79</sup> Moreover, the court said, letters within the company provided “clear evidence of Cape involving itself in issues relevant to health and safety policy at Cape Products, for example whether an employee diagnosed as having asbestosis could continue to be employed in that business.”<sup>80</sup> The court concluded:

Given Cape’s state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken.<sup>81</sup>

Canadian case law has also recognized the possibility of a direct duty of a parent corporation with respect to alleged human rights violations by a subsidiary. In *Choc v. Hubday Minerals Inc.*, the Ontario Superior Court denied a motion to dismiss a claim against a Canadian mining company based on security forces’ murder, physical assault, and rape of members of local communities living near the operations of one of its subsidiaries in Guatemala.<sup>82</sup> The defendant claimed that “there is no recognized duty of care owed by a parent company to ensure that the commercial activities carried on by its subsidiary in a foreign country are conducted in a manner designed to protect those people with whom the subsidiary interacts,”<sup>83</sup> and that “a parent corporation cannot be responsible for the actions of its subsidiary.”<sup>84</sup>

The court said that the standard for dismissal is that it is “‘plain and obvious’ that a claim discloses no reasonable cause of action and will fail.”<sup>85</sup> It acknowledged that a direct negligence claim against a parent company for the actions of its subsidiary was novel, but concluded that the plaintiffs had pled facts that, if proven, could support a claim that the injury was reasonably foreseeable, that there was sufficient

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79. *Id.*

80. *Id.* ¶ 76.

81. *Id.* ¶ 78.

82. *Choc v. Hubday Minerals Inc.*, [2013] ONSC 1414 (Can. Ont. Sup. Ct. J.).

83. *Id.* ¶ 18.

84. *Id.* ¶ 19.

85. *Id.* ¶ 55.

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proximity between the parties to impose a duty of care, and that there were no public policy concerns militating against finding a duty.<sup>86</sup>

With respect to foreseeability, the court noted that, *inter alia*, the parent company knew that violence frequently was used by security forces during eviction and had been used in the past; security personnel were unlicensed, inadequately trained, and possessed unlicensed and illegal firearms; and that “in general there was a risk that violence and rape could occur.”<sup>87</sup> The court thus concluded that, if the alleged facts were proven, it would have been “reasonably foreseeable” to the parent company that “authorizing the use of force in response to peaceful opposition from the local community could lead to the security personnel committing violent acts.”<sup>88</sup>

With regard to the proximity of the relationship, the court noted the claim that the parent company had made repeated public statements that it was making efforts to address conflicts over land in connection with its projects, that it was committed to working with local groups to resolve such conflicts, and that the company had adopted the Voluntary Principles on Security and Human Rights for its security forces.<sup>89</sup> The court also observed that plaintiffs alleged that parent company executives and employees assumed direct responsibility for operations relating to land issues.<sup>90</sup>

Finally, the court stated that the case presented competing policy considerations that would be best considered with the benefit of a full record, which meant that it was not “plain and obvious” that such considerations supported a motion to dismiss.<sup>91</sup>

One aspect of the dynamism of the common law duty of care that is especially relevant to norms in other rings of the Business and Human Rights Galaxy is the tendency of courts to look to compliance with common industry practice as probative of whether the duty has been satisfied.<sup>92</sup> As the court noted in *Trimarco v. Klein*,

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86. *Id.* ¶ 65.

87. *Id.* ¶ 64.

88. *Id.*

89. *Id.* ¶ 67.

90. *Id.*

91. *Id.* ¶ 74.

92. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §13 (AM. LAW INST., Proposed Final Draft No. 1, 2005) (noting the influence of custom as a source of legal obligation and in tort law as the test of “ordinary care”); *See generally* Michael L. Rustad & Thomas H. Koenig, *The Tort of Negligent Enablement of Cybercrime*, 20 BERKELEY TECH. L.J. 1553 (2005).

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[W]hen proof of an accepted practice is accompanied by evidence that the defendant conformed to it, this may establish due care and, contrariwise, when proof of a customary practice is coupled with a showing that it was ignored and that this departure was a proximate cause of the accident, it may serve to establish liability.<sup>93</sup>

Additionally, in a very recent, long expected, decision in the case of *Vedanta*, the U.K. Supreme Court affirmed the potential liability of multinational corporations for harms perpetrated through the acts of a subsidiary and approved respondents'/claimants' petition for their case to move forward on the merits.<sup>94</sup> This tort case arises from alleged toxic emissions from the Nchanga Copper Mine in the Chingola District of Zambia, affecting upwards of 1,500 people.<sup>95</sup> Discussing at length the duty of care of a parent company to third parties harmed by its subsidiaries, and the notion of substantial justice with regard to *forum non-conveniens*, the decision has far-reaching implications for extraterritorial activity undertaken by multinational corporations primarily through its subsidiaries.

While the court indicated that the appeal dealt only with the issue of jurisdiction, the discussion on the existence of a duty of care of a parent company is lengthy. Noting that “the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence,” the Court stated that “everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.”<sup>96</sup> In this, the court noted that just as the existence of a parent-subsidiary relationship does not *ipso facto* indicate an obligation or responsibility of the parent company,<sup>97</sup> the court is also “not persuaded that there is any such reliable limiting principle.”<sup>98</sup> Existing corporate guidelines about minimizing the social and environmental impact of inherently dangerous activities, such as mining, may very well implicate a duty of care if the parent companies

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93. *Trimarco v. Klein*, 56 N.Y.2d 98, 105-06 (N.Y. Ct. App. 1982).

94. *Vedanta Resources PLC v. Lungowe*, [2019] UKSC 20 (UK).

95. *Id.* ¶ 1. Further, claimants allege that their health and farming activities have been damaged by repeated discharges of toxic matter from the Nchanga Copper Mine into those watercourses from 2005 to date.

96. *Id.* ¶ 49.

97. *Id.*

98. *Id.* ¶ 52.

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hold themselves out to supervise implementation.<sup>99</sup> Further, when examining the contours of the application of the duty of care the U.K. Supreme Court noted three examples where the parent company could incur liability:

- (1) Where it has set down group guidelines which contain systemic errors that cause harm to third parties;<sup>100</sup>
- (2) Where it has taken active steps to implement guidelines in the operations of its subsidiary;<sup>101</sup> and
- (3) Where it has represented that it has relevant degree of supervision and control (even where it does not in fact).<sup>102</sup>

Similarly, in *Garthe v. Ruppert* the New York Court of Appeals stated that when “certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that [the one charged with a breach of care] has fallen below the required standard.”<sup>103</sup>

Courts do not, however, treat compliance with industry custom as dispositive evidence of compliance with a duty of care, in light of the fact that companies in an industry may not have been willing to take sufficient steps to prevent foreseeable harm from their activities.<sup>104</sup> As two authors note, “[c]ustom provides the floor, but not necessarily the ceiling, of reasonable care.”<sup>105</sup>

Furthermore, a practice need not be universal or ubiquitous to serve as a standard for satisfying a duty of care. In the notable case of *The T.J. Hooper v. Northern Barge Corp.*, for example, Judge Learned Hand of the U.S. Court of Appeals for the Second held that tugboats were negligent in not using radio sets that could have warned them of weather conditions that resulted in the loss of barges carrying cargo of the plaintiffs.<sup>106</sup> Judge Hand acknowledged, “It is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as

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99. *Id.* ¶ 53.

100. *Id.* ¶ 52.

101. *Id.* ¶ 53.

102. *Id.*

103. *Garthe v. Ruppert*, 264 N.Y. 290, 296 (N.Y. Ct. App. 1934).

104. *The T.J. Hooper v. Northern Barge Corp.*, 60 F.2d 737, 740 (2d Cir. 1932).

105. Michael L. Rustad & Thomas H. Koenig, *The Tort of Negligent Enablement of Cybercrime*, 20 BERKELEY TECH. L.J. 1553, 1588 (2005).

106. *See Hooper*, 60 F.2d at 737.



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they can be said to have relied at all.”<sup>107</sup> Thus, “here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general.”<sup>108</sup>

Nonetheless, declared Judge Hand, “Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.” In this case:

An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master’s binoculars are her eyes to see a storm signal ashore.<sup>109</sup>

The Second Circuit therefore concluded that “had [the tugboats] been properly equipped, they would have got the [weather] reports. The injury was a direct consequence of this un-seaworthiness.”<sup>110</sup>

Torts scholar Richard Epstein suggests that customary practice should be given the most weight in cases involving parties who interact in a market or trade, such as merchants.<sup>111</sup> With respect to outsiders, however, liability should be based on a cost-benefit analysis: “whether the defendant took all cost-justified precautions against the occurrence of the harm.” This requires an assessment of “the likelihood that the defendant’s conduct will result in harm, the expected severity of that harm, and the cost of avoiding the occurrence.”<sup>112</sup>

Finally, industry practice may also be probative not simply of whether a duty has been breached, but whether it existed in the first place. Based on the logic of the *T.J. Hooper* case, for instance, a court might use adherence by most companies in an industry to a private voluntary standard on monitoring working conditions in certain tiers of the supply chain as an indication that companies in the industry have assumed a duty to workers in those tiers. A company that was not a signatory to the standard could be deemed to have such a duty despite its failure to

107. *Id.* at 739.

108. *Id.* at 740.

109. *Id.* at 739-40.

110. *Id.* at 740.

111. Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4 (1992).

112. *Id.* at 1.

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join the agreement because of the general expectations that the standard has created.<sup>113</sup> The company could then be held in breach of the duty if its supply chain diligence is less rigorous than the standard.

### D. *Ring Four: Private Voluntary Initiatives*

The fourth ring of norms includes private voluntary standards and codes of conduct that may be formulated by individual companies or businesses in a particular sector, sometimes in concert with labor organizations and NGOs. In the apparel industry, for instance, several private organizations in the United States and Europe have established their own set of voluntary standards and have attempted to persuade major companies to agree to adhere to their programs.<sup>114</sup> Such programs differ with respect to features such as the labor standards they contain, the procedures for implementing commitment to those standards, the process of monitoring implementation, and the range of stakeholders involved in the process.<sup>115</sup> One scholar reports that the labor requirements of an increasing number of programs follow ILO standards.<sup>116</sup>

The standards in these programs are not imposed by public law, but suppliers in a company's supply chain agree by contract to adhere to them.<sup>117</sup> Companies typically hire third-party audit firms to monitor and certify compliance.<sup>118</sup> The failure of a supplier to obtain

113. There is a famous French case in which the Cassation Court recognized Total's civil liability following an oil spill, as the company did not comply with the internal safety procedures it had adopted, when choosing to transport fuel oil on the MV Erika. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sept. 25, 2012, Bull. crim., No. 10-82.938 (Fr.).

114. See LUC FRANSEN, CORPORATE SOCIAL RESPONSIBILITY AND GLOBAL LABOR STANDARDS (2012).

115. See generally *id.*

116. *Id.* at 162. Most provisions of the ILO Conventions are not regarded as self-executing and therefore constitute "soft law" in Ring Five. As one source states, "[i]n case of ratification, ILO conventions have the same impact for Member States as treaties have under international law: they are under an obligation to implement these rules, whereas the mode of incorporation of ILO standards into domestic law is governed by the different domestic legal systems themselves. Depending on the domestic status of ILO conventions and, foremost, on the wording of the respective norm, i.e. whether a provision is self-executing, ILO conventions may be relied upon in national courts. . . . In fact, ILO standards are frequently formulated as programmatic norms, putting an obligation upon governments to pursue a certain policy, without granting individual parties the right to invoke the provision in court." Keiko Sauer, *International Labour Organization (ILO)*, OXFORD PUB. INT'L L. ¶ 13 (Aug. 2014), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e490>.

117. Sauer, *supra* note 114, ¶ 13.

118. SHIFT PROJECT, FROM AUDIT TO INNOVATION: ADVANCING HUMAN RIGHTS IN GLOBAL SUPPLY CHAINS (Aug. 2013).

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certification may then be the basis for termination by an apparel company.<sup>119</sup> In this way, voluntary standards adopted by major companies may constitute a private enforcement scheme when they are incorporated into contractual requirements.

One example of a private program in the apparel sector is the Accord on Fire and Building Safety in Bangladesh, created after the collapse of a factory building in Bangladesh in 2013 that claimed more than 1,100 lives.<sup>120</sup> Some 190 global brands and retailers and unions in the ready-to-wear garment industry are parties to the agreement.<sup>121</sup> Companies disclose under the Accord all factories in Bangladesh where their garments are manufactured.<sup>122</sup> Participants have established building standards that are designed to “establish a common set of minimum requirements that provide a uniform and effective method for assessing fire and building structural safety in new and existing ready-made garment factories used by Accord suppliers.”<sup>123</sup> The results of these inspections are made public, and factories that fall short of standards file a plan to remedy substandard conditions.<sup>124</sup> The Accord provides that brands must “negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements.”<sup>125</sup> There is some concern, however, about the extent to which adequate funding has been available.<sup>126</sup> The program also involves safety training for joint management and labor committees, and a mechanism for workers to file complaints about substandard conditions.<sup>127</sup>

Abuses by security forces providing services for business operations in zones of conflict and weak governance prompted the creation of the Voluntary Principles on Security and Human Rights for the extractive

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119. *Id.*

120. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <https://bangladeshaccord.org/about> (last visited Apr. 12, 2019).

121. *Id.*

122. *Id.*

123. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, ALLIANCE FIRE SAFETY AND STRUCTURAL INTEGRITY STANDARD V 1.1, PART 1 §1.3 (2014).

124. *Id.*

125. Marc Bain, *The International Effort to Fix Bangladesh's Deadly Factories Has a Basic Math Problem*, QUARTZ (July 5, 2017), <https://qz.com/1018430/the-international-effort-to-fix-bangladeshs-deadly-factories-has-a-basic-math-problem/>.

126. *Id.*

127. *Workplace Programs*, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <https://bangladeshaccord.org/workers> (last visited May 30, 2019).

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industry.<sup>128</sup> Companies signing on to the Principles commit to obey the laws of the host state, “to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles . . . particularly with regard to the use of force.”<sup>129</sup> The Principles provide guidance with respect to risk assessments of doing business in weak governance or conflict zones, as well as contractual relationships with public and private security forces.<sup>130</sup>

The Principles also state that private security providers should provide only preventive and defensive services, and should not engage in activities that are the exclusive responsibilities of state military or law enforcement authorities.<sup>131</sup> Companies are encouraged to incorporate the Principles into their contracts with private security personnel,<sup>132</sup> and to provide for contractual authority to terminate services upon credible evidence of unlawful or abusive behavior by private security personnel. Finally, both public and private security providers are expected not to interfere with fundamental labor rights protected under the Universal Declaration of Human Rights (“UDHR”) and the ILO Declaration.<sup>133</sup>

Governments, extractive companies, and NGOs may become members of the Voluntary Principles Initiative.<sup>134</sup> The participation criteria explicitly state that the Principles do not create legally binding standards and specifically rule out the possibility of legal enforcement by third parties alleging human rights abuses.<sup>135</sup>

Another sector in which voluntary principles have become influential is financial institutions. The International Finance Corporation (IFC) is a member of the World Bank Group that makes financing available for private investment in countries developing.<sup>136</sup> Its Performance Standards on Environmental and Social Sustainability are measures that companies must adopt in order to qualify for funding.<sup>137</sup> The eight

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128. VOLUNTARY PRINCIPLES, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited Apr. 12, 2019).

129. *Id.*

130. VOLUNTARY PRINCIPLES, *supra* note 129, at *Risk Assessment*.

131. *Id.* at *Interactions Between Companies and Private Security*.

132. *Id.*

133. VOLUNTARY PRINCIPLES, *supra* note 131, at *Deployment and Conduct*.

134. *Id.* at *Introduction*.

135. *Id.*

136. IFC, [https://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/home](https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home) (last visited Apr. 12, 2019).

137. IFC, PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 1 (Jan. 1, 2012), [https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES).

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Standards “provide[e] guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way.”<sup>138</sup>

The Standards focus on risks to the environment, health, working conditions, and involuntary resettlement, but do not include a standard devoted specifically to human rights. The IFC has stated, however, that “[e]ach of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project.”<sup>139</sup> The Standards do say that “[i]n limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.”<sup>140</sup> The IFC indicates that its approach to assessing and managing environmental and social risks is “broadly convergent” with the U.N. Guiding Principles.<sup>141</sup> Importantly, the recent U.S. Supreme Court decision in *Jam et. Al. v. International Finance Corp*<sup>142</sup> has restricted the grant of immunity awarded to the IFC, bringing it in line with that awarded to foreign governments, which, in theory, increases liability and accountability.<sup>143</sup>

The Equator Principles (EPs) are characterized by its signatories as “a risk management framework adopted by financial institutions for determining, assessing, and managing environmental and social risk in projects being considered for financing.”<sup>144</sup> It is primarily intended “to

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138. *Id.*

139. *Id.* at 3.

140. *Id.* at 7 n.12.

141. IFC, U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND IFC SUSTAINABILITY FRAMEWORK, 1, <http://www.ifc.org/wps/wcm/connect/c3dedb0049c51e71886d99da80c2ddf3/UNGPsandIFC-SF-DRAFT.pdf?MOD=AJPERES> (last visited Apr. 12, 2019).

142. *Jam et al. v. Int’l Fin. Corp.*, 139 S. Ct. 759 (2019).

143. In the recent decision regarding *Jam v. IFC*, the U.S. Supreme Court overturned the U.S. Court of Appeals for the District of Columbia Circuit, holding that international organizations no longer enjoy absolute immunity, but are subject the same commercial activity exception to which foreign governments must adhere. What the Court’s opinion did not address is potentially more interesting, namely the question of where the line between commercial activity, and necessary development, lies. However, internal critiques and changes to the CAO, the ombudsmen of the IFC, remain the primary anticipated consequence of the decision. For more regarding the workings of the CAO see Brief of Amicus Curiae Professor Daniel Bradlow in Support of Plaintiffs-Appellants at 12, *Jam v. Int’l. Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017) (No. 15-cv-00612). For legal context of the Court’s decision, see Anthony Cooper, *Jam v. International Finance Corporation: Access to Remedy but Only When We Say So*, 26 TUL. J. INT’L & COMP. L. 417 (2018).

144. EQUATOR PRINCIPLES, <https://equator-principles.com/about/> (last visited May 26, 2019).

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provide a minimum standard for due diligence and monitoring to support responsible risk decision-making by the banking sector.”<sup>145</sup> The Principles were adopted in 2003 by a group of ten project finance banks, and are linked to IFC performance standards for the social and environmental sustainability of projects.<sup>146</sup> The preamble states that the aim of the Principles is to ensure that projects financed by the financial institutions that adopt them “are developed in a manner that is socially responsible and reflects sound environmental management practices.”<sup>147</sup> As with the IFC Performance Standards, the Principles do not explicitly address human rights except insofar as environmental or social impacts that are the focus of the Principles may have a bearing on them.

The Principles apply to all industry sectors and to four financial products: (1) Project Finance Advisory Services, (2) Project Finance, (3) Project-Related Corporate Loans, and (4) Bridge Loans.<sup>148</sup> Currently, “96 Equator Principles Financial Institutions (EPFIs) in 37 countries have officially adopted the Principles, covering the majority of international project finance debt within developed and emerging markets.”<sup>149</sup> Furthermore, multilateral development banks, including the European Bank for Reconstruction & Development, and export credit agencies through the OECD Common Approaches are increasingly drawing on the same standards as the EPs.”<sup>150</sup> Institutions committed to the Principles agree not to provide services to projects that do not comply with them.

The Principles require institutions to place a project in one of three categories based on its environmental and social impacts according to the IFC social and environmental criteria.<sup>151</sup>

Category A includes projects “with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible, or unprecedented.”<sup>152</sup> Category B includes projects with “potential

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145. *Id.*

146. EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES (June 2013), [https://equator-principles.com/wp-content/uploads/2017/03/equator\\_principles\\_III.pdf](https://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf).

147. *Id.* at 2.

148. EQUATOR PRINCIPLES, *supra* note 147, at 1, 3. (June 2013).

149. *About The Equator Principles*, EQUATOR PRINCIPLES, <https://equator-principles.com/about/> (last accessed May 30, 2019).

150. *Id.*

151. EQUATOR PRINCIPLES, *supra* note 147, at 1, 6 (June 2013). Of note, the Equator Principles require compliance with IFC standards in “Non-Designated Countries,” instead deferring to host country laws and regulations when undertaking projects in “Designated Countries.”

152. *Id.* at 5.

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limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible, and readily addressed through addressed through mitigation measures.”<sup>153</sup> Finally, projects in Category C are those with “minimal or no adverse environmental and social risks and/or impacts.”<sup>154</sup> Projects in Category A are subject to the most demanding requirements, while those in Categories B and C are respectively subject to decreasing demands.<sup>155</sup>

The Equator Principles are privately developed standards to which financial institutions voluntarily agree to adhere.<sup>156</sup> This “soft” feature of the Principles, however, takes on a “hard” edge for borrowers that must comply with the requirements of the Principles in order to obtain funding for projects.<sup>157</sup> This constraint becomes even more stringent as other public and private financial institutions incorporate the Principles into their own lending standards.<sup>158</sup>

The Thun Group represents another set of financial institutions that has issued two reports on the implications of the UNGPs, reflecting thoughts on what the Guiding Principles “might mean for banks in practice and initial guidance to banks keen to address human rights issues in their core business activities – both to minimise potential adverse impacts to rights holders and related risks to banks, and to identify opportunities to promote good practice.”<sup>159</sup> The Group’s second report in 2017 purports to define when bank activity is “directly linked” to an adverse human rights impact under UNGP Principle 13.<sup>160</sup>

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 11.

157. *Id.* at 9.

158. EQUATOR PRINCIPLES, EP ASSOCIATION MEMBERS & REPORTING (2019), <https://equator-principles.com/members-reporting/>.

159. THE THUN GROUP OF BANKS, U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS DISCUSSION PAPER FOR BANKS ON IMPLICATIONS OF PRINCIPLES 16–21 at 3 (2013); *see also* THE THUN GROUP OF BANKS, DISCUSSION PAPER ON THE IMPLICATIONS OF UN GUIDING PRINCIPLES 13 & 17 IN A CORPORATE AND INVESTMENT BANKING CONTEXT (2017).

160. THUN GROUP (2017), *supra* note 156, at 3. For a criticism of the Group’s approach to responsibility for adverse human rights impacts, see John Ruggie, *Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context*, HARV. KENNEDY SCH. (Feb. 21, 2017), [https://www.ihrb.org/uploads/submissions/John\\_Ruggie\\_Comments\\_Thun\\_Banks\\_Feb\\_2017.pdf](https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf).



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The influence of the UNGPs is reflected in the *Fédération Internationale de Football Association* (FIFA) embrace of the UNGP.<sup>161</sup> The organization's human rights policy indicates that it is "committed to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs)."<sup>162</sup> FIFA has stated that the standards in its policy apply to "FIFA subsidiaries, FIFA-recognized regional football confederations, FIFA member associations, entities tasked with organizing FIFA competitions, FIFA's commercial affiliates, service providers and suppliers, as well as other entities that are linked to FIFA through its business relationships."<sup>163</sup> FIFA's policy reflects its response to recommendations set forth in a report by John Ruggie, the leading participant in the drafting of the UNGPs.<sup>164</sup> Ruggie and John Sherman suggest that this step by FIFA indicates that the UNGPs "are adding significant human rights punch to private law of contracts, the new *lex mercatoria*, whose global reach and enforceability can affect workplace conditions, the welfare of communities, and environmental practices worldwide."<sup>165</sup>

Finally, what are known as International Framework Agreements are another form of standards that occupy the fourth ring. These are agreements on labor conditions between Multinational Companies (MNCs) and Global Union Federations (GUFs) that commit MNCs to abide by core international labor standards across all their operations.<sup>166</sup> All agreements incorporate the core ILO Conventions and the ILO's Declaration on Fundamental Rights and Principles at work.<sup>167</sup> As Brian Burkett notes, "The most recent generation of IFAs are noteworthy in terms of expanding the accountability of corporations in their human rights footprint by; (1) extending the scope of the IFAs to include

161. *FIFA Executive Committee Sets Presidential Election for 26 February 2016*, FIFA (July 20, 2015), <https://www.fifa.com/about-fifa/who-we-are/news/fifa-executive-committee-sets-presidential-election-for-26-february-20-2666448>.

162. *FIFA's Human Rights Policy*, FIFA, at 5 (2017), [https://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf).

163. *Id.* at 4.

164. John G. Ruggie, "For the Game. For the World." *FIFA and Human Rights*, HARV. KENNEDY SCH. (2016), [https://www.hks.harvard.edu/sites/default/files/Ruggie\\_humanrightsFIFA\\_reportApril2016.pdf](https://www.hks.harvard.edu/sites/default/files/Ruggie_humanrightsFIFA_reportApril2016.pdf).

165. John Gerard Ruggie & John F. Sherman, III, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice*, 6 J. INT'L DISP. SETTLEMENT 455, 456 (2015).

166. Brian Burkett, *Globalization in Transition: A Canadian Perspective*, 21 CAN. LAB. & EMP. L.J. 420-421 (2019).

167. *Id.* at 420.

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“business partners,” including suppliers, contractors and producers of the MNCs; and (2) by transferring “decisional power in respect of disputes over human rights violations to a third party, including the ILO itself.”<sup>168</sup>

### E. *RingFive: International Soft Law*

The final ring of norms is comprised of what traditionally has been called “soft law.” These are non-binding declarations, guiding principles, and frameworks set forth in international covenants or instruments published by international organizations.<sup>169</sup> Examples are the Universal Declaration of Human Rights and the two human rights covenants ratified pursuant to it (International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights);<sup>170</sup> the UNGPs on Business and Human Rights;<sup>171</sup> the OECD Guidelines on Multinational Enterprises;<sup>172</sup> the U.N. Global Compact;<sup>173</sup> and eight international conventions that the ILO regards as fundamental: Freedom of Association and Protection of the Right to Organize, Right to Organize and Collective Bargaining, Forced Labor, Abolition of Forced Labor Convention, Minimum Age, Worst Forms of Child Labor, Equal Remuneration, and Discrimination in Employment and Occupation.<sup>174</sup> There are also several additional conventions on a variety of topics, as well as recommendations by the ILO.<sup>175</sup> As we have mentioned, the UNGPs state that businesses have a responsibility to respect human rights as expressed in the UDHR and its two implementing covenants, as well as the ILO’s Declaration on Fundamental

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168. *Id.* at 421.

169. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEG. ANALYSIS 171 (2010).

170. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 1976 U.N.T.S. 4.

171. U.N. High Comm’r of H. R., *Guiding Principle on Business and Human Rights*, U.N. (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

172. *OECD Guidelines for Multinational Enterprises*, OECD (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

173. The Ten Principles of the UN Global Compact, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Apr. 12, 2019).

174. *Conventions and Recommendations. Labour Standards*, ILO, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> (last visited Apr. 12, 2019).

175. *Introduction to International Labour Standards. Labour Standards*, ILO, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang-en/index.htm> (last visited Apr. 12, 2019).

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Principles and Rights at Work. Over the years the soft law norms of the OECD, the ILO, and the U.N. have become increasingly integrated.

An example of reliance on these sources of standards is the new Netherlands Child Labor Due Diligence statute finally adopted by the Dutch Senate in Amsterdam, on the 14<sup>th</sup> of May 2019.<sup>176</sup> That law suggests the companies conducting due diligence to determine if child labor is occurring in their supply chains refer to the process set forth in the *Child Labour Guidance for Business* prepared by the International Labor Organization in collaboration with the International Organization of Employers.<sup>177</sup> That document in turn relies substantially on the UN Guiding Principles on Business and Human Rights.<sup>178</sup>

#### IV. GRAVITATIONAL FORCES IN THE GALAXY

In this section, we discuss how norms in various rings of the Business and Human Rights Galaxy have the potential to influence norms in other rings. The European Directive on Non-Financial Reporting, for instance, requires large companies to file a “non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, outcomes and risks related to those matters and should be included in the management report” of the company.<sup>179</sup> The statement “should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.”<sup>180</sup> As we have indicated, the Directive thus is located in what we have described as the second ring of norms that involve reporting requirements.

The Directive provides that companies may meet their obligations by drawing on norms contained in other rings of the Galaxy:

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176. See MVO PLATFORM, *supra* note 64.

177. *Id.*; see INT’L LAB. ORG., ILO-IOE CHILD LABOUR GUIDANCE TOOL FOR BUSINESS: HOW TO DO BUSINESS WITH RESPECT FOR CHILDREN’S RIGHT TO BE FREE FROM CHILD LABOUR (2015), <http://www.ilo.org/ipecinfor/product/download.do?type=document&id=27555>.

178. See *id.* at 9-23.

179. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2103/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 6.

180. *Id.*

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In providing this information, undertakings which are subject to this Directive may rely on national frameworks, Union-based frameworks such as the Eco-Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN “Protect, Respect and Remedy” Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation’s ISO 26000, the International Labour Organisation’s Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks.<sup>181</sup>

Similarly, the Guidance Report on the U.K. Companies Act issued by the FRC has said that in making disclosures on human rights issues, companies:

[M]ay refer to a source of guidance (e.g. the UN *Guiding Principles on Human Rights*) or a voluntary framework that provides advice on how the entity should conduct its business, suggests ways of monitoring or tracking performance, or provides examples of disclosures that might be helpful in communicating information to the entity’s stakeholders. In preparing the strategic report, the directors may choose to comply fully or partially with that guidance or voluntary framework, or take a more general regard of its content.<sup>182</sup>

The FRC guidance thus provides another example of how “soft” standards, such as the UNGP, in the fifth ring of the Galaxy may be incorporated into company compliance with “hard” law requirements, such as reporting obligations, in the second ring.

An example of a more targeted reporting requirement is the EU Accounting and Transparency Directives for the extractives and logging industries adopted in 2013.<sup>183</sup> These provisions are modeled on the

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181. *Id.* ¶ 9.

182. *Guidance on the Strategic Report*, FIN. REPORTING COUNCIL (2014), <https://www.frc.org.uk/accountants/accounting-and-reporting-policy/clear-and-concise-and-wider-corporate-reporting/narrative-reporting/guidance-on-the-strategic-report>.

183. Eur. Comm’n., *Public Country by Country Reporting* (2017), [https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/public-country-country-reporting\\_en](https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/public-country-country-reporting_en). (laying down supply chain due diligence obligations for European Union

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Extractives Industry Transparency Initiative (EITI) and apply to all “listed and large non-listed companies that are active in the oil, gas, mining or logging sectors” that are either registered in the European Economic Area or listed on EU-regulated markets, even if they are incorporated in a non-European country.<sup>184</sup>

The same EU Directives attempt to address corruption in the industry by requiring these companies to report all material payments to governments by country and project, including those for infrastructure improvements. The EU disclosure requirements apply directly to companies rather than, as with the EITI, to individual countries.<sup>185</sup> “These rules,” says the European Commission, “aim to improve the transparency of payments made to governments all over the world by the extractive and logging industries. This helps populations of resource-rich countries hold their governments accountable for the exploitation of natural resources, in line with the Extractive Industries Transparency Initiative.”<sup>186</sup>

In addition to the EITI, a major impetus for the EU initiative was the reporting requirement in Section 1504 of the 2010 Dodd-Frank legislation in the United States. That section requires resource extraction companies listed on U.S. stock exchanges to disclose all payments to governments by government entity, business segment making the payment, and individual project.<sup>187</sup> This reflects one way in which an enforceable obligation may reflect the gravitational pull of both voluntary standards and hard law provisions in other countries.

Another example of potential gravitational force is reporting requirements in the second ring of the Galaxy. These simply require disclosure of a company’s efforts and the process that it follows with regard to certain risks, rather than imposing enforceable substantive obligations. Consumers, investors, and NGOs, however, may use reports as a standard against which to evaluate company behavior. This could result in claims that the company is not living up to the commitments it describes in its reports, or that the reports misrepresent the company’s activities and thus create liability for fraud.

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importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas).

184. *Id.*

185. *Id.*

186. *Id.*

187. 15 U.S.C. § 78m(q) (2018); Disclosure of Payments by Resource Extraction Issuers, Release No. 34-78167, 17 CFR Parts 240 and 249b (Sept. 26, 2016).

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As one law firm has suggested, for instance, with respect to the California reporting requirement on supply chains, one risk for companies:

[I]s a class action based on misleading disclosures—that is, false advertising. If your company complies with the statute but inaccurately describes its practices that could trigger a class action based on affirmative misrepresentation. Although it is debatable whether a plaintiff could win class certification on such a theory, the expense of such a suit—and the public relations damage—could be significant. So, it’s important to be careful about what you say.<sup>188</sup>

Furthermore, “activists may push the envelope in litigation to try to find ways to use the statute without Attorney General involvement, or they may use extra-judicial methods to publicize violations.”<sup>189</sup> The law firm suggests that as a result, “companies would be well advised both to have reasonable fair trade practices in place and, in complying with the statute, to disclose those practices accurately.”<sup>190</sup>

In these ways, a reporting requirement may effectively subject a company to the expectation that it will minimize or eliminate human rights risks from its operations. Establishment and “enforcement” of this obligation in this case thus may occur, not through the actions of a governmental entity, but through the efforts of coalitions in civil society.

Finally, the content of the hard law obligation of the duty of care contained in the third ring of the Galaxy may be influenced by private voluntary norms in the fourth ring. Thus, for instance, a mining company that does not subscribe to the Voluntary Principles on Security and Human Rights, or one that does so but does not train its security forces in accordance with them, could well be presumed to violate its duty unless it has adopted measures at least as stringent as these Principles.

Patterns of influence such as these in the Business and Human Rights Galaxy reflect the fact that, in the absence of an international sovereign with regulatory authority over global corporate activities, transnational actors have increasingly looked to other forms of “law making” to regulate business operations.<sup>191</sup> The aim is to provide what

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188. SHEPPARD MULLIN, *supra* note 45.

189. *Id.*

190. *Id.*

191. *See generally* Hale & Held, *supra* note 28.

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Niklas Luhmann calls “a social system which depends upon the congruent generalisation of normative behavioral expectations.”<sup>192</sup>

As our description indicates, the Business and Human Rights Galaxy has several distinctive features. First, as Jessica Green puts it, “the right to make rules is not restricted to states.”<sup>193</sup> Instead, this right involves participation by a range of both public and private actors, such as international organizations, NGOs, industry groups, professional organizations, and major corporations. Authority in the Galaxy—the gravitational force of a particular form of norm—arises not from formal legal enactments, but from the willingness of others to be bound by a party’s guidance. As Green argues, “when actors consent to be bound by rules, they create authority.”<sup>194</sup> Such consent largely rests on the legitimacy of the actor, which in turn is based on qualities such as technical expertise, an inclusive deliberative process, a dominant position in a relevant market, or perceived acceptance by other relevant actors.

Second, rules and standards in the Galaxy develop in a range of less formal contexts than those in which traditional governmental regulation occurs. Meetings convened by international organizations and NGOs, industry conferences, gatherings of professional associations, and informal communications among actors in various networks are all possible sites where ideas are proposed, developed, refined, and adopted.

Related to this feature, the development of norms operates primarily through networks of loosely connected actors rather than in top-down, command-and-control fashion. In the classic international law system, legal rules fall into relatively clear categories and hierarchies, with international law binding states and national or local law governing legal persons, even though this system is less integrated and definite than domestic law. This makes it possible, in principle, to assess the normative force of rules and to determine which should apply in a particular situation.

By contrast, in a galaxy comprised of networks, normative systems overlap and influence one another. An important consequence of the networked nature of the Business and Human Rights Galaxy is what transnational law scholars Terence Halliday and Bruce Carruthers

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192. NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 82 (2d ed. 2014).

193. JESSICA F. GREEN, *RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE* 29 (2014).

194. *Id.* at 27.



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describe as “recursivity.”<sup>195</sup> This reflects the fact that various actors compete to have their respective descriptions and diagnoses become the accepted way to identify what is labeled as a problem, as well as the appropriate response to it.

Finally, as we have described, the clusters of norms in each ring of the Galaxy are not readily reducible to characterization as “hard” or “soft law,” or as voluntary or mandatory. Compliance with voluntary standards in ring four of the Galaxy, for instance, is often monitored by NGOs, consumer groups, and investors who may criticize a company for failing to adhere to them. This can serve as a form of informal enforcement, with serious financial and reputational consequences. Companies may also incorporate voluntary standards into their contracts with retailers and manufacturers, so that compliance with the standards becomes a legal obligation. Voluntary standards and principles also may become sufficiently accepted that they serve as a model for national legislation. Finally, rules and norms can circulate throughout networks, with various actors incorporating them into their practices in ways that reinforce their influence.<sup>196</sup> As transnational law scholar Sigrid Quack has observed, this process “represents global institution building that involves continuous transformations between ‘soft’ and ‘hard’ regulation.”<sup>197</sup> In the next section, we discuss the implications of these features of the Galaxy for the new French statutory duty of vigilance.

### V. THE DUTY OF VIGILANCE

Several issues remain open for clarification with respect to the operation of the French statutory duty of vigilance. As we suggest below, reference to norms in various rings of the Business and Human Rights Galaxy may be useful in this process as a source of guidance for administrative guidelines, judicial decisions, and corporate compliance programs. We will not discuss in detail the provisions of each of these sources, nor suggest what specific provisions of each source should inform interpretation of the French statutory duty. Our purpose is simply to identify a few of the potential sources of guidance that are available in the Galaxy of which the duty of vigilance is now a part.

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195. TERRENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMATIC FINANCIAL CRISIS* 132 (2009).

196. *See generally* Hale & Held, *supra* note 28.

197. Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14(5) *ORG. ART.* 643-44 (2007), <https://journals.sagepub.com/doi/pdf/10.1177/1350508407080313>.

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*A. Subsidiaries, Subcontractors, and Suppliers*

The first issue is the scope of the entities with respect to which a company has a duty of vigilance. To reiterate, the French law imposes a duty of vigilance upon a company with regard to the “companies that it controls within the meaning of Article L. 233-16, II [of the Commercial Code], directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship.”<sup>198</sup> The relevant section of the Commercial Code relies on consolidated accounting and the group management report as the basis for a determination of control that is sufficient to establish a parent-subsidiary relationship.<sup>199</sup> As French lawyers and business and human rights experts Stéphane Brabant, Charlotte Michon, and Elsa Sovourey note,<sup>200</sup> that section focuses on the ability of a company “to have decision-making power, in particular over the financial and operational policies of another entity.”<sup>201</sup> Such authority may be legal, contractual, or *de facto*.<sup>202</sup> Entities subject to such control would be regarded effectively as subsidiaries of the company.

By contrast, the reference in the French statute to subcontractors and suppliers is more ambiguous with regard to its scope. An initial version of the law established responsibility for subcontractors over which the company exercises “a decisive influence.”<sup>203</sup> This concept of decisive influence resembles concepts of business relations in the OECD Guidelines on Multinational Enterprises, or sphere of influence in the U.N. Global Compact, which take into account the amount of

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198. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4, <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation>. Section 1 of the French Trade and Industry Code provides that the law applies to “any company that employs, at the end of two consecutive years, at least five thousand employees within itself, as well as within its direct or indirect subsidiaries headquartered on French territory, or at least ten thousand employees within itself, as well as within its direct or indirect subsidiaries headquartered on French territory or abroad . . . establishes and implement an effective vigilance plan.”

199. The original text provides: “A corporation is deemed to exercise control over another corporation according to Article L-233-16 of the French Commercial Code when it controls directly or indirectly a majority of the voting shares or when it has authority to appoint the majority of executive management” (translated by authors).

200. Stéphane Brabant and Elsa Savourey are French lawyers and recognized experts in Business and Human Rights; Charlotte Michon is a French jurist and also an expert in Business and Human Rights. She is the executive director of EDH France. *See* Brabant, Savourey & Michon, *supra* note 25.

201. *Id.* at 2.

202. *Id.*

203. Assemblée Nationale, *supra* note 13.

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influence that the contracting company is capable of exercising on the subcontractor or supplier.<sup>204</sup>

Companies could claim that the eventual language of the French law suggests inclusion only of tier one suppliers and subcontractors. This interpretation, however, would seem to be inconsistent with the explanatory statement accompanying the legislation, which indicates that the aim of the law is to prevent disasters such as occurred at Rana Plaza.<sup>205</sup> In addition, the December 2013 PCN France report regarding the textile industry highlighted the risks posed by subcontracting by suppliers in this sector.<sup>206</sup> This suggests that a contracting company with reason to be aware of risks beyond the first tier of suppliers and subcontractors would have a duty of vigilance with respect to such risks.

Interpretation of this provision might also draw upon jurisprudence on the common law duty of care, particularly with respect to the element of proximity. As international lawyer and scholar Renée-Claude Drouin has observed, this case law deals with responsibility for the actions of subsidiaries rather than entities in the supply chain.<sup>207</sup> Nonetheless, the requirement of proximity directs attention to whether “the circumstances surrounding the existing relation between the plaintiff and the defendant are such that one can conclude that the defendant is required to be attentive to the plaintiff’s legitimate interests in its business management.”<sup>208</sup> As we have described, this may be the case if, analogizing from *Chandler v. Cape*, a subcontractor’s or supplier’s employees reasonably expect that a company has assumed responsibility for providing protection from certain risks.<sup>209</sup> It also could be the case if, as in *Choc v. Hudbay*, a company has made public declarations of its commitments with regard to the human rights impacts of its operations and has indicated its intention to work with the local community to prevent rights violations.<sup>210</sup>

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204. Queinnec, *La notion de sphère d’influence cœur de la RSE, lecture juridique d’un phénomène normatif*, JOURNAL DES SOCIÉTÉS 66 (July 2012).

205. Brabant, Savourey & Michon, *supra* note 25, at 4.

206. *National Contact Point Report on Implementation of the OECD Guidelines in the Textile and Clothing Sector, Following a Referral from Nicole Bricq*, NAT’L CONTACT POINT (Dec. 2, 2013), [https://www.tresor.economie.gouv.fr/Ressources/8507\\_rapport-du-pcn-sur-la-mise-en-oeuvre-des-principes-directeurs-de-l-ocde-dans-la-filiere-textile-habillement](https://www.tresor.economie.gouv.fr/Ressources/8507_rapport-du-pcn-sur-la-mise-en-oeuvre-des-principes-directeurs-de-l-ocde-dans-la-filiere-textile-habillement).

207. Renée-Claude Drouin, *Le développement du contentieux à l’encontre des entreprises transnationales : quel rôle pour le devoir de vigilance?*, DROIT SOCIAL 246, 254 (Mar. 2016).

208. *Id.*

209. *Chandler v. Cape plc* [2012] EWCA Civ 525, ¶ 62-71 (UK).

210. *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414, ¶ 67-68 (Can. Ont. Sup. Ct. J.).

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Brabant, Michon, and Savourey also suggest that drawing on the UNGPs could lead to an interpretation of the statute that provides for a robust duty of vigilance to encompass a significant number of entities in a company's value chain.<sup>211</sup> They note that the duty of diligence in the UNGPs focuses on adverse impacts that a company may cause or contribute to through its own activities, or those that may be directly linked to the company's operations, products, or services.<sup>212</sup> Companies are expected to remedy the first two types of impacts, and to use their leverage to try to prevent or minimize the third type. This is because the law focuses on the types of entities in question, rather than the extent of a company's involvement in adverse human rights impacts.<sup>213</sup>

They suggest, however, that also imposing a duty of vigilance with respect to impacts to which a company is directly linked would be more consistent with the intent of the law to reinforce the UNGPs. As they note, "a company may be linked to an adverse impact through any of the business partners and its value chain."<sup>214</sup> They propose that this principle "could therefore interact with that of the established commercial relationship and . . . advocate for a more inclusive, rather than exclusive, vision of entities falling under the ambit of the vigilance plan."<sup>215</sup> The potentially wide scope of this duty would be qualified by the emphasis in the statute on preventing "severe" impacts on human rights,<sup>216</sup> and by the acknowledgment in the UNGPs of the need to establish priorities with respect to the risks that should be avoided.

Defining the scope of the duty of vigilance in this way would be consistent, not only with the UNGP, but with the European Directive on Non-Financial Reporting. The latter instrument provides that companies must report on the risks of severe adverse social and environmental impacts.<sup>217</sup> It states that "[t]he risks of adverse impact may stem from

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211. Brabant, Savourey & Michon, *supra* note 25, at 4-6.

212. *Id.* at 5.

213. *Id.*

214. *Id.*

215. *Id.* at 6.

216. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4, <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation> (Fr.) (stating that "the plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks").

217. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2103/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 6.

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the undertaking's own activities or may be linked to its operations, and, where relevant and proportionate, its products, services and business relationships, including its supply and subcontracting chains."<sup>218</sup>

There are, no doubt, insights from other types of norms in the Business and Human Rights Galaxy that may be useful in determining the scope of a company's duty of vigilance. Our discussion is simply meant to emphasize the ways in which norms located in different rings of that Galaxy, whether legally enforceable or not, may help determine the scope of this potentially open-ended duty.

### *B. The Vigilance Plan*

Recall that the French statute requires that a vigilance plan include five components.<sup>219</sup> These are: (1) risk mapping, which involves identifying, analyzing, and setting priorities among risks; (2) regular assessment of relevant subsidiaries, subcontractors, and suppliers; (3) actions to mitigate risks or prevent severe impacts; (4) a mechanism to alert a company of the existence or materialization of risks; and (5) monitoring and evaluating the effectiveness of implementation measures.<sup>220</sup>

These measures correspond to the main elements of the duty to respect set forth in the UNGPs. Article 13(a) of the UNGPs says that this duty requires that businesses "[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur," and that they "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."<sup>221</sup> Article 17 emphasizes that conducting human rights due diligence is a crucial way that companies can identify potential impacts and seek to avoid or mitigate them.<sup>222</sup> As it states, "The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."<sup>223</sup> Moreover, the UNGPs emphasize the importance of consultation with stakeholders in this process.<sup>224</sup> The Constitutional Council ruled that

218. *Id.* pmb. ¶ 8.

219. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] Art. L. 225-102-4, <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation> (Fr.).

220. *Id.*

221. UNGP, *supra* note 17, art. 13.

222. *Id.*, art. 17.

223. *Id.*

224. *Id.*, art. 18.

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this was recommended—rather than required—by the statute,<sup>225</sup> but it will be essential in order to ensure that a plan is not reduced to simply a form of an internal audit.

What criteria should be used to determine whether a plan has adequately incorporated these required measures? Soft law instruments may be useful in answering this question. The OECD, for instance, has developed *Due Diligence Guidance for Responsible Business Conduct*,<sup>226</sup> as well as a set of guidelines for conducting due diligence in specific industry sectors.<sup>227</sup> In addition, the International Business Leaders Forum (IBLF) and the IFC, in association with the U.N. Global Compact, has published a *Guide to Human Rights Impact Assessment and Management*.<sup>228</sup> This provides step-by-step guidance on preparation for conducting due diligence and impact assessment; identification of human rights risks; engagement with stakeholders; assessment of impacts; mitigation of harms; implementing a mitigation plan and integrating human rights within business operations; evaluating impacts; and reporting to stakeholders.<sup>229</sup>

Guidance also may be available from non-financial reporting directives. France was a pioneer in requiring such reports as part of its 2001 law adopting new economic regulations.<sup>230</sup> This obligation has been progressively extended to more companies, while the scope of information required has widened with respect to “the way in which the company takes into account the social and environmental consequences of its activities.”<sup>231</sup>

Similarly, the 2014 EU Non-Financial Reporting Directive prescribes that companies communicate “the principal risks related to those matters linked to the undertaking’s operations including, where relevant

225. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-750DC, Mar. 23, 2017 (Fr.).

226. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), *DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT* (2018).

227. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), *GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011).

228. INT’L BUS. LEADERS FORUM ET AL., *GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT* (2010).

229. *Id.* at 6-7.

230. Loi 2001-420 du 15 mai 2001, relative aux nouvelles régulations économiques, art. 116 [Law 2001-420 of May 15, 2001 on relative to new economic regulations, section 116], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 15, 2001, p. 7776.

231. Décret 2012-557 du 24 avril 2012 [concerning companies’ obligations of transparence in social and environmental matters], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Apr. 26, 2012.

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and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks.”<sup>232</sup> The Directive also requires companies to provide information on “the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.”<sup>233</sup> Notably, in light of the fact that the French duty of vigilance requires measures to identify “severe” adverse impacts, the Directive requires reporting “in relation to matters that stand out as being most likely to bring about the *materialisation* of principal risks of severe impacts, along with those that have already materialized. The severity of such impacts should be judged by their scale and gravity.”<sup>234</sup>

The 2017 French incorporation of the EU Directive provides that non-financial reporting must present the business model of the company and, for each relevant category of information, “a description of the main risks linked to the company’s activity or to all the companies’ activities, including, when that is both pertinent and proportional, the risks generated by its business relations, its products, or its services.”<sup>235</sup> Moreover, the declaration inserted in the report must contain a description of the company’s policies that are applied with respect to, when appropriate, due diligence procedures implemented to prevent, identify, and mitigate risks, as well as the results of these policies, including key performance indicators.

The most recent requirements of the new French Decree (*Ordonnance*) on non-financial reporting, which came into force in July 2017,<sup>236</sup> converge with the requirements of the French law on Duty of Vigilance.

232. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330/1), art. 1 ¶ 1 (d).

233. *Id.* pmb. ¶ 6.

234. *Id.* pmb. ¶ 8 (emphasis added).

235. Ord. 2017-1180 du 19 juillet 2017, relative à la publication d’informations non financières par certaines grandes entreprises et certains groupes d’entreprises art. 1, III [Ord. 2017-1180 of July 19, 2017 regarding the publication of non-financial information by some large companies and some groups of companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 21, 2018; Béatrice Parance & Elise Groulx, *La déclaration de performance extra-financière, nouvelle ambition du reporting extra-financier* [The Extra Financial Statement, the New Ambition of Extra Financial Reporting], 11 LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES 1128 (2018).

236. Ord. 2017-1180 du 19 juillet 2017, relative à la publication d’informations non financières par certaines grandes entreprises et certains groupes d’entreprises art. 1, III [Ord. 2017-1180 of July 19, 2017 regarding the publication of non-financial information by some large companies



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Over time, the new Decree may have the effect of strengthening the French law.

The French Decree establishes an obligation to report (*obligation de dire*) while the French Statute on Duty of Vigilance creates an obligation to act (*obligation de faire*). Corporations are subject to respect both laws and must comply using the same corporate information.

The first generation of French legislation on non-financial reporting (*Loi Grenelle 2*, 2010 and its decree of 2012)<sup>237</sup> could be interpreted as mandating a box ticking or “checklist” exercise. In contrast, the second generation of legislation (Ordinance or Decree on Non- Financial Reporting and Law of Duty of Vigilance of 2017) establishes a series of more substantial requirements: (1) risk mapping; (2) regular risk assessments of relevant partners; (3) actions to mitigate risks and prevent severe impacts; (4) alert mechanisms about risks and their materialization; (5) monitoring and evaluation of the effectiveness of implementation measures.<sup>238</sup> To meet all these requirements, corporations need to do more than “box ticking.”

Moreover, exercising the duty of vigilance requires the enterprise to adopt a global vision of the corporate social responsibility and sustainability policies of the parent corporation, its subsidiaries, subcontractors, and suppliers. It must reach beyond “silos” of traditional compliance programs to conduct a wider and more thorough risk assessment of the corporate group and its key business partners.

The vigilance plan required by the French statute thus must be seen as but one of several types of reports on human rights impacts that companies have been required to provide in recent years. A company preparing its plan can draw on its own, and other companies’, experience in complying with similar reporting norms in the second ring of the Galaxy. In addition, it can look to soft law guidance in the fifth ring of

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and some groups of companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 21, 2018.

237. Loi 2010-788 du 12 juillet 2010 portant engagement national pour l’environnement [Law 2010-788 of July 12, 2010 confirming national commitment on the environment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 13, 2010; Loi 2012-557 du 24 avril 2012, relatif aux obligations de transparence des entreprises en matière sociale et environnementale [Law 2012-557 of April 24, 2012 on the new transparency requirements of corporations relative to social and environmental issues], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Apr. 24, 2012.

238. Loi 2010-788 du 12 juillet 2010 portant engagement national pour l’environnement; Loi 2012-557 du 24 avril 2012, relatif aux obligations de transparence des entreprises en matière sociale et environnementale; CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4, <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation> (Fr.).

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the Galaxy, such as OECD and Global Compact models for due diligence and human rights impact analysis, respectively.

### C. Reasonableness and Foreseeability

The French statute requires that a vigilance plan contain “reasonable vigilance measures adequate to identify the risks and to prevent gross violations of human rights and fundamental freedoms, of health and security of people, as well as of the environment.”<sup>239</sup> Use of the term “reasonable” reflects the desire for a balance between the need to protect human, social, and environmental concerns on the one hand and, on the other, the fact that a multinational company is involved in activity in numerous markets and that it relies on numerous parties in an extended supply chain.

The court in *Choc v. Hudbay Minerals Inc.* acknowledged these potentially competing concerns in describing the parties’ claims regarding the public policy considerations relevant to the case. Hudbay Minerals expressed the concern that holding a parent corporation responsible for the actions of its subsidiaries would create unduly expansive liability, expose Canadian companies to numerous lawsuits, and violate the principle of limited liability companies based on the separate legal identity of parent and subsidiary corporations.<sup>240</sup> The plaintiffs countered that finding such a responsibility would encourage Canadian companies to respect human rights, further the government’s goal of reducing violations of human rights by Canadian companies’ operations, and reduce the asymmetry between the global scope of business operations and the locally limited scope of tort law.<sup>241</sup> The court admitted the force of each set of claims, but concluded that it was more appropriate to attempt to balance them on a trial record rather than in reviewing a motion to dismiss.<sup>242</sup>

The French law’s imposition of a duty on companies to engage in a particular analytical process, rather than the imposition of liability for all harms committed by its subsidiaries, subcontractors, and suppliers, reflects an effort to strike a balance that takes account of the concerns expressed by both sides in the *Hudbay* case. The obligation thus is to

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239. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4 pmb. (Fr.) (trans. by authors).

240. *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414, ¶ 72 (Can. Ont. Sup. Ct. J.).

241. *Id.* ¶ 73.

242. *Id.* ¶ 74.

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provide the means (*obligation de moyens*) rather than to ensure a certain outcome (*obligation de résultat*).<sup>243</sup>

In addition, it is reasonable to assume that compliance with the French law will involve establishing priorities to ensure identification of the most serious types of risks. The law itself contemplates this approach,<sup>244</sup> and the UNGPs provide support for it in the commentary to Article 17:

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.<sup>245</sup>

Judges, therefore, should be well aware that most companies will not be able to immediately identify and prevent all risks along their supply chain. The judges are likely to be receptive to a vigilance plan that includes gradual but steady growth in prevention and management measures to address an expanding set of risks, ideally in collaboration with stakeholders.

Finally, the French duty of vigilance may exert its own gravitational pull in the Galaxy, encouraging common law jurisdictions to recognize a duty of care for parent companies with respect to the risk of human rights violations by their subsidiaries, subcontractors, and suppliers. Convergence around this norm will provide transnational companies a set of guiding principles and a common approach to human rights due diligence.

#### *D. Extraterritorial Application of the Duty*

The French law does not directly address whether its scope is extraterritorial, although the goal of the law would seem naturally to call for extraterritorial application. The drafters mentioned this issue in the

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<sup>243</sup> Parance & Groulx, *supra* note 66, at 21.

<sup>244</sup> The law requires a mapping of risks. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4 at ¶ 1 (Fr.).

<sup>245</sup> Human Rights Council Res. 17/4, HR/PUB/11/04, at 19 (June 16, 2011).

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law's explanatory comments.<sup>246</sup> The issue should be less difficult for damages resulting from harm to the environment. Article Eight of the Rome Regulation assigns competence to the law that governs the operative event that produces damage, which arguably would be the failure of the parent company to fulfill its duty of vigilance if the risk of harm is reasonably foreseeable. Had the French legislature expressly defined the vigilance statute as a police law, this would have provided a firmer basis for extraterritorial application of the statute. We anticipate, however, that practice and legal doctrine will evolve in this direction over time.

At the same time, courts in the United Kingdom,<sup>247</sup> Canada, and the Netherlands appear to be increasingly less stringent in applying the doctrine of forum non conveniens in cases involving allegations of human rights violations in countries where there is some doubt about the ability of plaintiffs to receive an adequate assessment of their claims.

U.K. tribunals have shown similar willingness to permit civil tort suits for alleged violations of human rights perpetrated abroad by companies headquartered in the United Kingdom.<sup>248</sup> Courts rely on the common law duty of care in doing so.<sup>249</sup> The 2016 decision in *Dominic Liswaniso Lungowe & Others v. Vedanta Resources Plc and KCM* reflects this trend. In this case, the court allowed an action to proceed in the United Kingdom against Vedanta, a mining company headquartered in England, and its Zambian subsidiary, Konkola Copper, that alleged grave environmental damage due to Vedanta's breach of its duty of care.<sup>250</sup> The court also

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246. Olivera Boskovic, *Brèves remarques sur le devoir de vigilance et le droit international privé*, EUROPÉEN ET INTERNATIONAL, 2016, at 385 (Fr.); Horatia Muir Watt, *Devoir de vigilance et droit international privé: Rev. int. Compliance 2017, dossier spécial Loi relative au devoir de vigilance, une perspective pratique et multidimensionnelle*, SCIENCESPO, May 17, 2018, at 48 (Fr.).

247. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1386 (stating that forum non conveniens cannot be used for British companies in the United Kingdom, although it can still be an issue for foreign subsidiaries of British parent companies).

248. Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3:1 CITY UNIV. OF HONG KONG L.R. 1 (2011).

249. Rob Edwards, *Liability of a Parent Company: Chandler v. Cape Plc*, DWF LLP (July 19, 2012), <http://www.mondaq.com/uk/x/187638/employee+rights+labour+relations/Liability+Of+A+Parent+Company+Chandler+V+Cape+Plc>.

250. Xandra Kramer, *UK Court on Tort Litigation Against Transnational Corporations*, CONFLICT OF LAWS (June 23, 2016), <http://conflictoflaws.net/2016/uk-court-on-tort-litigation-against-transnational-corporations/>.

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found that the doctrine of *forum non conveniens*<sup>251</sup> was inapplicable in the interests of justice.<sup>252</sup> The Civil Division for the Court of Appeal rejected Vedanta's appeal in 2017.<sup>253</sup>

On January 15 and 16, 2019, the U.K. Supreme Court in London heard the latest appeal, and issued a decision on April 10 finding in favor of the complainants.<sup>254</sup> The court quite easily concluded that the proper place for trial would have been Zambia,<sup>255</sup> but for serious concerns as to substantial justice issues in Zambia, primarily related to funding. In allowing the suit to proceed on the merits, the court's test of substantial justice is derived essentially from two factors:

First, the practicable impossibility of funding such group claims where the claimants were all in extreme poverty; and secondly, the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively, in particular against a defendant (KCM) with a track record which suggested that it would prove an obdurate opponent.<sup>256</sup>

In Canada, three recent cases illustrate this trend. *Choc v. Hudbay Minerals, Inc.*, which we have discussed above, concerned the alleged forced violent eviction by a Canadian parent company's security forces of a local community near a subsidiary's operations in Guatemala. The

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251. It is to be noted that the legal theory of *forum non conveniens* can no longer be used for British companies in the United Kingdom following the ECJ 2005 judgment in *Owusu v. Jackson*, although it can still be an issue for foreign subsidiaries of British parent companies. *Owusu*, 2005 E.C.R. I-1386.

252. *Id.*

253. Martyn Day & Oliver Holland, *Court of Appeal upholds ruling that claims by Zambian villagers against mining giant can be heard in UK court*, LEIGH DAY (Oct. 13, 2017), <https://www.leighday.co.uk/News/News-2017/October-2017/Court-of-Appeal-upholds-ruling-that-claims-by-Zamb-ww.business-humanrights.org>.

254. Gabrielle Holly, *Zambia Farmers Can Take Vedanta to Court over Water Pollution. What Are the Legal Implications?*, BUS. & HUM. RTS. RESOURCE CTR. (Oct. 4, 2018) <https://www.business-humanrights.org/en/zambian-farmers-can-take-vedanta-to-court-over-water-pollution-what-are-the-legal-implications>.

255. See *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, ¶ 85-87 (Can. Ont. Sup. Ct. J.) (noting that concluding the proper place for trial was anywhere but Zambia would offend the common sense).

256. *Id.* ¶ 89.

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Ontario Superior Court allowed the suit to move forward, and Hudbay decided not to appeal with regard to the *forum non-conveniens* issue.<sup>257</sup>

In January 2017, the British Columbia Court of Appeals in *Garcia v. Tahoe Resources* issued a holding with regard to a lawsuit brought by Guatemalan victims against a Canadian mining company.<sup>258</sup> Overturning a 2015 lower court that had ruled that Canada was not the *forum conveniens*, the court of appeals decided that the case could be brought in Canada.<sup>259</sup> This decision<sup>260</sup> was hailed as an important precedent, authorizing jurisdiction in Canada for a suit alleging human rights violations committed abroad by a Canadian company.

Finally, the November 2017 decision by the British Columbia Court of Appeals in *Araya v. Nevsun Resources Ltd*<sup>261</sup> confirmed the position taken in *Garcia v. Tahoe Resources*. In the *Nevsun* case the plaintiffs alleged forced labor, slavery, torture, and perpetration of crimes against humanity in the exploitation of the defendant's (Nevsun Resources Ltd) mine in Eritrea.<sup>262</sup> The British Columbia Court of Appeals admitted that adjudicating the claim in Canada would result in numerous logistical difficulties. It nonetheless affirmed the lower court's decision to accept jurisdiction, because serious doubts existed as to the possibility that the plaintiffs would receive a fair trial in Eritrea. The Court of Appeals rejected the defendant's arguments that accepting jurisdiction could have political and diplomatic repercussions because it would reflect an implicit criticism of the judicial system of another sovereign. The court also rejected the claim that individuals do not have civil remedies with regard to peremptory violations of *jus cogens* norms committed by companies because customary international law does not recognize individuals as legal subjects.<sup>263</sup> On January 23, the Supreme Court of Canada heard an appeal from Nevsun lodging the arguments that (a) customary international law has no place in

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257. *Hudbay Minerals Lawsuits (re Guatemala)*, BUS. & HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0#c18034> (last visited Apr. 3, 2019).

258. *Garcia v. Tahoe Resources Inc.*, [2017] BCCA 39 (Can.).

259. Susan Taylor, *Court Sets Canada as Jurisdiction for Guatemalan Suit Against Tahoe*, CAN. CTR. FOR INT'L JUSTICE, [www.ccij.ca/news/court-sets-canada-jurisdiction-guatemalan-suit-tahoe](http://www.ccij.ca/news/court-sets-canada-jurisdiction-guatemalan-suit-tahoe) (last visited Apr. 3, 2019).

260. Susan Taylor, *Update 1-Canada Set as Jurisdiction for Guatemalan Suit Against Tahoe Resource*, REUTERS (Jan. 26, 2017), <https://www.reuters.com/article/guatemala-mining-tahoe-resources-idUSL1N1FH004>.

261. *Araya v. Nevsun Resources Ltd.*, [2017] BCCA 401 (Can.).

262. *Id.*

263. Counsel for the plaintiffs in the Araya case are law firms Camp Fiorante Matthews Mogerman LLP and Siskinds LLP and international human rights lawyer James Yap.

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Canadian courts, and (b) the “act of state” doctrine indicates this should be a diplomatic matter, and not a legal one.<sup>264</sup> The decision is still pending.

In the Netherlands, several activities related to alleged tort claims suffered by Nigerian nationals resulted in the exercise of Dutch jurisdiction over Royal Dutch Shell, a company headquartered in the Netherlands, for breach of care that resulted in serious environmental damages inflicted by its Nigerian subsidiary. The scope of a common law norm (the duty of care) was applied and interpreted by Dutch tribunals, which operate under a civil law system, because the relevant facts occurred in Nigeria, a common law country. In 2013, one Dutch court found Shell liable for the actions of its Nigerian subsidiary and ordered that the company pay damages to the victims.<sup>265</sup> In 2015, the Dutch Court of Appeals held that it could not find in principle that Shell could not be sued for its subsidiaries’ negligent actions, although proof of liability would have to be proved at trial.<sup>266</sup> This has cleared the way for trials in the Netherlands based on the claims against the parent company headquartered in that country.

### VI. CONCLUSION

The new French statutory duty of vigilance is one of the most recent norms to emerge in the Business and Human Rights Galaxy.<sup>267</sup> It

264. Jamie Kneen, *Can Slave Labour Charges Against Canadian Company Be Heard in Court in Canada? Supreme Court of Canada Hears Arguments Today*, MININGWATCH CAN. (Jan. 23, 2019), <https://www.miningwatch.ca/blog/2019/1/23/can-slave-labour-charges-against-canadian-company-be-heard-court-canada-supreme-court>.

265. Anthony Deutsch & Ivana Sekularac, *Dutch Court says Shell Responsible for Nigeria Spills*, REUTERS (Jan. 30, 2013), <https://uk.reuters.com/article/uk-shell-nigeria-lawsuit-idUKBRE90T0DC20130130>.

266. *Dutch Court: Shell can be liable for Nigeria spills*, AL JAZEERA (Dec. 18, 2015), [www.aljazeera.com/news/2015/12/dutch-court-shell-liable-nigeria-spills-151218120516428.html](http://www.aljazeera.com/news/2015/12/dutch-court-shell-liable-nigeria-spills-151218120516428.html).

267. Worthy of mention, without going into detail, is the fact that the French legislature has adopted a new law: *La Loi Pacte* (Pact Law) in an accelerated procedure. *PACTE* means *plan d'action pour la croissance et la transformation des entreprises* (action plan for the growth and transformation of corporations). Amongst its very numerous dispositions, the law contains a provision, article 61, that modifies the Civil Code and the Code of Commerce in two ways. (1) First, for all corporations, the reform introduces the requirement to consider the social and environmental impacts of their activities in the corporation’s social purpose. (2) Moreover, the reform introduces the notion of benefit-corporation into French corporate law. Corporations may also include in their social purpose a mission statement that they deem representative. This Bill was finally adopted in Paris by both the National Assembly and the Senate on April 11, 2019. The Constitutional Council subsequently confirmed its constitutionality, and it will enter into force on May 24, 2019. *La loi PACTE adoptée par le Parlement*, REPUBLIQUE FRANÇAISE, <https://www.economie.gouv.fr/plan-entreprises-pacte> (last visited May 20, 2019).



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resembles several existing measures in its focus on corporate process rather than on outcomes and its basis on the premise that business enterprises are in the best position to identify and take steps to minimize the adverse effects of their operations. Like the common law duty of care, it is an enforceable obligation that is framed in broad terms. This means that guidance on its interpretation and application is available from other sources of norms in the Galaxy, such as common law tort jurisprudence, voluntary private standards of conduct, and soft law on due diligence. Each of these elements may exert some gravitational force in the development of the duty.

At the same time, the duty of vigilance is novel in its application to subsidiaries, subcontractors, and suppliers. In this respect, it reflects what Douglas Cassel argues is the next logical step in the evolution of the common law duty of care.<sup>268</sup> This means that the French law has the potential to exert its own gravitational force on other norms in the Galaxy, achieving greater alignment between the benefits that parent corporations receive from separate entities that they control, or with which they have close relationships, and the responsibility to ensure that such entities minimize harm to others. We must ultimately remember, however, that the gravitational forces that compete for influence are not natural phenomena that operate of their own accord. They, instead, are the product of politics and human agency, as actors contest and negotiate the obligations of the modern transnational business enterprise and its far-flung operations and impacts.

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268. See Cassel, *supra* note 69.

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APPENDIX: BUSINESS AND HUMAN RIGHTS GALAXY DIAGRAMS

BHR GALAXY - 2000

HUMAN RIGHTS GUIDELINES -  
"INTERNATIONAL SOFT LAW"

*Incorporation of standards in  
contracts and lending  
agreements*

Legal responsibility for process

Legal responsibility for Reporting

Legal responsibility for outcome  
/ (Proposed legislation)



BHR GALAXY - 2010

HUMAN RIGHTS GUIDELINES -  
"INTERNATIONAL SOFT LAW"

*Incorporation of standards in  
contracts and lending  
agreements*

Legal responsibility for process

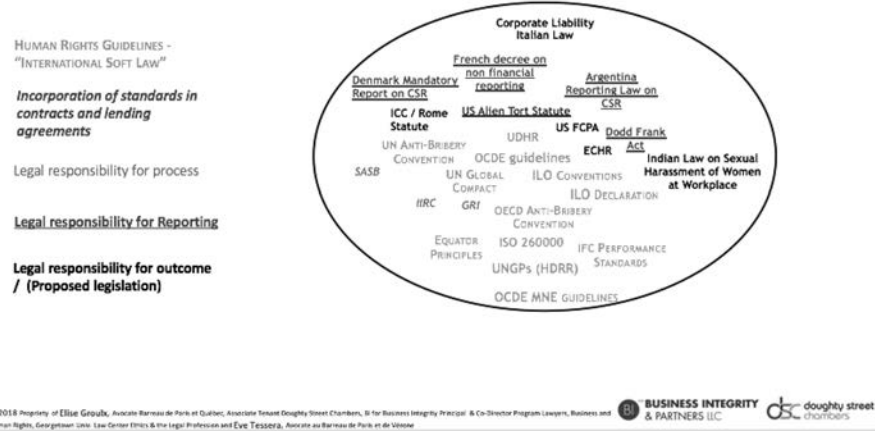
Legal responsibility for Reporting

Legal responsibility for outcome  
/ (Proposed legislation)

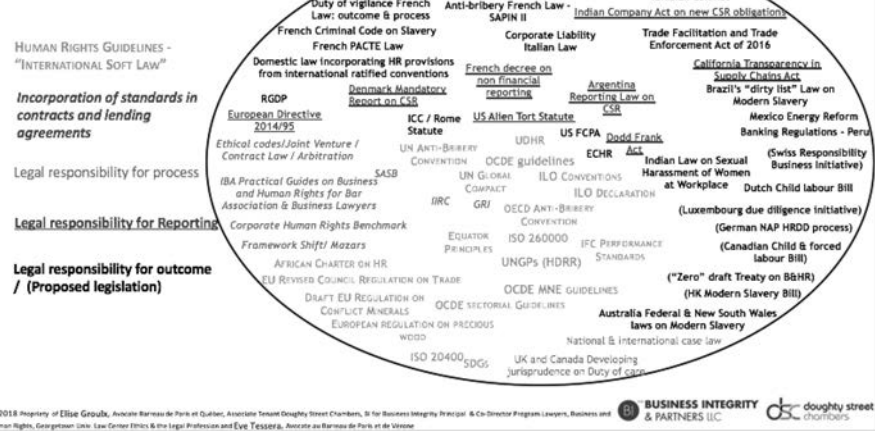


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BHR GALAXY - 2013



BHR GALAXY - 2019



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