Corporate Due Diligence and Accountability in Global Supply Chains: Legal Challenges and Possible Solutions

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Abstract

The globalisation of supply chains enables global buyers to capture significant value from the production process. Yet, the demand for flexible and low-cost production comes at a cost. The collapse of the Rana Plaza building in Bangladesh, which killed workers producing garments for international retailers, exemplifies the precarious working conditions prevalent in supply chains and the inadequate oversight of production activities by governments and buyers. This paper examines the reach of businesses' human rights responsibilities, with the focus on their responsibilities towards workers. It argues that the concept of human rights due diligence elaborated in the United Nations Guiding Principles on Business and Human Rights should inspire legal innovation to impose a binding due diligence standard on businesses extending to the activities of suppliers where there is a significant relationship, argued here to be on the basis of commercial relations rather than operational control.

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Introduction

Globalisation has generated "a new era of international competition".[1] According to Kevin Sobel-Read, the technological advancements and unprecedented cross-border trade characterising "contemporary globalisation"[2] have been key drivers in firms outsourcing production overseas to benefit from low wages and "loose or non-existent" labour and environmental regulation;[3] the resulting fragmentation of supply chains[4] offers multinational enterprises (MNEs) "opportunities for cutting costs in every corner of the planet".[5] Christian Witting similarly observes that businesses "expand beyond home markets" to benefit from "regulatory arbitrage" including with respect to labour and environmental standards.[6] He writes, for example, that "Asbestos manufacturers shut down production in advanced nations and commenced or increased production of dangerous products in the developing world."[7] Competition for investment has motivated states[8] and producers[9] to lower labour protections with labour rights violations, including child and forced labour and of the right to a safe working environment,[10] forming the majority of human rights violations reported by the United Nations (UN) Secretary-General's Special Representative on business and human rights

[1] Gary Gereffi, 'Global Value Chains in a Post-Washington Consensus World' (2014) RIPE 21:1, 9.
[2] Kevin B Sobel-Read, 'Global Value Chains: A Framework for Analysis' (2014) TLT 5:3 364, 373.
[3] *ibid* 374–375.
[4] Supply chains describe the "sequence of activities or parties that provides products and services to the organization", Radu Mares, 'The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments' (2010) Nordic Journal of International Law 79:2 192, 195.
[5] Sobel-Read (n2) 375.
[6] Christian A Witting, *Liability of Corporate Groups and Networks* (CUP 2018) 52–53.
[7] *ibid* 53.
[8] Weak regulation can be viewed as "competitive advantages", Karin Lukas, 'Human Rights in the Supply Chain: Influence and Accountability' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Koninklijke Brill NV 2012) 165.
[9] Central American producers reportedly sought to compete by "sweating workers", Richard Locke, Matthew Amengual and Akshay Mangla, 'Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains' (2009) PAS 37:3 319, 337.
[10] For listed labour-related human rights see, SRSG, 'Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse' (23 May 2008) UN Doc A/HRC/8/5/Add.2 para 18.

(SRSG).[11] Abusive working conditions engender other rights violations such as to education, and health,[12] and to life as exemplified by the 2013 collapse of the Rana Plaza building in Bangladesh which killed over 1,000 workers[13] and shone a spotlight on "contemporary sweatshops" in global supply chains.[14]

Globalisation has thus in parallel generated a "permissive environment" for corporate human rights violations,[15] in part because of the "governance gaps"[16] stemming from a "mismatch between the national reach of state legal systems and the transnational reach of [MNEs]."[17] The legal doctrines of corporate separation and limited liability also play a role by shielding a company from responsibility for its subsidiaries' and suppliers' wrongdoing even when acting as an integrated enterprise.[18] Furthermore, the length and complexity of global supply chains, which may span multiple jurisdictions[19] and engage "dozens of suppliers and hundreds of sub-suppliers and perhaps even thousands of sub-sub-suppliers",[20] can diminish the ability of even willing firms to monitor human rights risks.[21] There is however mounting

[11] *ibid* para 19.
[12] *ibid* para 17.
[13] Mark Anner, Jennifer Bair and Jeremy Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013) Comp.Lab.L.& Pol'y J 35:1, 1.
[14] *ibid* 3.
[15] SRSG, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5 para 3.
[16] *ibid*.
[17] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) BEQ 22:1 145, 154.
[18] SRSG (n15) para 13; Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) CJE 34:915, 920. In the context of contractual relationships, limited liability can be achieved through contractual "warranties or exclusion clauses", Peter T Muchlinski, Multinational Enterprises and the Law (CUP 2007 2nd ed) 535 fn139.
[19] Justine Nolan, 'Human Rights and Global Corporate Supply Chains: Is Effective Supply Chain Accountability Possible?' in Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (CUP 2017) 241.
[20] Sobel-Read (n2) 370.
[21] British Institute of International and Comparative Law (BIICL) and Norton Rose Fulbright, 'Making Sense of Managing Human Rights Issues in Supply Chains' (2018), 25 accessible at <https://www.biicl.org/documents/1939_making_sense_of_managing_human_rights_issues_in_supply_chains_-_2018_report_and_analysis_-_full_text.pdf?showdocument=1> accessed 15.09.2018.

pressure on companies to maintain socially and environmentally responsible supply chains,[22] with accusations of irresponsible supply chain practices prompting consumer boycotts[23] and investor divestment.[24] Supply chains are thus an area of commercial and reputational risk, particularly for "well-known, highly-branded companies".[25] They also comprise compliance risk with a growing number of supply chain due diligence instruments imposing some level of responsibility on firms, possibly with attached liability, for their suppliers' actions.[26]

Against this background, this paper seeks to examine the human rights responsibilities of global buyers, international retailers and major brands (the 'lead firm' or 'buyer' or 'global buyer'[27]) towards workers in their global supply chains. It focusses on buyer-supplier relationships based on contract, although noting that MNEs use a variety of equity- and non-equity structures to organise their globally dispersed suppliers.[28]

Chapter I draws on global value chain (GVC) analysis[29] to examine the notion of the 'powerful buyer' and how this power influences supply chain working conditions. Chapter II reviews normative theories on the scope of businesses' human rights responsibilities to consider whether that buyers have a *responsibility* to prevent and address rights violations at the level of their suppliers. Chapter III considers whether this extended responsibility can be given legal force, analysing the employment of tort law to argue that a buyer is jointly liable for its supplier's wrongdoing. It does so with reference to litigation against a Canadian buyer for its alleged failure to monitor factory safety standards in Rana Plaza building. It finds doctrinal limits in common tort law in this context, notably the need for operational control, and turns to review theories for closing the accountability gap. Chapter IV considers how domestic legislation could enhance corporate accountability in the context of global

[22] Joonkoo Lee and Gary Gereffi, 'Global Value Chains, Rising Power Firms and Economic and Social Upgrading' (2015) Crit.Perspect.Int.Bus 11:3/4 319, 330.
[23] Julia Hartman and Sabine Moeller, 'Chain liability in multitier supply chains? Responsibility Attributions for Unsustainable Supplier Behavior' (2014) Journal of Operations Management 32, 281.
[24] SRSG, 'Clarifying the Concepts of "Sphere of Influence" and "Complicity" (15 May 2008) UN Doc A/HRC/8/16 para 31.
[25] Mares (n4) 196.
[26] Nolan (n19) 246.
[27] For general references, 'firm', 'business' and 'company' are used interchangeably.
[28] United Nations Conference on Trade and Development (UNCTAD), 'World Investment Report: 2013' (UNCTAD 2013) 142; Gereffi (n1) 13–14.
[29] GVC are similarly defined to supply chains but specifically describe how value is captured and created, Gereffi ibid 12–13.

outsourcing. It argues a need for reform so that a buyer can be held accountable for harms resulting from its own sourcing demands and for national law regimes to manage the friction with the doctrine of corporate separation to hold buyers responsible for rights violations in specific contexts. It argues for legislation to impose a binding duty of due diligence or a duty of care which takes an expansive view of the enterprise to extend to the activities of suppliers where there is a *significant commercial* relationship. It also considers how buyers can better utilise their leverage to improve labour conditions. Chapter V presents concluding remarks.

1 Supply chain power dynamics and the role of lead firms

Much of the literature on businesses' responsibility to maintain responsible supply chains centres on the putative power of firms at the top of the chain.[30] Richard Locke et al, however, challenge the assumed power of global buyers, arguing that "power relations within global supply chains are far from asymmetrical" since some suppliers "wield a tremendous amount of influence over the global brands they serve."[31] Conversely, where a "small fraction" of a supplier's business is for any one buyer, they argue that it is not clear that buyers have the ability or leverage to pressure "suppliers to raise wages, reduce working hours, or even invest in costly improvements […] to improve working conditions."[32]

Nonetheless, global buyers, like all MNEs, must somehow coordinate suppliers "for purposes of efficiency, quality control […] the maintenance of labour and environmental standards",[33] and to ensure profitability.[34] According to GVC scholars, there has been a "fundamental shift" from producer-driven (vertically-integrated manufacturers) to buyer-driven supply chains.[35] They note the governance[36] power of global buyers (who generally do not own factories but focus on branding and marketing) extends "well beyond their main contractors as their orders and specifications travel down to hundreds of lower-tier suppliers".[37] GVC analysis depicts five types of chain governance, of which three are "network" (non-

[30] See Chapter II.
[31] Locke et al (n9) 325.
[32] *ibid* 326.
[33] Sobel-Read (n2) 365.
[34] UNCTAD (n28) 141.
[35] Gereffi (n1) 10.
[36] GVC scholars use 'governance' over coordination to refer to how lead firms distribute profit and risk in an industry, ibid 13.
[37] Lee and Gereffi (n22) 322.

equity) structures.[38] Notably, where suppliers are characterised as "captive" (typically a relationship between a large buyer and smaller suppliers), there is *significant* lead firm control of production, similar to a "hierarchy.[39] Even in partnership-based "relational" transactions, common in the apparel industry, lead firms hold asymmetric bargaining power,[40] with UNCTAD finding that in labour-intensive sectors such as textiles, buyers use this power to reduce costs, resulting in lower wages.[41] Some GVC studies depict "multi-polar GVC governance" noting the rise of "mega suppliers".[42] However, Joonkoo Lee and Gary Gereffi argue that lead firms nonetheless drive governance as they determine the product price and conditions of sale.[43] They also note that lead firms capture the greatest value; for example, the value captured by Foxconn, a major electronics manufacturer, is "extremely small" compared to the gains by its buyer Apple.[44] Lead firms' governance role also includes setting the normative standards for GVC participation,[45] which has expanded to social and environmental standards.[46] However, according to Lee and Gereffi, lead firms' own production demands can adversely impact supply chain welfare with "thin margins and the fast pace of production" hampering suppliers' ability to improve labour conditions.[47]

In sum, while Locke et al are correct that chain power dynamics are not necessarily asymmetric, some buyer-supplier relationships are such that it may be appropriate to ascribe responsibility 'upwards'. Justine Nolan, for example, posits that, "[i]f a lead firm […] can control the size, design, quantity and quality of a product, and possesses potential leverage to influence the working conditions of those producing the goods, it is then both fair and effective to align that power with legal responsibility."[48] The next chapter considers the reach of businesses' human rights responsibilities and in which contexts a lead firm has a responsibility to prevent supply chain human rights abuses.

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[38] These structures are termed: "market", "hierarchy" and "network", which comprises the subcategories "modular", "relational" and "captive", Gereffi (n1) 14.
[39] UNCTAD (n28) 143.
[40] ibid; Gereffi (n1) 14.
[41] UNCTAD (n28) 157–158.
[42] Lee and Gereffi (n22) 322.
[43] *ibid*.
[44] *ibid* 327.
[45] *ibid* 322.
[46] *ibid* 330.
[47] *ibid*.
[48] Nolan (n19) 253.

2 Conceptualising businesses' human rights responsibilities

There is complex debate on the nature of businesses' human rights responsibilities;[49] this chapter assumes that businesses have a responsibility to respect human rights and reflects on normative arguments for ascribing a *specific* responsibility to a buyer for the actions of its suppliers. It outlines two key conceptualisations of corporate human rights responsibilities before turning to select theories within the literature which expand on these concepts.

2.1 The 'sphere of influence' concept

The notion of businesses' "sphere of influence" (SoI) was conceived in the context of establishing the UN Global Compact (UNGC) as an attempt to delineate the boundaries of corporate human rights responsibilities.[50] The UNGC is not a regulatory body but sets forth core values pertaining to, inter alia, human rights and labour rights which it calls on businesses to "embrace, support and enact, within their sphere of influence".[51]

The SoI concept has critics, notably the SRSG who holds it "too broad and ambiguous" to define the scope of business' human rights due diligence.[52] For the SRSG, the concept conflates influence based on impact, where a business causes or contributes to the harm, and that based on the "'leverage' a company may have over actors that are causing harm".[53] He concludes that while "[i]mpact falls squarely within the responsibility to respect; leverage may only do so in particular circumstances."[54] He also criticises the operationalisation of SoI as "proximity", referring to the UNGC's visualisation of SoI as concentric circles which implies that a business' influence, and "presumably its responsibility", diminishes the further away 'geographically' a stakeholder is from the business.[55] Despite the SRSG's rejection of the SoI

[49] Muchlinski 2007 (n18) 514–518; Astrid Sanders, 'The Impact of The 'Ruggie Framework' And The United Nations Guiding Principles on Business and Human Rights On Transnational Human Rights Litigation' in Martin, Jena and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (CUP 2015) 297.
[50] Stepan Wood, 'The Case for Leverage-Based Corporate Human Rights Responsibility' (2012) BEQ 22:1 63, 66.
[51] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2014) 92.
[52] SRSG (n24) para 4.
[53] *ibid* para 12.
[54] *ibid*.
[55] ibid para 8.

concept, Stepan Wood observes that it remains core to UNGC discourse and is defended in the 2010 ILO 26000 as being "integral to its definition of and approach to social responsibility."[56]

2.2 The 'responsibility to respect' concept under the Guiding Principles

During his mandate, the SRSG developed the tri-pillar UN 'Protect, Respect, Remedy' framework which is explored in a number of reports to the Human Rights Council (HRC) and consolidated in the UN Guiding Principles on Business and Human Rights (the Guiding Principles or Principles).[57] These have no binding force and corporate human rights responsibilities are not phrased as legal duties. These, among other issues, are the subject of debate.[58] For this paper, the framework represents an authoritative approach to defining businesses' human rights responsibilities[59] which are set out in Pilar II and apply to all businesses regardless of their size and form.[60] The responsibility to respect human rights requires businesses to:

> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
> (b) Seek 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."[61]

Central to the Principles is the concept of human rights due diligence (HRDD), an ongoing process[62] whereby businesses identify actual and potential human rights risks – to the

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[56] Wood (n50) 70.
[57] SRSG, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.
[58] Deva (n51) 109–115.
[59] Human rights encompass those in the International Bill of Human Rights and the fundamental rights in the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work (Guiding Principles, Principle 12) being freedom of association and the elimination of forced labour, child labour and discrimination, Muchlinski 2007 (n18) 478.
[60] Guiding Principles, 14.
[61] *ibid* 13.
[62] Scholars note that the SRSG in earlier reports defined due diligence as a standard of conduct rather than process to manage human rights risk, see Jonathan Bonnitcha and Robert

business *and* rights-holders – and so discharge their responsibility to respect.[63] The appropriate management response to findings depends on whether the risk is linked to the businesses' own conduct (actions or omissions) or to that of a "related entity', which includes supply chain entities.[64] If the former, the business should cease and remediate actual harm and prevent potential harm, using its "leverage" over related entities to mitigate remaining harm.[65] If the latter, the business should undertake a contextual analysis regarding whether it has leverage over the entity, the importance of the commercial relationship, and the severity of the harm.[66] If the business remains in the relationship, the Principles caution that this may bring reputational, financial and legal repercussions;[67] for example, the SRSG has elsewhere noted divestment following allegations of a company's "indirect involvement" in its "supplier's violations of human rights in the workplace."[68] Where a business has numerous suppliers, it can limit the HRDD scope to where there is a risk of severe human rights impacts[69] and/or where its operating context carries greater risk.[70]

In sum, although the corporate responsibility to respect is non-binding, a business which fails to respect human rights could face legal action with HRDD essentially a mechanism to assist businesses in avoiding legal claims "by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse", although HRDD will not alone preclude liability.[71] What, then, are the legal risks if businesses have no human rights *obligations*? The Principles notably differentiate 'responsibility' from 'liability', which is "defined largely by national law provisions".[72] For example, the SRSG highlights corporate complicity for violations of international law under the Alien Tort Statute in the United States

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McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' EJIL 28:3 899, 903, 909

[63] Guiding Principles, 17 Commentary.

[64] *ibid* 13 Commentary. The term "related entity" is used regarding paragraph (b) relations, Principle 19 Commentary.

[65] *ibid* 19 Commentary. "Leverage" is defined as a business' "ability to effect change in the wrongful practices of an entity that causes".

[66] *ibid*.

[67] *ibid*.

[68] SRSG (n24) para 31.

[69] Guiding Principles, 17 para b.

[70] *ibid* 17 Commentary.

[71] *ibid*.

[72] *ibid* 12 Commentary

(US).[73] A business may also be held liable for human rights harm expressed as civil wrongs;[74] this avenue for potential liability is considered further in Chapter III.

2.3 Re-conceptualising businesses' human rights responsibilities

There is a clear normative distinction between the SoI and the 'responsibility to respect' concepts. The former adopts a stakeholder approach, bounding businesses' human rights responsibilities by the extent of their power and influence.[75] Conversely, the SRSG adopts a moral agency approach whereby responsibility is linked to a business' own culpable actions. This said, the SRSG ekes beyond responsibility only for blameworthy impacts by encouraging firms to exercise (and indeed increase) their leverage over third parties.[76] Karin Lukas argues that the SRSG thus "seems to clandestinely re-introduce" the SoI concept since "using leverage" is akin to "exercising influence".[77] The terms are complementary;[78] yet, while the SoI concept asks seems to ask *how much* influence a firm has (a factual analysis), "leverage" asks *what a* firm can do to reduce third-party harm (a normative analysis), with no responsibility to act.

For Wood, the Principles "do not go far enough" in formulating a corporate responsibility to use leverage[79] (although he concurs with the SRSG's rejection of the SoI concept[80]) since impact-based responsibility risks the unsatisfactory situation that "no one is responsible" where human rights harms "are not within the control of individual actors and contributions are difficult or impossible to tease apart."[81] Wood theorises a solution, proposing that determining responsibility could be achieved by (i) diluting the 'but-for' causal contribution to "substantial factor" to allow for "graduated" responsibility or (ii) defining causation in non-causal terms e.g. an omission to act.[82] Moreover, Wood argues that businesses have human rights responsibilities absent *any* contribution.[83] He presents a case for mandatory "leverage-based responsibility" predicated on the "substantial power of business enterprises to

[73] SRSG (n24) paras 29.
[74] Guiding Principles, 17 Commentary.
[75] SRSG (n24) para 13 fn8.
[76] Guiding Principles, 19 Commentary.
[77] Lukas (n8) 158.
[78] *ibid* 167.
[79] Wood (n50) 72.
[80] *ibid* 73.
[81] *ibid* 74.
[82] *ibid* 74.
[83] *ibid* 76.

influence social conditions" including vis-à-vis human rights, arguing that "in some circumstances [a business] has a responsibility to exercise leverage over actors with whom it has relationships in an effort to improve that state of affairs."[84] Wood lays down four conditions that if met, *obligate* a business to act even where it has not caused or contributed to the harm, including where there is a "morally significant connection" (which can extend to second and third tier suppliers[85]) between the business and rights-violator/rights-holder; the business is able to ameliorate the situation at "modest cost"; and the threat to the rights-holder's human rights is substantial."[86]

Kate MacDonald also addresses situations where there is no clear causal link between the business and human rights harm but where the business contributes through its corporate group or network.[87] She defends the SoI concept and its recognition of direct and indirect channels of influence over human rights,[88] arguing that the SRSG's agency approach fails to account for the influence of social institutions in constraining or distributing agency over human rights outcomes.[89] She argues that businesses operating within institutions, where day-to-day control over the human rights outcomes lies with another network actor, can "do harm at a distance".[90] MacDonald argues for "spheres of responsibility" where responsibility for indirect human rights harms is disaggregated pro rata among contributing businesses in, for example, the "supply chain system" according to their market or bargaining power as well as the financial or managerial control determinants in current liability regimes.[91] She argues that this disaggregation could ground legal liability following Gunther Teubner's "network share liability" regime where liability is decided according to an actor's share in the network.[92]

Stephen Chen offers a conceptualisation of a buyer's responsibility for social and environmental practices in its supply chain which draws on both the SoI concept and the

[84] *ibid* 76.
[85] *ibid* 84.
[86] *ibid* 93.
[87] Kate MacDonald, 'Re-thinking 'Spheres of Responsibility': Business Responsibility for Indirect Harm' (2011) J.Bus.Ethics 99:549, 553.
[88] *ibid* 555.
[89] *ibid* 552-553.
[90] *ibid*.
[91] *ibid* 557.
[92] *ibid* 557–558.

SRSG's approach.[93] Chen argues that a buyer may be held socially responsible for its supplier's behaviour even where it has not caused the harm but where it has power and influence (being "one aspect of power"[94]) over its supplier. Chen notes that, for some scholars, identifying *power* is "critical" for defining moral responsibility grounded on the "common assumption" that "the more powerful party in an economic relationship should bear the responsibilities of the weaker party."[95] Chen draws on the SRSG's concept of "influence as leverage" but argues that this *can* ground legal complicity where the buyer knew or should have known about its supplier's actions but remained in the business relationship.[96] Chen's argument is based on the premise that the buyer "could and should have prevented" the wrongdoing by "withholding certain resources."[97] He proposes metrics for ascertaining whether a firm indeed has economic and/or social power and whether this power is exerted directly (e.g. direct contracting) or indirectly (e.g. use of intermediaries in the labour industry).[98] Following Chen's analysis, even where a buyer is indirectly linked to the harm, through an intermediary, if it has "good" knowledge of the harm, it is likely complicit.[99]

2.4 Human rights responsibilities in supply chains

Under the Principles, a business' responsibility to prevent and remediate human rights harm clearly extends into its supply chain where its decisions contribute to a supplier's wrongdoing.[100] These are termed "rippling effects" by Radu Mares[101] and conceivably extend

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[93] Stephen Chen, 'Multinational Corporate Power, Influence and Responsibility in Global Supply Chains' (2018) J.Bus.Ethics 148, 365, 366.
[94] *ibid* 367.
[95] *ibid*.
[96] *ibid* 371.
[97] *ibid*.
[98] *ibid* 369.
[99] *ibid* 372.
[100] For example, "where the buyer demands significant last-minute changes in product specifications without adjusting price or delivery dates, leading to labor standard violations by a supplier in a low-margin business", see SRSG, 'The Corporate Responsibility to Respect Human Rights in Supply Chains Discussion Paper, 10th OECD Roundtable on Corporate Responsibility' (30 June 2010) para 5(b) <https://www.oecd.org/corporate/mne/45535896.pdf> accessed 15.09.2018.
[101] Radu Mares, 'Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Koninklijke Brill NV 2012) 169.

throughout the supply chain. Recalling that lead firms set the product price and conditions of production, where these increase the likelihood of irresponsible behaviour further down the chain, should this not be a 'contribution'? For example, where a retailer negotiates an unfair product price which leads to suppliers squeezing the price of agricultural inputs thereby adversely impacting farmers.[102] Here, the challenge is evincing causality between the buyer's decision-making and the harm sufficient to term it an impact and subject to remediation. The arguments of Wood and MacDonald are instructive where causality is nebulous and human rights outcomes are mediated by other actors.[103] While Wood seems to draw on the judicial exceptions to the but-for test,[104] by proposing that any *de minimis* contribution incurs responsibility,[105] MacDonald advocates for responsibility based on the business' association with the harm, seemingly viewing the supply chain as a single interconnected enterprise.[106]

Accordingly, the meaning of a 'contribution to' and 'linked with' the harm may distort where decisions made at the top of the chain impact the entire production process. Some scholars, however, argue against businesses having "boundaryless" corporate social responsibility (CSR), limiting their responsibility to immediate suppliers.[107] This is ostensibly the approach of the Guiding Principles, where the responsibility to prevent and mitigate harm extends only to related entities. Yet, as outlined by Chen, a business may utilise indirect *intermediary* exchanges to its their responsibilities to workers, noted to be the cause of "sweatshop" conditions; Chen argues that the CSR of a powerful buyer therefore extends to its subcontractors.[108] This said, the term 'directly linked' is left open in the Principles; the Office of the High Commissioner for Human Rights (OHCHR) adds some clarity by suggesting that it includes where a firm's supplier subcontracts work without the firm's prior knowledge.[109]

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[102] Lisa Rutherford, 'UK Supermarkets Squeezing Millions of the Poorest Farmers and Workers in Their Supply Chains' (Oxfam, 21 June 2018) accessible at <https://www.oxfam.org.uk/media-centre/press-releases/2018/06/uk-supermarkets-squeezing-millions-of-the-poorest-farmers-and-workers-in-their-supply-chains> accessed 14.09.2018.

[103] MacDonald (n87) 557; Wood (n50) 84.

[104] Witting (n6) 371–375.

[105] Wood (n50) 75.

[106] See Chapter IV.

[107] Kenneth M Amaeshi, Onyeka K Osuji, and Paul Nnodim, 'Corporate Social Responsibility in Supply Chains of Global Brands Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications' (2008) J.Bus.Ethics 81:1 223, 229.

[108] Chen (n93) 369, 370.

[109] Nolan (n19) 245.

There may of course be instances where a supplier acts independently. But what it is involved in serious rights violations; for example, "the product is produced by bonded or child labor"?[110] Here, the Principles, stipulate a discretionary response. The business could take no action at all. Notably, the responsibility to respect in the context of third-party harm is triggered by a commercial relationship rather than one company controlling another, for example, through its shareholding or day-to-day management.[111] According to the SRSG: "If the scope of due diligence were defined by control […] this could imply […] that companies were not required to consider the human rights impacts of suppliers they do not legally control".[112] It is surely positive that the remit of corporate HRDD is expansive. However, while noting that suppliers have their own responsibility to respect,[113] it is surprising that there is no *additional* responsibility where there is a relationship of control or another significant relationship. Given that an "impact" can be an act or omission,[114] might a firm's failure to use its leverage where there is a significant relationship between the entities be termed a culpable impact? Not explicitly under the Principles given the discretionary leverage regime, which seems mindful of corporate separation.[115] In the context of corporate groups Mares finds this approach risks the 'atomisation' of the responsibility to respect with affiliates left to operate autonomously and core companies "off the hook".[116] Mares points to Peter Muchlinski's recommendation that in corporate groups, "parent and holding companies have a responsibility to oversee that their subsidiaries respect human rights".[117] This recommendation might also apply to some contractual buyer-supplier relationships, noting Witting's argument for "business form neutrality" to prevent businesses from choosing one form over another to avoid liability.[118] The

[110] SRSG (n100) para 5(a).
[111] Janet Dine, 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' (2012) JHRE 3:1, 44, 66–67.
[112] SRSG (n24) para 17.
[113] SRSG, 'Business and human rights: Towards operationalizing the "Protect, Respect and Remedy" Framework' (22 April 2009) UN Doc A/HRC/11/13 para 75.
[114] Guiding Principles, 13 Commentary.
[115] Radu Mares, 'Legalizing Human Rights Due Diligence and the Separation of Entities Principles' in Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (CUP 2017), 291.
[116] Mares (n101) 175.
[117] *ibid* 178.
[118] Witting (n6) 5.

SRSG instead addresses the separate entities norm as a barrier to civil claims, and does not advance a theory for extended responsibility in corporate groups or networks.[119]

This said, the SRSG expresses an *implicit* oversight role by cautioning that: "The challenge for buyers is to ensure they are not complicit in violations by their suppliers",[120] presumably where the buyer benefits from the abuse.[121] Chen's thesis, which draws on the SRSG's consideration of complicity,[122] more clearly ascribes an oversight role to a buyer by arguing that its position of power engenders a specific responsibility to influence suppliers to act responsibly, at risk of legal complicity where the buyer knew or should have known about the wrongdoing and failed to act.[123] However, whereas Chen conceptualises the exercise of leverage as *withholding* resources, the Principles encourage businesses to take more positive steps, for example, by "offering capacity-building" to the related entity,[124] before disengaging. As outlined, Wood goes further, essentially adopting a "can implies ought"[125] approach by obligating a firm to use its resources to address human rights abuse, which he argues extends to lower-tier suppliers.[126]

In sum, there is consensus that a firm's human rights responsibilities extend to its supply chain. The SRSG goes beyond strict impact-based responsibility but adopts a discretionary approach to addressing third-party harm in line with the separate entities doctrine. The alternative theories considered advocate for a more expansive approach to ascribe a responsibility on a business for human rights harm by third-party entities where the business has the power or leverage to make a difference, or because of the economic reality of its business structure. The question is whether these normative theories can shape interpretations of legal responsibility, considered next.

3 Theorising a legal responsibility: tort law doctrines and Rana Plaza litigation

This chapter picks up on Nolan's suggestion that a lead firm's position of power and control over production together with its potential influence over a supplier's working practices

[119] SRSG (n113) para 95; Mares (n103): 173–174.
[120] SRSG *ibid* para 75.
[121] Guiding Principles, 17 Commentary.
[122] Chen (n93) 371.
[123] *ibid*.
[124] Guiding Principles, 19 Commentary.
[125] The SRSG rejects "can implies ought" as guiding the corporate responsibility, see SRSG (n24) para 13.
[126] Wood (n50) 84.

engenders legal responsibility.[127] It does so with reference to select common law tort doctrines raised in a transnational law suit brought following the Rana Plaza collapse to argue the liability of a Canadian buyer for failing to oversee factory safety standards. Tort law is held to offer an important avenue for litigating corporate human rights violations.[128] Cees Van Dam argues that tort law and human rights law "are brothers in arms".[129] Surya Deva notes limitations of tort law but posits its potential in securing human rights.[130] Furthermore, scholars observe parallels between the HRDD concept in the Guiding Principles and the duty of care principle defining the tort of negligence,[131] which is the impetus for this discussion.

In a 2017 case before the Superior Court of Ontario, considered below,[132] the court examined the viability of, inter alia, two legal theories for holding one company liable for the tortious activity of another. The first theory bases liability on the company owing a direct duty of care to the plaintiffs, together with proof of negligence.[133] Here, the court considered, inter alia, whether the plaintiffs' claims were viable under the "assumption of responsibility" principle,[134] where the defendant is held to voluntarily assume a positive responsibility to safeguard the plaintiff.[135] In this case, the plaintiffs relied, inter alia, on the UK Court of Appeal case *Chandler v Cape plc*[136] which set out a test for ascertaining whether a parent company owes a duty of care to its subsidiary's employees.[137] This approach has been affirmed in transnational litigation.[138] The *Chandler* test is summarised by Witting as requiring

[127] Nolan (n19) 253.
[128] Roger P Alford, 'The Future of Human Rights Litigation after Kiobel' (2013-2014) 89 Notre Dame Law Review 1749.
[129] Cees Van Dam, 'Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights' (2011) 2 JETL 221, 254.
[130] Deva (n51) 34.
[131] Sanders (n49) 303, 305; Van Dam (n129) 244; Bonnitcha and McCorquodale (n62) 903, 909.
[132] *Das v George Weston Limited* 2017 ONSC 4129.
[133] A duty of care indicates legal proximity between the parties such that care must be taken; negligence entails a breach of a standard of expected care causing reasonably foreseeable harm, Witting (n6) 352.
[134] *Das* (n132) [412 para e] and [413 para h].
[135] *ibid* para 430.
[136] *ibid* para 433. For analysis of *Chandler* see Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 MLR 603.
[137] Petrin *ibid* 610.
[138] For example, the Dutch case Akpan v Royal Dutch Shell, Douglass Cassell, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence'

"overlapping industrial activity, parent company interventions into the affairs of the subsidiary that do not necessarily relate closely to the injuring activity, knowledge of risk to health and safety, and 'reliance' upon the parent company by subsidiary employees."[139] The court must first, however, be satisfied that the parent exercised "relevant control" over its subsidiary.[140] This is not strategic control, which cannot generally incur liability,[141] nor "absolute control" such that the subsidiary is an agent of the parent company,[142] but sufficient operational control to satisfy "the requirement for proximity demanded by a duty of care analysis."[143] This doctrine does not entail "lifting the corporate veil", as the parent company is held to control the cause of the tort,[144] not the subsidiary,[145] and is thus *personally* liable. It is worth recalling that where suppliers are 'captive', there is significant lead firm involvement in production; however, proving control presents both factual[146] and evidentiary[147] challenges for plaintiffs who hold the burden of proof.

The second legal theory invoked was that the buyer was vicariously liable for the supplier's negligence on the basis the defendant company had non-delegable duty to ensure that care was taken.[148] The plaintiffs relied on, inter alia, a decision from the Supreme Court of India that a non-delegable duty may be imposed on businesses engaged in a hazardous or inherently dangerous industry that poses a threat to the health and safety to workers and local residents.[149]

(2016) 1(2) BHRJ 179, 197–198; and the UK case Lungowe v Vedanta Resources plc, Witting (n6) 361–362.

[139] Witting (n6) 362.

[140] *Chandler* [46] cited in Petrin (n136) 610 fn52.

[141] Muchlinski 2007 (n18) 316.

[142] *ibid* 309; Petrin (n136) 613 fn60.

[143] Petrin *ibid* 612.

[144] Witting (n6) 362 fn78.

[145] *Chandler* [69]. For a critique see Petrin (n136) 611–616.

[146] While an international buyer may influence "wages and conditions such as overtime […] many other working conditions remain controlled by decision makers at the factory level", MacDonald (n87) 554.

[147] Evidence of control is likely with the parent company, Muchlinski 2010 (n18) 919.

[148] *Das* (n132) [126].

[149] *ibid* [463].

3.1 Das v. George Weston Limited

In this case, a number of Rana Plaza survivors and relatives of the deceased sued the Canadian retailer Loblaws and its auditor Bureau Veritas. The plaintiffs argued in essence that:

> Loblaws, knowing of the notoriously dangerous workplaces in Bangladesh, voluntarily undertook the responsibility of ensuring that the buildings in which [its] garments were being manufactured by vulnerable employees, were safe and structurally sound.[150]

This paper outlines aspects of the plaintiffs' claims in tort with respect to the law of Bangladesh (*lex loci delicti*,[151] although they were also considered under Ontario law) since arguments drew on English law.[152] Notably, the firm operating in the Rana Plaza building was sub-contracted by Loblaws' supplier, thus a sub-supplier.[153]

First, the court considered whether the defendants owed the plaintiffs a direct duty of care. Finding this to be a novel category,[154] expert witness testimony was invited from two English academics to assess whether the claim was viable in law. It was the first expert's view that the plaintiffs' claim would fail. Notably, he concluded that "even assuming the foreseeability and a proximate relationship" required by the *Caparo* test,[155] the policy factors favouring the imposition of a duty were "overwhelmed' by those negating it,[156] and, further, that neither defendant had assumed responsibility for the plaintiffs' safety,[157] with Bureau Veritas "a mere bystander".[158] Conversely, the second expert opined that the policy factors "strongly favoured" imposing liability on the defendants based on the assumption of responsibility doctrine.[159] The expert argued that "by adopting CSR standards and Supplier Terms and Conditions and by undertaking safety audits" Loblaws assumed a duty of care,[160]

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[150] *ibid* [121].
[151] *ibid* [265].
[152] *ibid* [411].
[153] *ibid* [43].
[154] *ibid* [400].
[155] Understood as a tripartite test addressing foreseeability, proximity and policy factors, *ibid* [412 para b].
[156] *ibid* [412 para d].
[157] *ibid* [412 para e].
[158] *ibid* [412 para f].
[159] *ibid* [413 para b].
[160] *ibid* [413 para c].

and, further, that "where the plaintiff is vulnerable and dependent on the defendant acting with reasonable care", case law indicates that "a weak kind of reliance by the plaintiff would suffice to establish liability". He opined that the plaintiffs were "utterly dependent" on the defendants "taking reasonable care to implement its undertakings to inspect the premises".[161] Justice Perell agreed with the first expert. He did not agree that Loblaws had "the ways and means (control) to carry out a duty to protect its suppliers' employees" (concurring with Loblaws that its supplier agreement does not grant a right to control its supplier's actions[162]) or that a plaintiff's vulnerability entails "that he or she will be owed a duty of care."[163] Justice Perell found it both disproportionate[164] and unfair[165] to impose negligence liability on Loblaws which was "not responsible for the vulnerability of the plaintiffs, did not create the dangerous workplace [and] had no control over the circumstances that were dangerous."[166]

Second, the court considered whether Loblaws was vicariously liable.[167] It was the first expert's view that vicarious liability only exceptionally applies to cases of independent contractors and found no basis to impose it here.[168] The second expert, conversely, opined that it was appropriate to impose vicarious liability on the basis of Loblaws having a non-delegable duty of care[169] with the plaintiffs invoking the notion of inherent danger in the delegated activities such that Loblaws retained a duty to ensure worker safety.[170] Justice Perell refuted this argument, finding neither the production of garments to be inherently dangerous[171] nor the supplier to be an independent contractor envisaged by the doctrine, since Loblaws did not assign tasks but purchased goods.[172]

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[161] *ibid* [413 para f].
[162] *ibid* [418].
[163] *ibid* [450].
[164] *ibid* [455].
[165] *ibid*.
[166] *ibid* [457].
[167] *ibid* [459–458].
[168] *ibid* [461].
[169] *ibid* [464].
[170] *ibid* [465].
[171] *ibid* [482].
[172] *ibid* [493].

3.2 Analysis

It is difficult not to feel disappointment with the outcome of this case, not least because it indicates, as one commentator puts it, the "vacuousness" of CSR standards.[173] It also suggests significant shortcomings of the audit mechanism in protecting workers where the audit is not a holistic examination of working conditions. Commentators note, for example, that Bureau Veritas was retained to conduct a social audit (forced labour, hours of work etc.) not the "slightly more expensive" (an additional cost of USD2,000) "Electrical, Fire and Building Safety Assessment". [174]

Crucially, it shows the doctrinal limitation of tort law since the injured workers were unable to establish Loblaws' liability, notwithstanding its alleged contribution to the harm by its sourcing practices.[175] The challenges raised are that allegations of culpability will not establish a duty of care,[176] and the stringent interpretation of duties of care in cases of nonfeasance in part because, "common law is disinclined to impose positive duties to protect others". [177] According to Astrid Sanders, the "significant exceptions" to this rule can be categorised as where there is a "relationship of protection (between claimant and defendant)" and a relationship of control (of the defendant over a third party)."[178] In *Das*, the plaintiffs' pleadings invoked both categories, being their positon of vulnerability (relationship of protection) and Loblaws' "control of their workplace through its substantial purchasing power and its CSR standards"[179] (relationship of control); neither could establish the requisite proximity. In essence, Justice Perell disagreed with the plaintiffs' interpretation of control, interpreting it as "rights to hire, supervise, or fire their supplier's or sub-supplier's employees [and] control over access to the workplace".[180] This links back to MacDonald's concern about equating responsibility with agency where another entity in the business network has control

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[173] Davis Doorey, 'Vacuousness of CSR on Display in Loblaws' Victory in Rana Plaza Class Action Lawsuit' (LawofWork blog undated) <http://lawofwork.ca/?p=8992>.
[174] *ibid* with reference to *Das* (n132) [54].
[175] According to expert testimony, "Although Loblaws had not created the dangerous situation, nevertheless, it contributed to a dangerous situation by negotiating tight margins with stringent deadlines that would compel the suppliers to cut corners on worker safety." *Das* (n134) [413 para b].
[176] *ibid* [417].
[177] *ibid* [402].
[178] Sanders (n49) 306.
[179] *Das* (n132) [4].
[180] *ibid* [49].

allowing a lead firm to "do harm at a distance".[181] However, Justice Perell cautions against imposing liability on the basis of CRS statements, that it would encourage "defensive tactics" making "the situation of the Plaintiffs worse not better."[182]

The vicarious liability and non-delegable duties arguments take a different approach to imposing a safeguarding duty on defendant company.[183] Although rejected in *Das*, this legal theory is instructive in the context of this paper as Mares advances that the notion of non-delegable duties offers a way to reframe a company's "culpable conduct" by omission to culpable *commission*, as the company would be liable "unless it engages in careful selection and takes further precautions against" certain risks.[184] Mares draws on the doctrine's emphasis on "vulnerability" (defined by Mares as the "absence of *effective remedies*"[185]) and lack of remedy[186] to argue that "risks of unremedied [human rights] harm are a special category of 'peculiar-light' risks that require some special precautions to be taken, some responsibility to act"[187] such that it is "blameworthy to disregard foreseeable and peculiar risks to workers" in the production of the buyer's goods.[188] Ultimately, the development of non-delegable duties is unlikely,[189] but the theory importantly encapsulates the moral argument that some risks should not be externalised.

[181] See section 3.2.
[182] *ibid* [536].
[183] For discussion on whether a non-delegable duty results in strict or vicarious liability see Jonathan Morgan 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure That Care Is Taken' (2015) CLJ 74(1) 109, 118. Notably, Morgan suggests that the "vulnerability" aspect is about the inability of the plaintiff to protect herself through contract, 139.
[184] *Das* (n132) 185.
[185] *ibid* 180.
[186] *ibid* 186.
[187] *ibid* 183.
[188] *ibid* 185.
[189] Witting (n6) 405–406.

3.3 Proposals for reforming common law tort doctrine

Finding the *Chandler* doctrine to be problematic,[190] Witting proposes a new tort to address situations where an entity within a corporate group or network[191] becomes insolvent,[192] with the aim to extend liability "in cases of unsatisfied personal injury claims"[193] for the benefit of mass-tort victims resulting from dangerous corporate activity.[194] Witting's proposed tort draws on the tort of 'unlawful means conspiracy' "when […] persons agree upon a course of action with an aim of injuring another, and the latter suffers loss as a consequence of the wrong committed."[195] Witting proposes modifying: (1) the *mens rea* of 'intent to injure' to "objective recklessness" and (2) the tort's application to personal injury cases, not solely financial loss. His proposed "multiple entity recklessness" tort would be committed when the risk-taking company engages in conduct giving rise "to an obvious and unreasonable risk of physical injury to persons" but "nevertheless undertakes that conduct so that injury is caused."[196] Entities with "substantial commercial relations" with the reckless entity are *prima facie* liable for their part in facilitating the tort.[197] Each participating entity would have a defence if it "took every step to avoid the future causation of personal injury to others, for example, whistle-blowing or "ceasing coordination with the risk-creating company."[198] Witting argues that this reversed burden of proof incentivises "defendants both to monitor risky conduct" and "cease coordinating with the risk-taking company should the latter refuse to modify its conduct."[199]

Douglass Cassell similarly finds liability regimes "based on the extent of the parent's control of the subsidiary's conduct" to create "perverse incentives" to minimise control.[200] Cassell proposes a new common law norm imposing on parent companies a duty of care to

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[190] Witting writes: "Parent companies in risky industries will 'maintain "strategic control" but avoid responsibility by delegating operational matters, which are more likely to give rise to tortious consequences" *ibid* 363.

[191] Witting defines networks as "related […] by detailed cooperation agreements, and/or repeated transactions" (*ibid* 5) and "some type of governance arrangement" (*ibid* 39). Some GVCs organised through 'network' structures will fit this definition.

[192] *ibid* 1.

[193] *ibid*.

[194] For example, injuries from mining (asbestos) and pharmaceutical activities, *ibid* 6.

[195] *ibid* 382.

[196] *ibid* 391–392.

[197] *ibid* 382.

[198] *ibid* 393.

[199] *ibid* 393.

[200] Cassell (n138) 181.

exercise due diligence extending to the activities of all entities in the enterprise.[201] He interprets the Guiding Principles' use of the term "enterprise" to mean a parent company *and* its subsidiaries,[202] being entities over which the parent has "control" (i.e. majority ownership[203]) *or* "effective leverage",[204] including this latter nexus to overcome a situation where a firm is "barred from exercising control by the terms of the contractual agreement".[205] With direct reference to the Principles, Cassell argues for the exercise of due diligence to be a judicially recognised standard of care and that a breach of this standard "would create a rebuttable presumption of causation and hence liability" in negligence where the business activity causes human rights harm.[206] It would be for the parent company to prove "that the risk of the human rights violation was not reasonably foreseeable, or that the damages would have resulted even if the company had exercised due diligence."[207] According to Cassell this approach would not "pierce the corporate veil" as the parent would only be liable for the "foreseeable consequences of their own failures to exercise due diligence".[208]

These proposals offer a number of interesting reforms to the common law tort regime. This paper offers a few preliminary observations. Witting expressly rejects enterprise liability,[209] therefore presenting a higher likelihood of support given courts' reluctance to apply an enterprise approach to liability for tort cases.[210] Further, by introducing the *mens rea* standard of "objective recklessness", Witting makes this pathway to redress more viable given, as he notes, the difficulty in attributing mental states (e.g. "subjective recklessness") to companies.[211] Further, the "every step" defence for allegedly participating entities sets a high oversight threshold, meaning that an outsourced audit (as in *Das*) might not suffice. The "objective recklessness" standard might accommodate outsourcing practices where a supplier disregards health and safety standards resulting in injury, although the inherently risky nature of the textile industry was not accepted in *Das*. Finally, by rejecting a nexus of 'control' in

[201] *ibid* 179.
[202] ibid 186.
[203] *ibid* 186.
[204] *ibid* 179.
[205] *ibid*: 186.
[206] *ibid* 180.
[207] *ibid*.
[208] *ibid*: 181.
[209] Witting (n6) 185; Cassell (n138) 182.
[210] Muchlinski 2010 (n18) 920.
[211] Witting (n6) 391.

favour of "substantial commercial relations", this tort would accommodate situations where suppliers are indeed independent.[212]

Cassel also rejects an enterprise liability approach;[213] however, his *presumption* of parent liability for the activities of its subsidiaries seems to draw on enterprise theory,[214] although he does not stipulate a rebuttable presumption of 'control' (unlike enterprise liability theory[215]) only vis-à-vis the causal link to the harm.[216] Cassell essentially proposes extending the boundaries of the "enterprise", which the Guiding Principles do not,[217] but which scholars suggest is needed.[218] His thesis would avoid judicial discretion in "lifting the corporate veil" by providing clarity as to when a parent company risks liability.[219] Further, Cassell rightly argues that "the interest of victims in access to an effective remedy" is an "important factor" in assessing whether imposing a new duty of care on a defendant is "fair, just and reasonable".[220] Finally, by theorising a way to embed the content of the Guiding Principles in common law, this approach would allow for legal actions for violations of the spectrum of human rights including those not giving rise to personal injuries (e.g. lack of unionisation, lack of fair wages). One caution might be raised, however, that, as considered below and recommended in the Principles, encouraging a business to *increase* its leverage over another may have the overall benefit of reducing human rights harm; an explicit leverage-based approach to liability may deter this.

4 Looking forward: responsibility and accountability in global supply chains

This chapter considers proposals for enhancing corporate accountability for human rights violations in global supply chains. Even with a potential UN-level treaty on business and

[212] *ibid* 395.
[213] ibid 185; Cassell (n138) 182.
[214] Muchlinski 2010 (n18) 924.
[215] *ibid*.
[216] Cassell (n138) 180.
[217] *ibid* 185.
[218] Muchlinski (n17) 153.
[219] *ibid*.
[220] Cassell (n138) 194.

human rights,[221] multifaceted private (firm-led and industry level) and public (host and home state laws[222]) governance is needed to regulate corporate human rights behaviour.[223]

4.1 Domestic law as a mechanism for corporate accountability

States have a clear obligation to protect against corporate human right violations through regulation[224] and to ensure that those whose rights are violated have access to an effective remedy.[225] Yet, as alluded to above, the limits of national law coupled with the separate entities doctrine limits states' ability to regulate transnational business activity and "make it exceedingly difficult to hold the extended enterprise accountable for human rights harm".[226] This section draws on the argument of Bonnitcha and McCorquodale that the HRDD concept in the Guiding Principles encompasses both a procedural responsibility and a standard of care to consider how domestic law might operationalise the responsibility to respect and obligate businesses to prevent and address human rights violations they cause or contribute to (impact-based responsibility) *and* to prevent and mitigate harm they are harm they are linked to through their business relations (leverage-based responsibility). Distinct from the Principles, it argues that businesses should be required to prevent and potentially remediate harm caused by some related entities.

4.2 Impact-based responsibility

This paper has outlined judicial development of negligence law to find a parent company (potentially) jointly liable for its foreign subsidiary's tortious behaviour.[227] Might there be further doctrinal development, inspired by the Principles, to more readily impose a duty of care on a buyer toward its foreign supplier's workers? Justice Perell suggests not, observing that the duty of care principle is "restrictive, conservative, and cautionary".[228]

Further, as noted, finding liability on the basis of CSR standards and a level of operational control may be counterproductive where encouraging the same may improve

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[221] Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights: Context and Contours* (CUP 2017).
[222] 'Host state' refers to the subsidiary/supplier's jurisdiction, while 'home state' refers to the (different) jurisdiction where the parent company/lead firm is located, Sanders (n49) 289.
[223] Deva (n51) 231..
[224] Guiding Principles, Principle 1.
[225] *ibid*, Principle 25.
[226] SRSG (n15) para 13.
[227] See *section 3*.
[228] *Das* (n132) [403].

working conditions. Furthermore, the court's reasoning in *Das* suggests that negligence actions are unable to provide an avenue for redress based on a buyer's *contribution* to the harm by its sourcing demands.[229]

Moreover, for some scholars, where a business fails to respect human rights through its own conduct, liability should be *strict* not fault-based.[230] It is noteworthy that a recurring theme in the literature is that buyers' demands for flexible and cost-sensitive subcontracting and compressed lead-times are a major cause of labour rights violations in supplier factories.[231] The SRSG's recognition that sourcing demands can be a culpable impact[232] (and subject to remediation) is therefore valuable in countering the view that demands for fast and flexible production are simply normal business practice. Amaeshi et al, for example, argue that a buyer is responsible for the actions of a controlled supplier where the buyer misuses its power;[233] for example, to set low-cost targets at the expense of responsible business practices.[234] Typically, however, the abuse of buyer power is a competition or consumer law issue, not a ground for employees of the weaker bargaining party to sue the stronger party for adverse effects on wages and welfare.[235] This indicates a need for a legal or other mechanism to permit harmed workers a right of action against a buyer where its terms of production contribute to rights violations.

4.3 Leverage-based responsibility

This section picks up on the SRSG's observation that a firm's use of leverage may fall within the responsibility to respect "in particular circumstances"[236] to argue that a buyer has a responsibility to use its leverage where it has a significant relationship with its supplier. Conceptually, this relationship is based on the firm's power or influence over the other entity. In tort law doctrine, as considered, the relationship is one of control. Given the limitations of this common law doctrine, this paper draws on Witting's proposed nexus of "substantial commercial relations" to propose that a business has a *responsibility* to prevent human rights harm caused by a significantly related entity, with attached civil liability, by granting those

[229] *ibid* [413 para b].
[230] Bonnitcha and McCorquodale (n62) 912, 917–919.
[231] Anner et al (n13) 3; Locke et al (n9) 335; Lukas (n13) 161.
[232] SRSG (n100) para 5(b).
[233] Amaeshi et al (n107) 231.
[234] *ibid* 229.
[235] Peter C Carstensen, *Competition Policy and the Control of Buyer Power: A Global Issue* (Edward Elgar Publishing Limited 2017) 4.
[236] SRSG (n24) para 12.

harmed a right to sue the business, where it fails to do so and harm ensues. It notes recent legislative direction to this end in France's Duty of Vigilance Law 2017,[237] considered below.

First, however, it notes Mares' caution that legalising 'leverage-based responsibility 'will cause "frictions" with the separate entity norm and the sovereignty of host states, as depriving companies the protection of corporate separation might deter trade and investment in high-risk zones thereby impacting on states' ability to join the global economy "according to [their] own sovereign developmental path."[238] This paper proposes three ways to keep this friction "manageable".[239]

4.3.1 Human rights transparency and reporting

Some states have introduced mandatory transparency and reporting on select human rights-related issues in supply chains. For example, the UK Modern Slavery Act 2015 and the California Transparency in Supply Chains Act 2012 require large companies to disclosure steps taken to ensure there is no slavery, forced labour or human trafficking in their supply chains.[240] Positively, they require due diligence throughout the supply chain. However, a company could take no steps at all as long as a statement to this effect was published. Nolan argues that the lack of sanctions renders such measures largely ineffective,[241] although she notes consumer law actions in California based on companies' allegedly misleading statements.[242] This paper argues for introducing a civil penalty for non-compliance; while this might cause some blurring of the boundaries of corporate separation,[243] any friction is minimal as liability results from the company's non-compliance with national law not vis-à-vis the rights violations.

4.3.2 Developing common law tort doctrines

This paper has outlined arguments for common law courts to impose a duty of care on the defendant company. First, by developing the non-delegable duty of care doctrine where inherently dangerous tasks are delegated. Second, following Cassell's thesis, by establishing a

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[237] For detail on the law see Sandra Cossart, Jérôme Chaplier and Tiphane Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 BHRJ 317, 320.
[238] Mares (n115) 281–283.
[239] *ibid* 281.
[240] Nolan (n19) 248–250.
[241] *ibid* 249.
[242] *ibid* 251–253.
[243] ibid 247.

binding duty of care which extends to subsidiary activities. Regarding the former, Witting's thesis similarly aims to establish liability for injuries resulting from dangerous production activities, but, unlike non-delegable duties, would make the defendant *personally* liable on the basis of its role in facilitating the tort by failing to prevent it. While these proposals might apply to some types of outsourced production,[244] they may not have wide application where the industry is not perceived to be dangerous but the country-context in which it takes place makes it risky. Regarding the latter, noting the conservatism of common law duties of care,[245] this objective is better introduced by statute, considered next.

4.3.3 Legalising human rights due diligence

Public policy concerns can justify a statutory exception to the corporate separation doctrine and impose a presumption of liability on one company for the acts of another on the basis of control.[246] Gwynne Skinner, for example, argues for a parent company to be strictly liable where it is linked to, inter alia, gross human rights violations occurring in high-risk contexts and victims cannot access remediation in the host state.[247] Albania's Company Law codifies enterprise liability to address the risk of subsidiary insolvency or undercapitalisation.[248] Notably, this law adopts a novel definition of control being, inter alia, "where one company regularly behaves and acts subject to the directions or instructions of another company".[249] Janet Dine writes that this could "include relationships such as franchising or other kinds of supply or distribution [or] outsourcing", to recognise that a "significant relationship between companies is the flow of money rather than the share structure",[250] although the law does not explicitly account for contractual arrangements.[251] This law notably provides a right of action against the corporate *group* to persons harmed by the activity of any 'controlled' entity.[252]

[244] For example, mining activities, *Das* (n132) [482].
[245] *ibid* [403].
[246] Muchlinski 2010 (n18) 926; Muchlinski (n17) 152.
[247] Mares (n115) 273–274.
[248] Dine (n111) 44.
[249] s.207(1) ibid 62.
[250] s.208(4) *ibid* 66.
[251] *ibid* 68.
[252] *ibid* 63.

However, in a network structure, as considered here, a determination of the firm's own fault may additionally be required to extend liability for third-party harm.[253] This links to Cassell's argument for extended liability where the harm is caused by a company's inadequate due diligence. France has set a precedent in legislating for fault-based extended corporate liability through its Duty of Vigilance Law. Although opposition from business reversed the proposed burden of proof initially on the defendant company;[254] the law seminally prescribes, inter alia, a mandatory duty of 'vigilance' on large French companies to identify and prevent "serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment" extending to controlled affiliates and subcontractors and suppliers with which it has "an established commercial relationship".[255] It also provides victims a right of action where the vigilance plan is unfulfilled or inadequate.[256] According to Sandra Cossart et al, France's Constitutional Council "confirmed the strength and importance of general civil liability principles, and the ability to apply them worldwide without being inhibited by the corporate veil" (p.322).[257] The law therefore seems to manage the friction with the separate entities norm by prescribing personal not vicarious liability.

Instructively, the Albanian and French laws provide a precedent for extended liability on the basis of a company's *commercial relations* with *another* entity[258] rather than its shareholding or operational control; this is important if corporate accountability legislation is to provide for, as Witting argues, "business form neutrality".[259] A commercial relations nexus should also not deter a buyer from engaging in its supplier's operations, since this relationship will not alone 'trigger' liability risk. Subsequent legislative initiatives might succeed in retaining the reversed burden of proof to hold the defendant company *prima facie* liable, which would provide a strong incentive to exercise due diligence and be more favourable to plaintiffs. Conversely, a reversed burden of proof indicates a strict (or vicarious) liability ethos; however, the due diligence defence would, recalling Cassell's thesis, retain a fault-based approach to third-party liability.[260]

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[253] Witting (n6) 173; Deva argues that where a company aware of human rights violations by a business relation takes no remedial steps is jointly responsible for the violations, (n51) 21.
[254] *ibid* 317, 321.
[255] Cossart et al (n237) 320.
[256] *ibid* 321.
[257] *Ibid* 322.
[258] See also Witting's thesis, section 3.3.
[259] Witting (n6) 5.
[260] Cassell (n137) 181. See section 3.3.

One concern might be that a company would reduce the level of its engagement with suppliers to avoid the liability threshold. However, given that global buyers are likely already held socially accountable for their suppliers' behaviour,[261] they may welcome statutory clarification on the reach of due diligence duties to provide legal certainty,[262] and avoid the uncertain development of duties of care in tort.[263] Another concern might be that this places an overly onerous burden on small and medium businesses; an eventual law might limit their duty to where operating in high-risk environments in line with Principles' justification for limiting the scope of HRDD,[264] or follow the French example and limit jurisdiction to large companies.

Might future legislation recognise a right of action for an individual harmed by any entity in supply chain network, in line with MacDonald's thesis? One legal regime reflecting "an attempt at creating 'network liability"' is product liability law which establishes joint and several liability among all entities in the manufacturing and supply chain.[265] The underlying premise of such regimes is that "all of the costs of an economic activity should be borne (or internalised) by those profiting from it",[266] thus relevant to this discussion. However, the development of network liability is unlikely.[267] This presents a legal gap, particularly noting Chen's thesis on the use of indirect exchanges to weaken labour protections. However, legal development is not inconceivable along the lines of Skinner's thesis, to establish a form of strict network liability where fundamental labour rights are violated and the victim is unable to access a remedy in their home country.

Finally, as a general comment on potential friction with national sovereignty, while stronger compliance requirements might deter some trade/investment, economic upgrading should not come at the cost of social downgrading.[268] Governments might indeed be incentivised to better oversee production standards to attract investment.

[261] Hartman and Moeller (n23).
[262] BIICL (n21) 1.
[263] P Muchlinksi 2010 (n18) 921–923.
[264] Guiding Principles, 17 Commentary.
[265] Witting (n6) 236.
[266] *ibid* 245.
[267] Muchlinski 2007 (n18) 316–317; Witting (n6) 183.
[268] Lee and Gereffi (n22) 323.

4.3.4 Private initiatives for supply chain governance

This final section considers *how* a buyer can use its leverage to prevent labour rights abuses. It notes that 'leverage' is variously defined, being withdrawing resources,[269] taking positive steps to remediate harms[270] or a mixture of positive steps and disengagement.[271] Each approach has value depending on the context; for example, it may be justifiable to terminate the commercial relationship where violations of fundamental labour rights are identified.[272] It also notes a tension where a buyer remaining in the relationship, so as to mitigate rights violations, risks a perception of complicity.[273] It suggests this can be managed through the due diligence defence and corporate transparency around the steps taken by the buyer to address supply chain abuse. This section outlines two models which are are not predicated on a buyer using its leverage to *force* suppliers to improve working conditions, but instead view improving working conditions a shared responsibility.

First, distinct from the traditional 'compliance' paradigm of supplier monitoring, where non-compliance with a buyer's code of conduct leads to the termination of the business relationship[274] – noting also that buyers may make it impossible to comply with their code[275] – a more collaborative approach is advocated in the scholarship,[276] which aims not solely to monitor supplier behaviour but at "joint problem solving".[277] Notably, this model requires buyers to "provide better prices to their suppliers so that the latter can afford to pay workers higher wages" and to "introduce better production planning to provide business throughout the year and avoid last-minute orders",[278] as well as supporting capacity-building for workers on their legal rights to promote "bottom-up pressure" to improve working conditions.[279]

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[269] See section 2.3.
[270] ibid.
[271] Section 2.2.
[272] See above fn 59.
[273] Guiding Principles, 19 Commentary.
[274] Locke et al (n9) 325.
[275] Peter Lund-Thomsen and Adam Lindgreen, 'Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going?' (2014) J.Bus.Ethics 123:1 11, 13; see also BIICL research: "buyers often contradict their own HRDD requirements with their purchasing practices, such as lead times, prices and technical specifications." BIICL (n21) 56.
[276] Lund-Thompson and Lindgreen *ibid* 14–15.
[277] *ibid* 321.
[278] *ibid* 15.
[279] *ibid*.

This model is not without limitations; Peter Lund-Thompson and Adam Lindgreen argue, for example, that it is unrealisable where companies have hundreds of suppliers,[280] and that it risks imposing 'Northern' norms (e.g. full-time employment),[281] failing to recognise the "agency" of workers who may chose flexible work.[282] Alternatively, buyers sourcing from the same factory or country could coordinate efforts as is the approach of the Accord on Building and Fire Safety in Bangladesh (the Accord) which arose out of the Rana Plaza tragedy and commits signatory buyers to, inter alia, retaining current production levels and paying a price sufficient for suppliers to afford factory repairs in line with fire safety inspection reports.[283] Importantly, the Accord departs from a voluntary approach to impose enforceable contractual duties on signatories[284] and stresses contractual inclusivity to give supplier workers a right of action against a buyer which breaches its commitments, as attested by a recent arbitral decision brought under the Accord against a signatory buyer for failing to remedy hazards at a supplier factory.[285] According to Mark Anner et al the Accord represents a new paradigm of corporate accountability.[286] Initiatives like the Accord could also address the critique of normative imposition by including national union representatives in drafting terms and oversight.

Crucially, these approaches require buyers to internalise risks currently externalised to suppliers and passed onto workers[287] by contributing to factory improvements and paying a fair product price.[288] Given that international buyers "command the most rents in the value

[280] *ibid* 17.
[281] *ibid* 18.
[282] *ibid*: 19.
[283] Anner et al (n13) 27–28.
[284] *ibid* 2.
[285] Dominic Rushe, 'Unions Reach $2.3m Settlement on Bangladesh Textile Factory Safety' *(The Guardian* 22 January 2018) <https://www.theguardian.com/business/2018/jan/22/bandgladesh-textile-factory-safety-unions-settlement>.
[286] Anner et al (n13) 2.
[287] *ibid* 9.
[288] For example, BIICL research finds "buyers are hesitant to pay a price that covers minimum wages increases" with suppliers accepting "orders below production cost"; in short "the low value [suppliers] see from the product sits at odds with funding the cost of audits and improvements." BIICL (n21) 32.

chain",[289] it seems reasonable that economic gains are used to protect the rights of those who contribute. This seems a fairer way for social standards to trickle-down the supply chain.[290]

5 Concluding remarks

This paper has sought to examine the human rights responsibilities of global buyers towards workers in their global supply chain. The complexity and length of global supply chains makes regulating them difficult and securing corporate accountability for human rights violations even more so. Although some buyers have responded to regulatory governance gaps by introducing private 'audit' mechanisms of supplier monitoring, these have proved to be largely ineffective and notably failed to protect the Rana Plaza workers. Further, power asymmetries between buyers and suppliers and competitive pressures mean that buyers' own sourcing demands may contribute to labour rights violations. Recognition by the SRSG that sourcing practices may be culpable impacts should drive legal reform where buyers fail to cease the abusive behaviour and remediate adverse impacts. This paper highlights the Accord which presents an innovative transnational approach for holding buyers to their responsible sourcing commitments and granting workers a right of action where these are unfulfilled.

This paper finds the HRDD concept in the Guiding Principles to offer an opportunity for states to impose through legislation a binding due diligence duty or duty of care to ensure that both elements of the HRDD concept – the procedural process and standard of care – are recognised to be part and parcel of business practice. This paper finds support in the scholarship to argue for an expansive duty to *prevent* human rights harm should extend beyond the business' direct activities to entities within its supply chain. It however recognises a need for gradations of civil liability depending on whether the harm results from a direct business relationship (argued here to be where there is, inter alia, a significant commercial relationship) or is more remote in the lower tiers of the chain. Regarding the former, this paper has argued that foreseeable victims of the human rights harm should have a right of action against the lead firm for its failure to prevent harms identified during the due diligence process. Regarding the latter, it proposes a parallel mandatory due diligence regime, with no right of action for victims, but with sanctions for non-compliance, in short a stronger form of existing initiatives. This approach harnesses the power, influence and reach of global business to help address human rights issues in global supply chains. Although primary responsibility lies with the host

[289] Lund-Thomsen and Lindgreen (n275)18.

[290] Businesses typically engage beyond first tier suppliers by requiring their suppliers to undertake due diligence causing a "trickle-down effect", *ibid* 52.

government, the interconnectedness of transnational business organised through GVCs means that harm can be done "at a distance' while economic value flows 'upstream'. This justifies calling on businesses to, use Wood's expression, change the state of affairs.

Although this proposal to impose a binding responsibility to prevent human rights harm caused by a third party blurs the leverage-based and impact-based responsibility distinction, it is argued that a buyer's failure to prevent labour rights abuses where it has the ability and leverage to make a difference is blameworthy (i.e. a culpable omission). This extended responsibility to include specific related entities thus arguably aligns with the parameters of the responsibility to respect. This paper finds France's Duty of Vigilance Law to be an important advance in corporate accountability in this regard and notes that similar initiatives have been considered in other jurisdictions.[291] Subsequent legislative initiatives will hopefully retain the reversed burden of proof. Alongside legislative reform, proposals for judicial development of common law torts should be given serious consideration to address situations where dangerous activities are offshored

National level law reform will not overcome the various barriers to justice faced by human rights victims of corporate human rights violations[292] but it would represent step towards deterring the exploitation of governance gaps and providing access to a remedy for victims of corporate activities offshored to countries less able to manage them.

[291] Cossart (n262) 323.
[292] Guiding Principles, 26 Commentary.

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