

STUDY

Requested by the DROI committee



Access to legal remedies for victims of corporate human rights abuses in third countries



Policy Department for External Relations
Directorate General for External Policies of the Union
PE 603.475 - February 2019

EN

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ABSTRACT

European-based multinational corporations can cause or be complicit in human rights abuses in third countries. Victims of corporate human rights abuses frequently face many hurdles when attempting to hold corporations to account in their own country. Against this backdrop, judicial mechanisms have increasingly been relied on to bring legal proceedings in the home States of the corporations. This study attempts to map out all relevant cases (35 in total) filed in Member States of the European Union on the basis of alleged corporate human rights abuses in third countries. It also provides an in-depth analysis of 12 cases and identifies various obstacles (legal, procedural and practical) faced by claimants in accessing legal remedy. On the basis of these findings, it makes a number of recommendations to the EU institutions in order to improve access to legal remedies in the EU for victims of human rights abuses by European based companies in third countries.

This paper was requested by the European Parliament's Sub-Committee on Human Rights
English-language manuscript was completed on 01 February 2019.

Printed in Belgium.

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This paper will be published on the European Parliament's online database, '[Think tank](#)'.

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ISBN: 978-92-846-4642-5 (pdf)

ISBN: 978-92-846-4643-2 (paper)

doi:10.2861/566720 (pdf)

doi:10.2861/59434 (paper)

Catalogue number: QA-04-19-224-EN-N (pdf)

Catalogue number: QA-04-19-224-EN-C (paper)

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Executive Summary

The use of judicial mechanisms to hold companies to account for human rights abuses in third countries is receiving increased attention. Several publications and reports have mapped out the different barriers victims (rights-holders) face in holding companies to account. This study aims to contribute to research on this topic by focusing on cases in which companies based in the European Union (EU) (EU companies) are accused of human rights abuses in third countries. The study provides in-depth analysis of several such cases with the objective of elucidating how existing opportunities and barriers to holding companies to account for human rights abuses play out in concrete cases brought to courts in the Member States of the EU (EU MS). These case studies detail the nature of the alleged human rights abuse, the relationship between the EU company and the abuse, and a brief history of the litigation, including the current status or outcome of the case. For each of the cases, we also attempted to identify the main constraining (barriers) and enabling (opportunities) factors for the claimants to access the courts and obtain a remedy.

The study briefly reviews the literature on the main barriers to accessing legal remedies for corporate human rights abuses in third countries. This overview starts with an introduction to the third pillar of the United Nations Guiding Principles on Business and Human Rights (UNGPs) and an overview of the main barriers identified in the literature. The main positions of the different EU bodies and other relevant organisations are presented in Annex 1.

The study then maps out all relevant cases in EU MS on human rights abuses by businesses in third countries (35 cases in total) in order to assess the distribution of cases across EU MS. For each research step, different data collection approaches were used. The mapping was based on screening specialized websites, existing mappings from other studies and consultation of academic experts via e-mail. On the basis of these sources, we drew up an inventory of existing cases and provided key information on the company involved, the EU MS in which the case took place, the nature of the abuse and the outcome. The mapping reveals that most cases involve major multinational corporations listed in the Fortune 500 non-US companies based in only a few EU MS, notably France, Germany, the Netherlands and the United Kingdom. In order to better understand this distribution, we also analyse the number of cases and their distribution in one of the main non-judicial mechanisms, namely the system of National Contact Points linked to the OECD Guidelines on Multinational Enterprises. This analysis shows a similar pattern. The mapping also reveals that: cases are brought to court on a range of human rights issues; there is little evolution over time; a wide range of sectors are involved with a slight overrepresentation of companies in natural resources extraction (mining, forestry and petroleum); and human rights abuses occur across many third countries (21 different countries in total). Finally, the mapping revealed that few cases lead to a decision finding the defendant company liable or an out-of-court settlement.

Based on the mapping, we selected 12 cases brought before EU MS courts for further research. The case selection was based on several criteria. First, cases were chosen from different EU MS and in relation to different companies engaged in different economic sectors. Second, cases were selected involving different types of human rights abuses and environmental damages allegedly perpetrated either directly or indirectly (through complicity) by multinational companies or their business partners. Third, cases were selected which had already been under way for some time. Finally, cases with varying outcomes were included.

The case studies are based on desk research and consultations with experts and lawyers involved. For each case, primary and secondary sources were consulted and people involved contacted. All cases were written up using an identical template which focused on (1) the legal background of the country (civil/criminal procedure available against companies and recent legal developments), (2)

the history of the case (company and sector involved, nature of the human rights abuse), (3) discussion of the case and procedural history (who filed the complaint, against whom, before which court, arguments presented and description of the different steps of the procedure), (4) outcome of the case and (5) identification of opportunities and legal and practical barriers for access to justice and remedies.

For France, the study analyses three cases. The joint Amesys and Nexa case relates to alleged complicity in war crimes, crimes against humanity and acts of torture in Libya and Egypt by a surveillance equipment company. The Lafarge case concerns allegations of complicity in war crimes, crimes against humanity and financing of terrorist operations by Lafarge in Syria. In the Vinci case, allegations were put forward of forced labour, enslavement, deliberate endangerment of migrant workers' lives, as well as working conditions incompatible with human dignity by Vinci in Qatar. For Germany, the study analyses three cases. The KiK case relates to accusations that the German retailer KiK failed to provide a healthy and safe working environment and prevent the harm suffered by the victims of a fire that broke out in a textile factory owned by one of its suppliers in Pakistan, which resulted in the death of many workers and left dozen more injured. The Danzer case is about the alleged involvement of the German managers of the company in a number of human rights abuses committed by security forces against a forest community in the Democratic Republic of the Congo. The RWE case concerns the alleged share of responsibility of a German electricity supply company in the harmful consequences of climate change suffered by a Peruvian farmer. For Italy, the study focuses on the ENI case, which is about alleged environmental damage and human rights violations due to an oil spill arising out of the Italian company's activities in Nigeria which affected the health and the livelihood of the local community. For the Netherlands, two cases are presented. In the Trafigura case, the UK company was accused of having disposed of, without adequate treatment, hazardous waste in Côte d'Ivoire, which affected the health and livelihood of the residents. The Shell case is about environmental damage and human rights violations due to oil spills allegedly resulting from Shell's operations in the Niger Delta. For Sweden, the study focuses on the Boliden case in which the Swedish mining company was accused of exporting industrial waste to Chile where it was disposed of by a subcontractor of the company without being adequately processed, allegedly affecting the health of the local communities. Finally, for the United Kingdom, the study analyses three cases. Legal proceedings were brought in the UK by another group of Nigerian citizens against Shell on the basis of the same abuses allegedly committed by the company in the case of Shell trialled in the Netherlands. The Xstrata case concerns alleged complicity, by the company, in police violence perpetrated during environmental protests in Peru, including participation in murder, injury, assault and unlawful detention. In the Vedanta case, the UK company was accused of releasing toxic effluent from its operations of the Nchanga mine in Zambia into the waterways and the local environment, which affected the lands and the livelihood of the surrounding communities.

The final part of the study focuses on conclusions and recommendations for both internal and external EU policy.

Regarding the recommendations in relation to internal policies, it is firstly recommended to strengthen human rights due diligence requirements, in particular through the adoption of a new legislation at the EU level requiring mandatory human rights due diligence across sectors, drawing on the model provided by the French Law on the Duty of Vigilance, but with wider scope of application and a reversed burden of proof. This recommendation would address many of the issues observed in the various case-studies around the attribution of legal liability to parent companies in corporate groups, by imposing a legal duty on the parent company to carry out due diligence throughout the supply chain. It would also help bridge the regulatory gap by creating a much needed level-playing field in Business and Human Rights at European level. Failing the adoption of such legislation at EU level, it is suggested that the European Commission make the adoption of

stringent company-based human rights due diligence instruments a requirement for companies in the context of public procurement or investment funds. Second, the study proposes to revise the Brussels I Recast Regulation to include two new provisions. The first would be specific to civil claims based on alleged corporate human rights abuses and extend the jurisdiction of the courts of the EU MS where the EU parent company is domiciled to claims over its foreign subsidiary or business partner when the claims are so closely connected that it is expedient to hear and rule on them together. This would foster greater legal certainty and predictability and ensure access to the European fora for victims of corporate human rights abuses by foreign subsidiaries or business partners of EU companies in third countries. Second, it is suggested to establish a *forum necessitatis* on the basis of which the courts of an EU MS may, on an exceptional basis, hear the case brought before them if the right to a fair trial or the right to access to justice so requires, and the dispute has a sufficient connection with the EU MS of the court seized. This would ensure that the right to access to justice for third country claimants is respected for disputes linked to EU territory. The study also proposes to encourage EU MS to assume jurisdiction over criminal cases involving their nationals (companies, staff, and executives) for corporate human rights abuses in third countries, and to exercise universal jurisdiction under the conditions set out by international law. Third, with regard to applicable law, many of our case studies have revealed issues with the current rule under the Rome II Regulation, which provides that the law applicable to civil liability claims is the law of the place where the damage occurred. In order to address these issues, the study makes two recommendations. First, it is submitted that the EU encourage EU MS to make use of the overriding mandatory provisions and public policy exception in the context of business-related human rights claims, in order to substitute the law normally applicable to the dispute for its own law or relevant provisions thereof when the former does not offer sufficient protection for the human rights of the victims. Second, it is submitted that the Rome II Regulation be modified to include a specific choice of law provision for civil claims on alleged business-related human rights abuses committed by EU companies in third countries that would allow the victim to choose between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled. Finally, the study recommends creation of an information exchange platform.

Regarding external policy, the study offers three sets of recommendations. First, it is recommended to strengthen current capacity building programmes in relation to rule of law and access to justice in host countries and human rights defenders, and align them better with the human rights agenda in business. This recommendation follows from the observation that there were significant information gathering issues with the cases analysed. In order to address information imbalances and facilitate information gathering in the countries in which the abuses took place, strengthening the capacity of key information providers could be considered. Second, in relation to trade policy, the study proposes to further assess the possibility of using targeted sanctions against companies under the Generalised System of Preferences (GSP) and free trade agreements. This recommendation follows from the observation that currently only a very limited number of companies are targeted with judicial mechanisms. In order to address corporate human rights abuses more effectively, other instruments might also be considered. Finally, regarding international mechanisms and cooperation agreements, this study recommends promoting the ratification of certain Optional Protocols to United Nations Human Rights Treaties and potentially including them as eligibility requirements under GSP, further support existing international mechanisms (including International Labour Organisation mechanisms), exploring possibilities for international judicial cooperation, and promoting the adoption of the OECD (Organisation for Economic Co-operation and Development) Guidelines on MNEs and the associated institutional mechanism of National Contact Points which can hear 'specific instances' of human rights abuses by multinational enterprises.

1. Introduction

The United Nations Guiding Principles on Business and Human Rights (UNGPs) constituted a new development in the debate on business and human rights. The UNGPs are built on the 'Protect, Respect and Remedy' Framework and introduce three pillars in which action needs to be taken. The first pillar focuses on the State's duty to protect against human rights abuses, the second on corporate responsibility to respect human rights and the third on the victim's right to access an effective remedy where their human rights are harmed. Over the past decade, much has been written on these three pillars. More recently, attention has turned to the third pillar and how to ensure access to remedies. Special attention is being given to how to hold companies to account for their role in human rights abuses in third countries. This study aims to contribute to research on this topic by focusing on cases in which EU companies are accused of human rights abuse in third countries. This focus is becoming increasingly relevant in a world economy characterized by a massive increase in trade in goods and a changed nature of trade. Goods and raw materials are increasingly traded and produced through global supply chains. These global supply chains link companies around the world and they link EU companies to providers and producers in the global South. As a result, the responsibility of these companies for human rights abuses has become an important issue. This is also amplified by current developments in relation to a possible UN treaty on business and human rights. In July 2014, the UN Human Rights Council adopted a resolution establishing an intergovernmental working group mandated to draw up an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (also referred to as the UN Treaty on Business and Human Rights).¹ Several sessions took place between 2015 and 2017, resulting in a "Zero Draft" presented in September 2018, containing material for the future treaty. Article 8 of this draft, in particular, recognizes the right of victims to 'fair, effective and prompt access to justice and remedies',² and affirms that 'State Parties shall guarantee the right of victims, individually or as a group, to present claims to their Courts, and shall provide their domestic judicial and other competent authorities with the necessary jurisdiction... in order to allow for victim's access to adequate, timely and effective remedies'.³ Although initially reluctant, the EU is now involved in drafting this treaty, with two main requirements: 'ensuring that the scope of the discussion is not limited to transnational companies', and that 'the treaty should be firmly rooted in the UNGPs'.⁴ The European Parliament in particular, is 'a staunch supporter of the binding treaty initiative' and has 'expressed full support for the UN-level preparatory work', recognising 'the insufficiency of voluntary action'.⁵

The study shows that companies can be held to account for human rights abuses through a variety of judicial and non-judicial state and non-state mechanisms. They differ *inter alia* in terms of who has access, the procedures followed and outcomes. Currently, there is no exhaustive overview of all possible mechanisms or finalized or ongoing cases. For the purpose of this study, we have limited our focus to the use of judicial mechanisms in EU MS and aimed to provide an overview of all relevant cases. This study also provides in-depth analysis of several court cases with the objective of elucidating how existing opportunities and barriers to hold companies to account for human rights abuses play out in concrete cases brought to courts in the EU MS. These case studies detail the nature

¹ Resolution A/HRC/26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', 14 July 2014.

² Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, 16 July 2018, Article 8(1).

³ *Ibid*, Article 8§2.

⁴ European Parliament, 'Towards a binding international treaty on business and human rights', EPRS Briefing, April 2018, p. 10.

⁵ *Ibid*., p. 11.

of the alleged human rights abuse, the relationship between the EU company and the abuse, and the main facts and proceedings, including the current status or outcome of the court case. For each of the cases we also attempted to identify the main enabling and constraining factors for the claimants in accessing the courts and remedies.

This study consists of four parts. In the next chapter, we introduce our methodological approach. This will be followed by a brief review of the literature on the main barriers in terms of access to legal remedies for corporate human rights abuses in third countries. This overview starts with an introduction to the third pillar of the UNGP and an overview of the main barriers identified in the literature. Next, we briefly present the main positions of the different EU bodies and other relevant organisations. In the following chapter we present the results of our mapping of all identified cases and discuss the main characteristics of the cases and their distribution across EU MS. In order to better understand this distribution, we also analyse the number of cases and their distribution of one of the main non-judicial mechanisms, namely the system of National Contact Points linked to the OECD Guidelines on Multinational Enterprises. The subsequent chapter constitutes the main part of the study and provides an in-depth analysis of 12 cases. All cases follow a similar format and focus on the key barriers to holding companies to account for human rights abuses. Finally, we present a comparative table with an overview of the 12 cases. The final chapter focuses on recommendations concerning both internal policies and external EU policies.

2. Methodology

This study provides a mapping of all relevant cases in EU MS of human rights abuses of businesses in third countries, in order to assess the distribution of cases across EU MS. It also provides an in-depth analysis of 12 cases. For each research step, different data collection approaches were used. We first discuss the approach used for the mapping of cases. Next we discuss the case selection. Finally, we present how we approached the case studies.

The mapping was based on three activities. First, we searched three specialized websites which keep track of business and human rights cases: the website of the European Center for Constitutional and Human Rights (ECCHR), an independent, non-profit legal and educational organisation dedicated to the protection of human rights which keeps track of human right abuses by businesses; the website of Sherpa, an organisation focusing specifically on victims of economic crimes; and the website of the Business & Human Rights Resource Center, an independent non-profit organisation based in the UK which works to advance human rights in business and eradicate abuse, and which systematically reports on human rights cases in which businesses are involved. Second, in addition to these websites, we also made use of on existing mappings by two other independent studies (Jennifer Zerk (2015) and Liesbeth Enneking (2017)). Finally, we conducted a written consultation of 21 academic human rights experts from 14 EU MS. Each of the academic experts received an individual mail with the results of the mapping so far and a request to add additional cases. These consultations confirmed the cases identified on the basis of the specialized websites.

On the basis of these sources we made an inventory of existing cases in order to assess their distribution across EU MS. The analysis (next chapter) shows an uneven distribution of cases across EU MS. In order to explore this finding further, and compare it to other mechanisms which provide access to remedy, we performed an analysis of 'specific instances' submitted to a National Contact Point (NCP) set up under the OECD Guidelines for Multinational Enterprises. The mechanism of submitting 'specific instances' allows stakeholders to hold businesses to account for alleged human rights abuses. To analyse the distribution of specific instances across EU MS we analysed the OECD database on specific instances available at: <http://mneguidelines.oecd.org/database/>.

Based on the mapping we selected 12 cases for further research. The selection of the cases was based on 4 criteria. Firstly, we aimed to analyse cases from different EU MS and in relation to different companies engaged in different economic sectors. Secondly, we selected cases involving different types of human rights and environmental abuses allegedly carried out either directly or indirectly (through complicity) by multinational companies. Thirdly we chose cases with already a significant timeline. Fourthly, we selected cases that reached different outcomes.

The case studies are based on desk research and consultations with experts and lawyers involved. For each case we ensured that we were able to consult sources in the original language. For each case we consulted primary and secondary sources and contacted people involved or experts to gather further information specifically in relation to barriers and opportunities for access to justice and remedy. When interviews were conducted, both claimants and defendants were contacted. Concerning the primary and secondary sources we consulted court decisions, academic articles, newspaper articles, press-releases and reports from businesses involved in the case-studies, and NGO reports. Overall, there were more NGO sources than non-NGO sources available. When court decisions or documents have been translated, it is specified in the footnotes of the cases in chapter 5. Concerning the consultations, we contacted, via email, telephone or in person, in some cases additional experts and victims' lawyers if information was missing on the basis of the written documents. We also participated in three events directly relevant for the study, namely the United Nations Forum on Business and Human Rights, a symposium in Bochum about the KiK case, and a hearing in the Landgericht of Dortmund regarding the KiK case.

3. Literature review

3.1. Introduction

This chapter introduces the third pillar of the UNGPs and the judicial mechanisms available to address corporate human rights abuses in third countries. It also maps out the different barriers to access to justice frequently encountered by claimants.⁶ In Annex 1 the study gives an overview of the different positions of EU bodies and other international organisations. Before we proceed, some conceptual distinctions and definitions are needed. Victims are the persons or communities whose human rights are directly affected by businesses.⁷ Stakeholders constitute a broader group of persons and organisations which can have a specific stake in the case, which are indirectly affected by the human rights abuses of businesses or which represent the victims. Businesses refer, following the opinion of the Fundamental Rights Agency (FRA),⁸ to any form of business entity. When referring to businesses, a distinction is often made between the parent company (large multinational domiciled in an EU MS) targeted by the claim and the foreign subsidiary (operating in a third country where the human rights abuse took place). One also needs to make a distinction between access to justice and the right to an effective remedy. Access to justice refers to the right to a fair judicial system. Judicial systems should have the capacity to address business-related human rights abuses by providing adequate remedy for actual or potential victims. Effective remedy refers to whether the

⁶ It goes beyond the scope of this report to provide a comprehensive and in-depth discussion of the literature. Recent relevant publications which provide an extensive overview include Bright (2013), Rubio and Yiannibas (2017), Enneking (2017, forthcoming), Chenoweth et al. (2017), Skinner, McCorquodale and De Schutter (2013), Vandenhole and Rodriguez (2016) and Zerk (2014)

⁷ UN OHCHR, 2012

⁸ 'Improving access to remedy in the area of business and human rights at the EU level', Opinion of the European Union Agency for Fundamental Rights, 1/2017, Vienna, 10 April 2017, p. 20. See also J. Wouters and A.-L. Chané, 'Multinational Corporations in International Law', in M. Noortmann, A. Reinisch and C. Ryngaert (eds.), *Non-State Actors in International Law*, Oxford, Hart Publishing, 2015, pp. 225-251; J. Wouters, C. Ryngaert, T. Ruys and G. De Baere, *International Law: a European Perspective*, Hart Publishing, 2018.

remedy provided effectively redressed or repaired the harm caused.⁹ Finally, throughout the literature the concepts of human rights violations and human rights abuses are used interchangeably. In this study we consistently refer to human rights abuses following the UNGPs.

3.2. Third Pillar of the United Nations Guiding Principles

The third pillar of the UNGPs focuses on access to effective remedy for victims of human rights abuses by businesses. There are three broad types of mechanisms which can be used for this purpose: judicial mechanisms, state based non-judicial mechanisms and non-state-based grievance mechanisms. State-based judicial mechanisms (referred to in principle 26 of the UNGPs) are defined as '(the) appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.¹⁰ They are discussed in the next section.

The state-based non-judicial grievance mechanisms include different forms of administrative bodies which meet the effectiveness criteria of principle 31 of the UNGPs, namely mechanisms which are *inter alia* legitimate, accessible, predictable, equitable, transparent and rights-compatible (in line with internationally recognised human rights).¹¹ The Office of the High Commissioner for Human Rights (OHCHR) project identifies four types of state-based non-judicial mechanisms. First, there are complaint mechanisms at different administrative departments with public regulatory and enforcement responsibilities. Second, inspectorates linked to different administrative departments relevant for human rights such as labour ministries, environmental ministries, etc. have grievance mechanisms. Third, there are different types of ombudspersons. Finally, there are state-based mediation and conciliation bodies. Non-State-based grievance mechanisms may encompass company-based or multi-stakeholder based grievance mechanisms, as well as regional and international bodies. The OHCHR Accountability and Remedy project (2018) identifies three types of non-state based grievance mechanisms. First, there are company-based grievance mechanisms which are established and administered by businesses.¹² Second, there are grievance mechanisms developed by industry, multi-stakeholder initiatives or other collaborative initiatives including grievance mechanisms linked to international certification bodies. Third, there are grievance mechanisms developed by international financial institutions, which aim to provide a means by which a person (or group of people) whose human rights have been adversely affected by an institution-financed project can raise a complaint with the financial institution itself.¹³

3.3. Judicial mechanisms

Different ways have been identified in which businesses can become implicated in human rights abuses. A study on Corporate liability for Gross Human Rights Abuses has identified four scenarios in particular, which are not exhaustive:

- cases where the company, its executives and or staff are accused of being directly responsible for human rights abuses;
- cases where companies are providing goods, technology, services or other resources to governments or State authorities which are then reported to be used in abusive or repressive ways;

⁹ Vandenhole and Rodriguez, 2016, p. 14

¹⁰ UNGP 2011, p. 28

¹¹ UNGP 2011, pp. 33-34.

¹² Office of the High Commissioner for Human Rights (2018), p. 10

¹³ Office of the High Commissioner for Human Rights (2018), p. 13

- cases in which companies are accused of having provided information, assurance, logistical support or financial support to other companies which are causing human rights abuses (for instance when security services have been enlisted to assist the resolution of a dispute surrounding the business activities or when a company provides a certificate of compliance with labour rights to a company breaching these labour rights)
- cases in which the companies have made investments in projects or governments or State authorities with poor human rights records or with connections to known abusers accused of being complicit in human rights abuses.¹⁴

To this list, we could add another scenario covering the cases where companies are sourcing products from suppliers which are committing human rights abuses.

Increasingly, companies have been brought to court in the EU to account for such type of human rights abuses in third countries. Cases normally take either the form of criminal proceedings initiated at the instigation of victims and NGOs, or the form of civil proceedings based on the general principles of torts.¹⁵ Parallel civil and criminal proceedings arising out of the same conduct are also possible in many jurisdictions.¹⁶ In some civil law jurisdictions such as France, Belgium, or Ukraine, victims can join criminal proceedings as *parties civiles*.¹⁷

Overall, there have been a greater number of legal proceedings brought against companies for human rights abuses in third countries based on private law (civil liability) than there have been based on criminal law.¹⁸ This might be linked to the fact that lower thresholds in terms of applicable standards usually apply to civil cases as opposed to criminal ones. Concerning criminal law claims, a survey carried out in 16 countries concluded that it was the prevailing practice (in 11 of the countries surveyed: Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States) to expand criminal liability so as to apply to legal persons as well as natural persons.¹⁹

As far as private law claims are concerned, in the absence of civil regimes specifically designed for human rights abuses (with the exception of the United States), claimants have been bringing their claims on the basis of general tort law principles under domestic law.²⁰ If these principles vary from one domestic system to another, common features can be found and in particular domestic law tests for liability in both common law and civil law jurisdictions are based either on the intent of the perpetrator or on its negligence.²¹ Negligence claims often require the claimants to show first, the existence of a duty of care owed to them by the defendant company; second, that such duty of care was breached by the defendant; and third that the breach of duty caused the claimants a damage.²² The burden of proof of the elements constitutive of civil liability usually falls on the claimants and

¹⁴ J. Zerk, 'Corporate liability for gross human rights abuses ...' *op. cit.*, p. 6. Most cases covered in this study (see next chapter) fall into one of the four categories. However, some cases such as the RWE are more difficult to categorize in one of the four categories since the causal link and the specific human rights abuse fall less under the category of *gross* human rights abuses.

¹⁵ L. F.H. Enneking, 'Judicial remedies: The issue of applicable law' *Rights in Business* (Routledge, 2017), 38, pp. 40-41.

¹⁶ J. Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies', report prepared for the Office of the UN High Commissioner for Human Rights, available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> (last accessed on 26 November 2018), p. 43.

¹⁷ *Ibid.*, p. 45.

¹⁸ *Ibid.*, p. 9.

¹⁹ Thompson and Ramasastry, p. 13

²⁰ J. Zerk, 'Corporate liability for gross human rights abuses ...' *op. cit.*, p. 45.

²¹ *Ibid.*, p. 43.

²² *Ibid.*, p. 44.

frequently poses a significant hurdle in accessing effective remedies,²³ especially due to complex corporate structures and the lack of access to information and internal documents preventing claimants from substantiating their claims.²⁴

3.4. Use of judicial mechanisms

To date, the vast majority of foreign direct liability cases has been brought before US courts on the basis of the Alien Tort Statute (ATS).²⁵ The ATS is a federal law of the United States dating back to 1789 and revived in 1980,²⁶ which grants federal courts jurisdiction over civil claims brought by non-US claimants in reparation of violations of international law. Over 150 claims were filed before US federal courts on the basis of the ATS against multinational companies for alleged human rights and environmental abuses.²⁷ However, the exercise of extraterritorial jurisdiction by US courts over conduct of multinational companies on the basis of the ATS was dramatically reduced over the past few years following some prominent cases. The first case is the *Kiobel* case concerning the alleged involvement of Shell in human rights abuses perpetrated by the Nigerian military regime against environmental activists of the Ogoniland region. The case was dismissed by the Second Circuit Court in September 2010 on jurisdictional grounds.²⁸ On 17 April 2013, the US Supreme Court affirmed the dismissal on the basis of the presumption against extraterritoriality, stating that the ATS did not apply to cases involving foreign companies when all the relevant conduct took place outside the United States.²⁹ Another case influencing the use of the ATS for corporate-related human rights abuses in third countries is the recent *Jesner* case.³⁰ In this case proceedings were brought to the US by approximately 6,000 foreign nationals seeking compensation under the ATS for the deaths and injuries that they had suffered as a result of acts of terrorism in the Middle East that, they argued, were enabled and facilitated by the defendant, Arab Bank PLC, a Jordanian financial institution with a branch in New York. The US Supreme Court dismissed the case on the grounds that foreign companies may not be sued under the ATS.³¹

As possibilities to bring foreign direct liability cases to the US on the basis of the ATS have gradually become scarcer, attention has turned to the role of EU MS in providing a forum for such claims.³² A 2015 comparative study revealed that approximately 40 foreign direct liability cases were brought before European courts between 1990 and 2015, 35 of which were in the following six countries: Belgium, France, Germany, the Netherlands, the UK and Switzerland. Out of these 35 cases on which the study focused, only three resulted in a final judicial decision finding the defendant company liable.³³ Out of the 20 *civil* law proceedings brought against companies, 8 were settled out of court (of which 7 were brought in the UK (and 1 of these was only partly settled), and 1 in Germany), 3 were dismissed (of which 1 was brought in France and 2 in the UK), 7 were still ongoing (2 in Germany, 4 in the UK and 1 in the Netherlands), and compensation was actually granted by the court in only 2 of these cases (1 in France and 1 in the Netherlands though for the latter compensation was only

²³ *Ibid.*, p. 44.

²⁴ Amnesty International, 'Injustice Incorporated: Corporate Abuse and the Human Right to Remedy', 2014.

²⁵ L. F.H. Enneking, 'Judicial remedies ...', *op. cit.*, p. 39.

²⁶ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁷ Enneking, *op. cit.*, p. 40.

²⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010).

²⁹ *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Sup. Ct. Apr. 17, 2013).

³⁰ *Jesner v Arab Bank, Plc*, No 16-499, 584 U.S. (2018).

³¹ *Ibid.*

³² J. Kirshner, 'A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses', 13 *Northwestern Journal of International Human Rights*, 2015, p. 1.

³³ L. F.H. Enneking, 'Judicial remedies ...', *op. cit.*, p. 41.

partial).³⁴ Out of the 15 *criminal* proceedings brought against companies, 1 was settled out of court (in France), 1 was dismissed (in Belgium), 1 was dropped (in the Netherlands), the investigation was ended by the prosecutor in 4 cases (1 in Germany, 1 in France and 2 in Switzerland), 5 were still ongoing (in France), the status of the proceedings was unclear for 2 of them (in Germany and in France) and only 1 gave rise to a conviction (in the Netherlands).³⁵ Enneking states that many of these cases have been dismissed at an early stage of the proceedings, often on the basis of issues of jurisdiction or lack of sufficient evidence substantiating the claims.³⁶

3.5. Barriers to Access to Justice - Legal Remedies

Three key categories of recurrent obstacles to justice and reparation that victims of business-related human rights abuses face when seeking legal remedies have been identified in a study carried out by Amnesty International. The study draws on four case studies: the Bhopal gas leak disaster in India, the Omai gold mine dam rupture in Guyana, the OK Tedi mine waste dumping in New Guinea, and the hazardous waste dumping in Côte d'Ivoire.³⁷ The first category concerns legal challenges and includes issues related to the difficulty for claimants to secure legal representation, the complexity of corporate structures, the difficulties in establishing parent company liability, and the jurisdictional challenges faced by claimants. The second category revolves around the lack of access to information that is essential for victims to support their claim. The third category concerns the power of influence of multinational companies which can result in States being unwilling or unable to develop regulatory and/or legal instruments to hold companies to account.

Zerk identifies three crucial phases to initiate a case.³⁸ In each phase specific barriers can occur. First, there is the phase of getting started which can be inhibited by lack of funding, refusal of standing and lack of access to legal counsel. The second phase is surviving motions of dismissal which includes *forum non conveniens*. The third phase constitutes the applicable tests for corporate liability (e.g. of the parent company). Obstacles to access to legal remedies extend throughout the court process to include procedural issues of time limitations and access to information, as well as legal obstacles (such as issues of applicable law), up to the end of the judicial proceedings (with issues surrounding access to effective remedies).³⁹ As a result, States are failing to meet their obligation to protect human rights and ensure effective access to judicial remedies to victims of businesses operating outside their territories.⁴⁰

3.5.1 Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed

The UNGPs tackle the issue of access to remedy, and more particularly the obstacles that can prevent or complicate such an access. Principle 26, in particular, lists possible barriers that 'could lead to a denial of access to remedy'. These barriers are the following:

Attribution of legal responsibility among members of a corporate group. Large transnational corporate groups are 'organized as a network of distinct legal entities, with variable degrees of

³⁴ Ibid., p. 42.

³⁵ Ibid.

³⁶ Ibid., p. 41.

³⁷ Amnesty International, 'Injustice Incorporated', op. cit.

³⁸ Zerk, 'Corporate liability for gross human rights abuses', op. cit., p. 100.

³⁹ G. Skinner, R. McCorquodale, O. De Schutter, 'The Third Pillar - Access to Judicial Remedies for Human Rights Violations by Transnational Business', December 2013 available at: <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657dfa6a4963597fed598b/1483046398204/The-Third-Pillar-FINAL1.pdf> (last accessed on 26 November 2018).

⁴⁰ Ibid., p. 13.

influence exercised by the parent company over its subsidiaries (...), by one business on its business partner (...), within joint ventures and consortium, and by other corporate structures'.⁴¹ Under the company law doctrine of separate legal personality, each separately incorporated legal entity within a corporate group is treated as having a separate existence from its owners and managers,⁴² and is governed by the law of its country of incorporation. This entails that the parent company will not automatically be held liable for the actions or omissions of its subsidiary merely on the basis that it owns shares in the subsidiary (even a wholly owned one).⁴³ The difficulty in holding parent companies legally accountable for the human rights harms arising out of the activities of their subsidiaries is thought to be one of the main hurdles faced by claimants in cases involving business-related human rights abuses.⁴⁴ Lifting the corporate veil, to attribute the acts or omissions of a subsidiary to a parent company can be a very challenging process. The obstacle of the corporate veil can sometimes be circumvented by establishing the liability of the parent company on the basis of its own negligence in the way the subsidiary was managed.⁴⁵ However, this also requires the claimants to gather evidence regarding corporate structure which the claimants often struggle to get access to in practice.⁴⁶ These challenges applies to an even greater extent in relation to suppliers and other business relationships of the company.

Denial of justice in the host State and difficulties in accessing home State courts. Issues relating to effective access to justice often arise when victims of corporate human rights abuses bring proceedings in their own country as host States are frequently unwilling or unable to hold companies accountable for their human rights impacts for fear of losing foreign direct investment. Hurdles to accessing legal remedies are particularly acute when the host State is a developing country and faces one or several of the following challenges: underdeveloped justice system, lack of respect for the rule of law, weak enforcement mechanisms, lack of judicial independence, issues of corruption among state officials, or lack of measures to ensure protection of victims and human rights defenders from intimidation and threats or reprisals.⁴⁷ In this context, claimants often seek justice before the home State courts. However, establishing jurisdiction in the company's home State can prove difficult for the claimants who are faced with recurrent jurisdiction hurdles.⁴⁸ Examples of these include the doctrine of *forum non conveniens*, which can 'prevent a case from moving forward in jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue for the case due to the location of the parties, witnesses, evidence, and given that the local court is more familiar with the local law, which is often the law applied in the case'.⁴⁹ Although the European Court of Justice (ECJ) has ruled out the applicability of the doctrine of *forum non conveniens* in claims against EU domiciled defendants brought before EU MS courts,⁵⁰ it is, however, applicable in many

⁴¹ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 56.

⁴² UN High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse' *op. cit.*, p. 9.

⁴³ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, pp. 65-67. See also Vandenhole and Lizarazo Rodriguez, 'UNGP on Business and Human Rights...', *op. cit.*, p. 45.

⁴⁴ Amnesty International, 'Injustice Incorporated', *op. cit.*

⁴⁵ UN High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse' /HRC/32/19, 10 May 2016, p. 9.

⁴⁶ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, pp. 65-67. See also below about the difficulties accessing the information necessary to prove a claim, as well as Vandenhole and Lizarazo Rodriguez, 'UNGP on Business and Human Rights...', *op. cit.*, pp. 90-91, and Amnesty International, 'Injustice Incorporated', *op. cit.*, pp. 122-127.

⁴⁷ C. Bright, 'L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales', *op. cit.*, p. 31.

⁴⁸ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, p. 45.

⁴⁹ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 6. See also Vandenhole and Lizarazo Rodriguez, 'UNGP on Business and Human Rights...', *op. cit.*, p. 94.

⁵⁰ *Owusu v Jackson and Others*, C-281/02 [2005] ECR I-1383

common law countries such as Canada, the USA and Australia and might well be reintroduced in the UK in cases involving UK domiciled defendants following Brexit. Other jurisdictional hurdles include the difficulties in establishing the jurisdiction of the home State courts over both the parent company and its foreign subsidiaries, subcontractors or suppliers. In addition, claimants such as associations and NGOs can also encounter standing issues.⁵¹ Finally, in criminal law cases, prosecutors have discretion on whether or not to pursue a legal action, which also creates challenges.⁵²

Exclusion of specific social groups. Although human rights are theoretically universal, particularly vulnerable groups such as indigenous people do not, in practice, enjoy the same level of legal protection of their human rights as most people.⁵³ For example, with regard to indigenous people, 'the lack of control and accountability mechanisms constitutes a major impediment to effective and adequate remedy' in case of human rights abuses by corporate entities.⁵⁴ Migrants form another particularly affected part of the population due to their particular vulnerability which means that they may be 'unable to effectively enjoy their human rights, are at increased risk of violations and abuse', and are often unable to access judicial remedy.⁵⁵ In particular, they may face marginalization, exclusion, or discrimination when seeking judicial remedy.

3.5.2 Practical and procedural barriers to accessing judicial remedy

Costs of bringing a claim. Seeking remedy in Europe can prove very costly for the claimants as a result of the cost of legal and technical experts, translators when required, the costs associated with gathering evidence in a foreign State to support a claim, and the fact that cases can take over a decade in court.⁵⁶ Claimants often face difficulties in securing the necessary financial resources to be able to pursue their claim as legal aid is not usually available to alleged victims of human rights abuses occurring outside the EU.⁵⁷ In addition, many European States require the losing party to pay the costs of the other party, including the lawyers' fees, which can have a dissuasive effect when the prospects of success are low.⁵⁸

Difficulties in securing legal representation. The aforementioned limited availability of legal aid can have consequences on the possibility to secure legal representation. In addition, claimants can face a lack of access to suitably qualified and experienced legal counsel, as few lawyers and law firms are willing to represent them since 'the litigation is so complex, and the outcomes so uncertain, and the prospect of securing sufficient legal aid to cover costs so unlikely'.⁵⁹ However, this barrier is beyond the scope of this study as the cases selected already reached the Court stage, meaning that the victims were able to secure legal representation.

Inadequate options for aggregating claim. Class or collective actions can be an effective way for a large number of victims to access remedy, especially because they 'have the potential to reduce legal fees and risks for claimants'.⁶⁰ However, most European States have not adopted class action

⁵¹ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, pp. 75-77.

⁵² *Ibid.*, p. 75.

⁵³ Office of the High Commissioner, 'Indigenous Peoples and the United Nations Human Rights System', Fact Sheet No. 9, 2013.

⁵⁴ European Parliament, Report on violation of the rights of indigenous peoples in the world, including land grabbing, 29 May 2018, 2017/2206(INI).

⁵⁵ Office of the High Commissioner and Global Migration Group, 'Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations', 2017.

⁵⁶ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 9.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 10. See also Enneking, 'Judicial remedies', *op. cit.*, p. 68.

⁵⁹ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, pp. 81-82.

⁶⁰ *Ibid.*, p. 82.

mechanisms,⁶¹ although some analogous mechanisms have been created. In addition, even where class actions are possible (e.g. in the United Kingdom), 'considerable negotiation is required between each party's lawyers for the process to be effective, and it remains at the discretion of the court to allow it'.⁶²

State prosecutors lack adequate resources and expertise to investigate. Public prosecution often lacks resources, know-how, or even time to deal with complex transnational cases involving corporate human rights abuses. Some countries have created specialised units to remedy this potential barrier, but in many cases, prosecutors might prefer spending time and resources on fighting national crimes because of 'the extra efforts required to get access to victims, to evidence, the unfamiliarity of the judges with the issues at hand, and the costs of undertaking international prosecutions' in transnational civil litigation cases.⁶³

Corruption and political interference. In many host States, courts can face interference or pressure by political or private actors,⁶⁴ and claimants, witnesses and human rights defenders may encounter fear of reprisals and intimidation.⁶⁵ In some cases (not limited to host States), intimidation can reportedly take the form of retaliatory litigation, when victims or NGOs face claims by businesses in response to their claims.⁶⁶

Difficulties accessing the information necessary to prove a claim. Victims may have difficulties in gaining access to the information required to substantiate their claim.⁶⁷ In most EU MS, this constitute a particular important barrier as there is no discovery or disclosure rule obliging the defendant to divulge information in its possession.⁶⁸ This, in turns, contributes to the difficulties in lifting or circumventing the corporate veil, since claimants may face issues when trying to establish the liability of the parent company in relation to the human rights abuses arising out of its subsidiaries activities (see above).

Different barriers to access to justice can play out in different ways in the various EU MS.

⁶¹ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 10. See also Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, p. 82. See also Enneking, 'Judicial remedies', *op. cit.*, p. 68.

⁶² Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 11.

⁶³ Thompson and Ramasastry, *op. cit.*, p. 18. See also Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, p. 84.

⁶⁴ Vandenhole and Lizarazo Rodriguez, 'UNGP on Business and Human Rights...', *op. cit.*, p. 73.

⁶⁵ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, pp. 83-84.

⁶⁶ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 46.

⁶⁷ Zerk, 'Corporate liability for gross human rights abuses', *op. cit.*, p. 84.

⁶⁸ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 43.

4. Case Mapping

4.1. Mapping of relevant cases of alleged human rights abuses of EU-based companies in third countries

In this chapter we present an overview of the relevant cases following a mapping exercise of all relevant cases in the EU following the methodology outlined in chapter 2.

In total we were able to identify 35 cases. Some companies like Trafigura, Shell and Kik are brought to court in several EU MS. Table 1 summarizes the main characteristics of the identified cases. Table 1 identifies for each case: the EU MS in which a case was filed, the year, the company against which the case was filed, the economic sector of the company, the nature of the alleged human rights abuse, the country where the alleged abuse took place, the current status of the case and the outcome for finalized cases.

The table reveals that most cases concern very large multinational enterprises which are listed in the Fortune top 500 non-US companies. These cases are concentrated in only a few EU MS: France (10), Germany (4), Italy (2), Netherlands (3), Sweden (1) and United Kingdom (10). This concentration might be explained from the fact that many multinational enterprises (MNEs) have their headquarter in one of these MS. An analysis of the recent Fortune top 500 non-US companies shows that the large companies are only concentrated in a few EU MS. These are Germany, France, Italy, the Netherlands, Spain and the United Kingdom. Besides these EU MS the following EU MS have one or two companies from the top 500 list: Luxembourg (1 company), Sweden (1 company), Denmark (1 company), Ireland (2 companies) and Finland (1 company).⁶⁹ In addition, the number of businesses that have operations or controlled suppliers in third countries is smaller in some EU MS than in others. The combination of the fact that mostly very large MNEs are targeted by legal proceedings for corporate human rights abuses on the one hand and that these MNEs are concentrated in only a few EU MS results in the uneven distribution of cases across EU MS.

So, it is noteworthy that in many EU MS no judicial activity takes place vis-à-vis MNEs for human rights abuses in third countries. Other explanations might be that in those countries civil society organisations are focusing less on legal actions, or focus on other domestic environmental, labour and human rights issues perceived as more pressing; that these EU MS do not offer any judicial grounds to file a complaint; that legal aid is not available for the claimants; that there is a lack of law firms ready to represent them on a pro bono or no win no fees basis; or that there is a lack of NGOs ready to support them. We further explore the distribution across EU MS in the next section.

Over time there is little evolution in the number of cases with the exception of 2015 when most cases were filed. For the rest the spread out over time is balanced and the distribution over time is as follows: 2006 (2), 2007 (3), 2009 (1), 2010 (3), 2011 (2), 2012 (2), 2013 (4), 2014 (3), 2015 (8), 2016 (2), 2017 (1) and 2018 (4).

In terms of targeted economic sectors, one can observe that companies from different economic sectors such as consumer goods, oil, textile, banks, construction, natural resource extraction and others are targeted. There is a slight overrepresentation of companies in natural resources extraction (mining, forestry and petroleum). The companies targeted are large MNEs active in multiple countries with brand recognition.

⁶⁹ Fortune top 500 companies: <http://fortune.com/global500/list/filtered?non-us-cos-y-n=true> (last accessed 10 January 2019).

Concerning the nature of the alleged human rights abuses one can also observe significant variation. Cases involve allegations of gross human rights abuses such as murder and complicity to murder, war crimes and crimes against humanity but also issues related to health, environmental justice and several labour rights related issues (workers safety and forced labour).⁷⁰ Table 1 provides for each case some further information on the nature of the abuses which triggered the case.

With regard to the countries in which the abuses took place, we can observe that many countries are involved. In total, the 35 cases cover abuses in 23 mostly low and middle-income countries, including Bangladesh, Cambodia, Chile, China, Colombia (2), Cote d'Ivoire (3), DR Congo, Gabon, Kenya, Liberia (2), Libya, Nigeria (4), Palestine (2), Pakistan (2), Peru (2), Rwanda, Sierra Leone, South Africa, Sudan, Syria (2), Tanzania, Qatar, Yemen and Zambia.

Finally, table 1 reports on the current status of the cases as well as the outcome in case of finalized cases. For the current status we distinguish between on-going cases, dismissed cases, settled cases and finalized cases. For the settled and finalized cases we report on the outcome. Out of the 35 cases concerning allegations of human rights abuses in third countries by EU based companies, 12 cases were dismissed (2 of which were partially settled), 17 are still ongoing (1 of which was partially settled), 4 cases were fully settled out of court with payments of compensation, and only 2 cases led to a successful outcome for the claimants.

⁷⁰ Some of these abuses are not always direct human rights abuses but can lead to human rights abuses.

Table 1: Overview of identified court cases in different EU MS grouped per country

Year (start proceedings)	Company	Sector	Claimants	Court or Prosecutor's Office	Causing alleged HR Abuses or complicity to HR Abuses	Where	Status	Verdict (if applicable)
FRANCE								
2011	Amesys	Surveillance Technology	International Federation for Human Rights (FIDH) and Ligue des Droits de l'Homme (NGOs)	Tribunal de grande instance de Paris	Amesys was accused of complicity in war crimes, crimes against humanity, torture and genocide committed by the Gaddafi government in Libya by providing surveillance equipment which was used to intercept private internet communications, and to identify dissidents who were then arrested and tortured.	Libya	Ongoing	30 May 2017: Amesys declared an "assisted witness".
2014	Auchan	Consumer goods/retail	Peuples solidaires, Sherpa, Collectif Ethique sur l'étiquette (NGOs)	Public Prosecutor's office, Lille	Auchan was accused of using misleading advertisements in relation to the conditions in which clothing was manufactured, in particular with regard to the working conditions at its suppliers in the light of the Rana Plaza factory collapse in Bangladesh (which appeared to have manufactured clothes for the company)	Bangladesh	Ongoing	January 2015: case dismissed due to lack of evidence. June 2015: new complaint filed by NGOs on the basis of deceptive commercial practices
2017	BNP Paribas	Finance	Sherpa, Collectif des parties civiles pour le Rwanda, and Ibuka (NGOs)	Tribunal de grande instance de Paris (pôle génocides et crimes de guerre)	BNP Paribas was accused of complicity in genocide, war crimes and crimes against humanity in Rwanda by virtue of allowing a financial transaction which would have participated to financing the purchase of 80 tons of weapons by the Rwandan government which were used to kill over 800,000 people (mostly of the Tutsi minority) during the Rwandan genocide in 1994.	Rwanda	Ongoing	

2007	COMILOG	Mining	800 former COMILOG workers (Gabonese citizens)	Conseil des Prud'hommes de Paris, then Cour d'Appel de Paris	COMILOG was accused of causing labour rights abuses through unfair dismissal of workers, without due notice or compensation (which can have serious human rights implications) following a railway accident in which a train transporting raw materials from the COMILOG company collided with a passenger train in Congo Brazzaville and in which 100 people died.	Gabon	Finished (defendant ordered to pay compensation)	10 September 2015: the Court of Appeal ruled that COMILOG should compensate the claimants.
2009	Dalhoff, Larsen & Horneman (DLH)	Forestry	Sherpa, Greenpeace France, Global Witness, Les Amis de la Terre (NGOs), and a Liberian citizen	Public Prosecutor, Court of Nantes	DHL was accused of complicity in human rights (HR) abuses during the Liberian civil war (2002-2003) by virtue of purchasing timber from Liberian companies that provided support to the then Liberian Government, despite strong evidence of their involvement in corruption, tax evasion, environmental degradation and UN arms sanctions violations and human rights abuses.	Liberia	Dismissed	15 February 2013: the Prosecutor dismissed the case and required 'no further action'.
2018	Lafarge	Cement	ECCHR and Sherpa (NGOs), and 11 former Syrian employees	Parquet de Paris	Lafarge was accused of deliberate endangerment of people's lives, working conditions incompatible with human dignity, exploitative and forced labour as well as complicity in war crimes and crimes against humanity by virtue of financing of terrorist enterprise (ISIS) in order to maintain the running of their Jalabiya plant between 2012 and 2014.	Syria	Ongoing	28 June 2018: the company was indicted on charges of complicity in crimes against humanity, financing of a terrorist enterprise, and endangerment of people's lives.
2012	Qosmos	Software	International Federation for Human Rights /Ligue Droits de l'Homme (NGOs)	Parquet de Paris	Qosmos was accused of complicity in human rights abuses, by providing surveillance equipment to the Bashar Al Assad government in Syria which was used to identify, arrest and torture dissidents.	Syria	Ongoing	17 April 2015: Qosmos declared an "assisted witness".

2018	Samsung	Electronics	Sherpa, ActionAid France, Peuples solidaires (NGOs)	Tribunal de Grande Instance of Paris	Samsung was accused of misleading business practices regarding the working conditions in its Asian factories (following reports documenting the exploitation of children under sixteen, excessive working hours, dangerous working conditions due to lack of proper equipment, working conditions and accommodation incompatible with human dignity and the presence of benzene and methanol in Korean factories, which present a health hazard for employees).	China and Korea	Ongoing (partially settled)	On 1 November 2018, following a mediation procedure, Samsung recognised its responsibility in exposing South Korean factory workers to toxic chemicals and agreed to pay compensation for each of the affected worker.
2007	Trafigura	Petroleum	FIDH, 20 Ivorian claimants	Prosecutor's office in Paris	Two French executives of Trafigura (Claude Dauphin and Jean-Pierre Valentini) were accused of dumping harmful substances, manslaughter, bribery and violation of the special provisions concerning cross-border movements of waste in relation to the disposal of hazardous waste in Côte d'Ivoire, without adequate treatment, which affected the health and livelihood of the residents.	Côte d'Ivoire	Dismissed	16 April 2008: the case was dismissed on jurisdictional grounds, on the basis that the proceedings were 'entirely of foreign origin'.
2007	Veolia and Alstom	Transport	Association France Palestine Solidarité (AFPS) (NGO) and the Palestinian Liberation Organisation (PLO)	Tribunal de Grande Instance of Nanterre	Veolia and Alstom were accused of aiding and abetting Israel's occupation and commission of war crimes in relation to West Jerusalem by virtue of their involvement in a consortium which contracted with the Israeli Government to construct a light rail in Jerusalem.	Israel/Palestine	Dismissed	April 2009: Nanterre Tribunal asserted jurisdiction over the case. Affirmed in Appeal in December 2009. 22 March 2013: Court of Appeal ruled that the suit was inadmissible as the relevant international agreements created obligations between States, but could not be used to hold private companies liable. AFPS and PLO ordered to pay €30,000 to each defendant company to cover their legal expenses.

2015	Vinci	Construction	Sherpa (NGO), <i>Comité contre l'esclavage moderne</i> (committee against modern slavery) and with six former Indian and Nepalese employees	Parquet de Paris	Vinci was accused of various human rights violations (including forced labour, enslavement, reckless endangerment of workers' lives and working conditions incompatible with human dignity) in relation to the migrant workers employed on its construction sites for the 2022 football World Cup in Qatar.	Qatar	Ongoing	31 January 2018: preliminary investigation closed on the basis of lack of identified victims. New criminal proceedings filed in November 2018 by Sherpa, the <i>Comité contre l'esclavage moderne</i> and 6 former Indian and Nepalese employees as <i>parties civiles</i> .
GERMANY								
2013	Danzer	Forestry	ECCHR and Global Witness (NGOs)	Staatsanwaltschaft in Tübingen	The German manager of Danzer was accused of aiding and abetting, through omission, gross human rights abuses committed by the security forces against a forest community in the DRC (including rape, grievous bodily harm and false imprisonment).	DR Congo	Dismissed	March 2015: the German prosecutor decided not to pursue the case on the basis that the causal connection between the inaction of the manager and the damage suffered by the alleged victims had not been established. In addition, proceedings requiring mutual judicial assistance with 'African states' were deemed very lengthy and costly and the public prosecutor considered that the case did not justify such expense.
2015	KiK	Textiles	Four Pakistani citizens	Landgericht Dortmund	KiK was accused of failing to do its share to prevent the harm suffered by the victims of a fire that burst out in a textile factory owned by one of its suppliers in Pakistan which caused the death of hundreds of workers and left dozens more injured, in	Pakistan	Dismissed	10 January 2019: the German court rejected the case on the basis that the claims were time-barred under Pakistani law.

					breach of its legal obligation to secure a healthy and safe working environment			
2010	Lahmeyer	Construction	ECCHR (NGO)	Staatsanwaltschaft in Frankfurt am Main	Two managers of the engineering company Lahmeyer were accused of knowingly flooding more than 30 villages in northern Sudan during the construction of a dam causing the displacement of over 4700 families and the destruction of their livelihood.	Sudan	Ongoing	20 April 2016: the German Prosecutor decided not to pursue the case due to lack of evidence with regard to the intent of the managers. The claimants have appealed this decision.
2015	RWE	Energy	Peruvian farmer	Landgericht Essen	RWE, as one of the world's top emitters of greenhouse gases, was accused of contributing to climate change and asked to contribute its share (proportional to its historic CO2 emissions) to the cost of protecting the claimant's house and the village of Huaraz from the risk of flooding due to the melting of two glaciers into a lake.	Peru	Ongoing	30 November 2017: the Higher Regional Court of Hamm ruled that it would proceed to hear the case and enter into the evidentiary stage.
ITALY								
2018	ENI s.pa. and Nigerian subsidiary NAOC	Petroleum	Ikebiri community (Nigerian citizens)	Tribunal of Milan	Eni was accused of environmental pollution as a result of an oil spill arising out of its activities in the Niger Delta which affected the health and livelihood of the local community.	Nigeria	Ongoing	
2014	RINA Services S.p.A.	Certification	Affectees Association (victims' association)	Public Prosecutor in Genova	RINA was accused of failing to detect safety issues (and issuing the SA8000 certificate) at the Ali Enterprises factory in Pakistan which subsequently caught fire, leading to the death of hundreds of workers and the injury of dozens more.	Pakistan	Ongoing	
2018	RWM Italia S.p.A.	Defence	ECCHR, Mwatana Organisation for Human	Public prosecutor in Rome	RWM's managers were accused of exporting part of the deadly weapons which were used in a strike in Yemen in	Yemen	Ongoing	

			Rights, Rete Disarmo (respectively German, Yemeni and Italian NGOs)		2016 which killed a family of six.			
NETHERLANDS								
2010	Oriental Timber Company	Forestry	N/A	Court of Den Bosch (retrial ordered by the Supreme Court)	Guus Kouwenhoven, the head of the company Oriental Timber Company (and Dutch national) was accused of complicity in war crimes by virtue of, amongst other things, supplying weapons to Charles Taylor's government in return for having been granted timber concessions in Liberia.	Liberia	Finished (conviction of the defendant)	7 June 2006: defendant acquitted due to lack of evidence. 21 April 2017: sentenced by the Den Bosch court of Appeal in absentia to a 19 year jail sentence.
2010	Riwal / Lima	Equipment	Al-Haq (Palestinian human rights NGO)	Dutch Public Prosecutor	Riwal was accused of complicity in war crimes and crimes against humanity by virtue of its contribution (through its equipment) to the illegal construction of the wall between Israel and Palestine.	Israel/Palestine	Dismissed	14 May 2013: the Dutch Public Prosecutor decided not to pursue the case on the basis that the company's contribution was minor.
2015	Shell	Petroleum	Four Nigerian citizens	District Court of The Hague, Court of Appeal of The Hague	Shell was accused of environmental damage caused by oil spills arising out of the activities of its subsidiary in the Niger Delta which affected the health and livelihood of the communities living in the surrounding areas.	Nigeria	Ongoing	30 January 2013: The District Court of The Hague dismissed the claims from the villagers of Goi and Oruma against the Nigerian subsidiary on the basis that the oil spills resulted from acts of sabotage by third parties (rather than poor maintenance on the part of the Nigerian subsidiary). The court also rejected the claims against the parent company, finding that under Nigerian law there was no general duty of care on parent companies to prevent their subsidiaries from inflicting damage on

								<p>others through their business operations</p> <p>18 December 2015: The Court of Appeal of The Hague reversed the District Court's decision on the basis that it could not be ruled out that the parent company could be liable for damages resulting from the conduct of its subsidiary. The Court of appeal affirmed the jurisdiction of the Dutch courts to hear the claims against both the parent company and the foreign subsidiary and ordered disclosure by the company of a number of internal documents.</p>
2006	Trafigura	Petroleum	Dutch Public Prosecutor	Amsterdam District Court, Court of Appeal of The Hague, Dutch Supreme Court	Charges were brought against the Dutch parent company (TBBV), Trafigura's Chairman (Claude Dauphin), an employee of Trafigura Limited who was in charge of the 'caustic washing' aboard the Probo Koala vessel (Naeem Ahmed), the Ukrainian captain of the Probo Koala (Sergiy Chertov), Amsterdam Port Services (APS), its director (Evert Uittenbosch), and the Municipality of Amsterdam in relation to the illegal export of hazardous waste from the Netherlands to Côte d'Ivoire.	Côte d'Ivoire	Settled	<p>21 December 2011: The Amsterdam Court of Appeal found that APS and its director had made an 'excusable error of law'.</p> <p>23 December 2011: the same court considered that the municipality of Amsterdam was immune to prosecution as it was exercising its executive function</p> <p>16 November 2012: an out-of-court settlement was reached, following which the company agreed to pay a €1 million fine, plus a further €367 000 as compensation for assets</p>

								acquired through the illegal export, the company's Chairman was asked to pay a €67,000 fine; and the employee of Trafigura who was in charge of the 'caustic washing' aboard the vessel was required to pay a €25,000 fine, in exchange of which all the legal proceedings were ended.
SWEDEN								
2013	Boliden Mineral	Mining	Arica Victims KB (representing 707 Chileans)	County court of Skellefteå, Court of Appeal for Övre Norrland.	Boliden was accused of having exported industrial waste (smelter sludge) to Chile where it was disposed of by a subcontractor of the company without being adequately processed.	Chile	Dismissed	8 March 2018: the county court dismissed the claim for lack of causation between the company's actions and the injury suffered by the claimants.
UNITED KINGDOM								
2013	African Barrick Gold and North Mara Gold Mine Limited (NMGML)	Mining	12 Tanzanian citizens	High Court	African Barrick Gold and NMGML were accused of failing to prevent the use of excessive force by private security forces and police forces at the North Mara Mine in 2008, as a result of which 6 persons were killed and others were injured.	Tanzania	Settled	February 2015: an out-of-court settlement was reached (the terms of the settlements were not disclosed as the settlement was subject to a confidentiality clause).
2011	Anglo American SA	Mining	2,336 South African gold miners	High Court	Anglo American was accused of failing to provide safe working conditions for its workers who contracted dust-related lung diseases such as silicosis whilst working in the gold mines of the company.	South Africa	Dismissed (partially settled as part of the South African proceedings)	July 2013: the London High Court rejected the claims on jurisdictional grounds.

2015	BP	Petroleum	Gilberto Torres (Colombian citizen)	London High Court	BP was accused of complicity in the false imprisonment and torture of a Colombian trade unionist by a paramilitary group allegedly hired and paid by the company	Colombia	Dismissed	September 2016: the UK High Court dismissed the case due to difficulties in attributing legal responsibility.
2014	BP	Petroleum	Group of 73 Colombian farmers	London High Court	BP was accused of causing environmental damage to farmers' land as a result of the construction of an oil pipeline by OCENSA (a consortium led by BP).	Colombia	Dismissed	27 July 2016: the UK High Court dismissed the case on the grounds that the claimants failed to provide sufficient evidence to prove that the damage was attributable to the pipeline works.
2012	Shell	Petroleum	15,000 Nigerian citizens	London High Court	Shell was accused of environmental damage caused by oil spills arising out of the activities of its subsidiary in the Niger Delta which affected the health and livelihood of the communities living in the surrounding areas.	Nigeria	Settled	January 2015: case settled for approx. €60 million. 24 May 2018: a UK court ruled that the Bodo community should retain the right to revive the claim for another year should the clean-up not be completed to an adequate standard.
2015	Shell	Petroleum	42,500 Nigerian citizens	London High Court, Court of Appeal, Supreme Court	Shell was accused of environmental damage caused by oil spills arising out of the activities of its subsidiary in the Niger Delta which affected the health and livelihood of the communities living in the surrounding areas.	Nigeria	Ongoing	26 January 2017: The High Court considered that the claim against the parent company had no prospect of success and that, as a result, the claim against the Nigerian subsidiary could not proceed in English courts. 14 February 2018: ruling upheld by the Court of Appeal on the basis that the claimants could not demonstrate a properly arguable case that the parent company owed

								<p>them a duty of care, and that, therefore, the case against the Nigerian subsidiary was bound to fail (on jurisdictional grounds).</p> <p>Claimants announced their intention to bring the case to the Supreme Court. 9 July 2018: the Supreme Court announced its decision to defer consideration of the claimants' application to appeal until judgment is given in a similar case being examined at the Supreme Court, namely <i>Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)</i>(see below).</p>
2013	Tate & Lyle (T&L) and T&L Sugars Limited	Agribusiness	200 Cambodian citizens	London High Court	British Sugar company T&L was accused of complicity in human rights abuses including land grabbing, by virtue of purchasing sugar from Koh Kong Companies, despite being aware of allegations that the Cambodian company acquired its plantations through illegal confiscation of land, forced evictions of the residents and other human rights abuses.	Cambodia	Ongoing	
2015	African Minerals, Tonkolili Iron Ore	Mining	142 citizens of Sierra Leone	London High Court	Iron Ore producer Tonkolili and its former parent company (African Minerals, previously headquartered in the UK) were accused of complicity in human rights abuses (including assault, false imprisonment, rape and murder) carried out by the police forces to quell villagers	Sierra Leone	Dismissed (partially settled)	19 December 2018: the London High Court dismissed the case on the basis that the claimants had not succeeded in establishing liability of the company for the acts of the police.

					protests against the company's mining operations.			
2006	Trafigura	Petroleum	30,000 Ivorian citizens	London High Court	Trafigura was accused of having disposed of hazardous waste in Côte d'Ivoire without adequate treatment, which affected the health and livelihood of the residents.	Côte d'Ivoire	Settled	On 16 September 2009, the parties reached an out-of-court settlement whereby Trafigura agreed to pay approximately £30 million, in exchange for a waiver of all claims against the company.
2016	Unilever PLC and Unilever Tea Kenya Limited	Consumer goods	Kenyan employees and residents of a Unilever tea plantation	London High Court, Court of Appeal of London	Unilever (both the UK-domiciled parent company and its Kenyan subsidiary) were accused of complicity in human rights abuses by virtue of failing to protect its tea workers from the foreseeable risk of ethnic violence.	Kenya	Dismissed	27 February 2017: the UK High Court rejected the case on the basis that there was no real issue to be tried between the claimants and the parent company and therefore no basis to establish jurisdiction over the claim against the subsidiary. 4 July 2018: High Court's judgement upheld on the grounds that the parent company did not owe a duty of care to the claimants.
2015	Vedanta Resources	Mining	1.826 Zambian citizens	High Court, Court of Appeal, Supreme Court	Vedanta was accused of personal injury, damage to property, loss of income and loss of amenity and enjoyment of land arising out of alleged pollution and environmental damage caused by the Nchanga copper mine owned and operated by one of its subsidiaries in Zambia.	Zambia	Ongoing	27 May 2016: the UK High Court asserted its jurisdiction over the claim 13 October 2007: the Court of Appeal upheld the High Court's decision
2016	Xstrata	Mining	Peruvian citizens	London High Court	Xstrata was accused of complicity in police violence to quell environmental protests (murder, injury, assault and unlawful detention)	Peru	Ongoing	19 January 2018: the UK High Court dismissed the case on procedural grounds (claims time-barred)

4.2. Mapping of ‘specific instances’ (OECD/NCP) across EU MS

As observed above one can only identify judicial action in a few EU MS. This uneven distribution of action against MNEs can also be observed in the context of the OECD Guidelines on MNEs, a leading non-judicial grievance mechanism. The Guidelines were originally adopted by the OECD Ministerial Council in 1976 and revised in 1979, 1984, 1991, 2000 and 2011. They are now endorsed and implemented in 48 states (all 36 OECD Member States and 12 non-OECD members⁷¹). The Guidelines are a set of (voluntary) recommendations addressed by participating governments to MNEs operating in or from their territory, for conduct relating, *inter alia*, to labour rights, environmental protection, human rights, consumer protection, information disclosure and the fight against corruption. In order to implement compliance with the Guidelines all adhering states must establish a National Contact Point (NCP) domestically. NCPs *inter alia* contribute to the resolution of complaints resulting from alleged non-compliance with the Guidelines.⁷² The NCP provides an alternative dispute resolution mechanism,⁷³ or non-judicial grievance mechanism.⁷⁴ Any interested party may file a “specific instance” with an NCP when the party has evidence that a MNE is in non-compliance (domestically or abroad) with the Guidelines.⁷⁵ Specific instances should be dealt with by the NCP of the country in which the non-compliance occurred.⁷⁶ However, there is also the possibility to file specific instances for issues occurring in third countries (countries which have not endorsed the Guidelines).⁷⁷ In this case a specific instance can be submitted to the NCP of the MNE’s home state.⁷⁸

The use of NCPs can give additional insights on how action against MNEs is distributed across EU MS. Table 2 reports on the number of specific instances in EU MS based on the online database of the OECD (<https://mneguidelines.oecd.org/database/>). Between 2001 and 2018, there were 206 specific instances in EU MS (compared to 409 specific instances in all 34 countries which endorse the Guidelines). Ten EU MS do not have a NCP and hence there are no specific instances filed in those EU MS. For the other 18 EU MS table 2 shows that the distribution of specific instances is uneven across EU MS and follows the same patterns as the distribution of judicial cases of table 2. Most specific instances have been submitted in the United Kingdom, the Netherlands, France and Germany. Except for Belgium and Denmark, very few specific instances have been submitted in EU MS indicating that overall there is little judicial and non-judicial actions against MNEs. Note also that looking at the evolution of specific instances over time in the EU there is no obvious trend towards more specific instances. The evolution over time displays that there are some years with more specific instances than others but that overall there is no overall increasing trend. The same was observed in the case of judicial cases (see above).

What explains this uneven distribution is unclear. We know from research on the OECD NCPs that there are two possible explanations. First, related to the perceived ineffectiveness of the system,

⁷¹ These are Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Kazakhstan, Morocco, Peru, Romania, Tunisia and Ukraine.

⁷² OECD, 2011, p. 68, §1.

⁷³ B. Linder and A. Steinkeller, ‘The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations’, Vienna: Ludwig Boltzmann Institute of Human Rights, 2013.

⁷⁴ Commentary to principle 25 of the OECD guidelines, UN, 2011.

⁷⁵ *Ibid.*, p. 72, section C.

⁷⁶ *Ibid.*, p. 82, §23.

⁷⁷ *Ibid.*, p. 88, §39.

⁷⁸ *Ibid.*, p. 88, §39. See also Marx, Ebert, Hachez and Wouters 2017.

some observers note that several civil society organisations⁷⁹ and academics⁸⁰ have criticized the lack of enforcement capacity of NCPs. The only thing NCPs can do is “name and shame.” Yet OECD Watch⁸¹ has reported that, in practice, very few NCPs actually name MNEs that have breached the Guidelines.⁸² Hence, one could argue that using NCP is not pursued since there is little promise for any result. Second, related to the functioning of NCPs, Maheandiran⁸³ argues that, for some NCPs, it is unclear whether they are intended to determine, investigate and sanction breaches by MNEs of the Guidelines, or whether they are intended to serve merely as mediation platforms between antagonistic parties. Most NCPs interpret their role in the latter fashion, i.e. to provide a forum for discussion so as to potentially contribute to the resolution of specific instances. Ochoa⁸⁴ shows, on the basis of five NCP case studies, that NCPs have fundamentally different conceptions of their roles and powers in handling complaints. This observation is supported by Davarnejad,⁸⁵ who notes that many NCPs see it as outside their mandates to investigate whether MNEs have breached the Guidelines and to sanction them if so. The reasons why we then do observe specific instances in some NCPs lies in the fact that some NCPs do examine conduct when a specific instance is issued. Ochoa⁸⁶ finds that some NCPs conduct thorough examinations of possible breaches. The UK and the Dutch NCPs, notably, do name MNEs that are in breach and identify their violations.⁸⁷

⁷⁹ OECD Watch, ‘OECD Watch statement on the update of the OECD Guidelines for MNEs. Improved content and scope, but procedural shortcomings remain’, 2011.

⁸⁰ Ruggie, J. and Nelson T., ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges’, in *Brown Journal of World Affairs*, 12, 1, 2015, pp. 99-127; Maheandiran, B., ‘Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises’ in *Harvard Negotiation Law Review*, 20, 2015, pp. 205-244; Ochoa Sanchez, J., ‘The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation’, in *Nordic Journal of International Law*, 84, 2015, pp. 89-126.

⁸¹ OECD Watch, ‘Calling for Corporate Accountability: A Guide to the 2011 OECD Guidelines for Multinational Enterprises’, 2013.

⁸² See also Davarnejad, L., ‘In the Shadow of Soft Law: “The Handling of Corporate Social Responsibility Disputes Under the OECD Guidelines for Multinational Enterprises”’, in *Journal of Dispute Resolution*, 2, 2011, pp. 351-385

⁸³ Maheandiran, *op. cit.*

⁸⁴ Ochoa, *op. cit.*

⁸⁵ Davarnejad, *op. cit.*, p. 381.

⁸⁶ Ochoa Sanchez, J.C., ‘An Empirical examination of the function of the OECD national contact points to handle complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises’, pp. 159-169, in Wouters, J, Rayp, G., Beke, L. & A. Marx (eds.), *Bulletin of Comparative Labour Relations: Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy*, Kluwer, 2015.

⁸⁷ Fick Vendzules, S., ‘The Struggle for Legitimacy in Environmental Standards Systems: the OECD Guidelines for Multinational Enterprises’, in *Columbia Journal of International Environmental Law and Policy*, 21, 2010, p. 480.

Table 2: Number of Specific Instances with NCP in EU MS (OECD Guidelines)

NCP	2001-2018																		Total
	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	
Austria	0	0	0	1	0	1	0	1	0	0	0	0	0	2	0	0	0	0	5
Belgium	1	0	2	5	1	1	0	1	1	1	0	1	1	0	0	1	0	2	18
Bulgaria																			--
Croatia																			--
Cyprus																			--
Czech Rep.	2	0	1	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Denmark	0	1	1	0	0	1	0	0	0	0	1	1	5	4	0	0	1	1	16
Estonia																			--
Finland	0	0	0	0	0	2	0	0	0	0	0	1	0	0	0	1	0	0	4
France	3	1	4	1	1	0	0	0	0	4	1	1	1	3	1	1	2	1	25
Germany	0	2	2	1	0	1	2	1	2	1	0	2	4	4	3	2	0	0	27
Greece																			--
Hungary	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Ireland	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	2
Italy	0	0	0	0	1	0	3	0	0	0	2	0	0	0	1	2	1	0	10
Latvia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Lithuania																			--
Luxembourg	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
Malta																			--
Netherlands	4	2	3	3	1	3	0	1	0	0	3	3	0	1	2	2	2	0	30
Poland	0	0	0	0	0	1	0	0	0	0	0	0	0	2	0	0	1	0	4
Portugal	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Romania																			--
Slovakia																			--
Slovenia																			--
Spain	0	0	0	2	0	0	0	0	0	0	0	2	1	0	0	0	0	1	6
Sweden	0	0	1	0	0	1	0	0	0	1	0	1	2	0	0	0	0	0	6
UK	0	1	5	0	5	4	0	2	2	3	2	5	9	4	0	2	0	0	44
Total	10	7	19	17	9	15	5	7	5	10	11	17	23	20	7	12	7	5	206

Source: Own calculations based on OECD database - <https://mneguidelines.oecd.org/database/> - access 31/10/2018

5. Case studies

In this chapter we provide an in-depth analysis of 12 cases. All cases were written according to an identical template which focused on (1) the legal background of the country (civil/criminal procedure possible against companies, and recent legal developments), (2) the history of the case (company and sector involved, nature of the human rights abuse), (3) discussions of the case and procedural history (who filed the complaint, against whom, before which court, arguments presented and description of the different steps of the procedure), (4) outcome of the case and (5) identification of the opportunities and legal and practical barriers for accessing justice and legal remedies (in reference to the ones identified in the UNGPs). The cases are grouped per country.

5.1. EU Legal Background

5.1.1. Jurisdiction

In European private international law, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Brussels I Recast) provides a set of harmonized rules on jurisdiction applicable to civil liability claims filed in EU MS against EU domiciled defendants. Under the general rule laid down in Article 4 of the Regulation, EU domiciled defendants are to be sued in the courts of their country of domicile. When the defendant is a company, the domicile is defined by Article 63 of the Regulation as the place where it has its statutory seat, central administration or principal place of business. On 1 March 2015, the European Court of Justice (ECJ) ruled out the possibility for EU MS courts to decline to exercise the jurisdiction conferred on them by the rules of the Brussels I Regulation on the basis that another forum would be more appropriate to hear the claim (*forum non conveniens doctrine*).⁸⁸

In recent years, the Brussels I Recast Regulation has increasingly been relied on by claimants bringing civil proceedings in Europe for business-related human rights abuses that occurred in third countries. However, the scope of application of the Regulation is limited to EU domiciled defendants, which means that the jurisdictional rules laid down in the Regulation do not extend to claims against third State defendants, except for some limited exceptions concerning claims brought by consumers and employees or to claims falling under exclusive jurisdiction. As a result, residual jurisdiction over non-EU entities, such as the foreign subsidiary or suppliers of EU-domiciled companies, will be determined by domestic private international law rules of the forum.

5.1.2. Applicable Law

The issue of applicable law is governed, in European private international law, by Regulation 864/2007 (Rome II).⁸⁹ Article 4 of the Rome II Regulation lays down a general rule according to which the applicable law for torts is the law of the country in which the damage occurs (*lex loci damni*).

Article 4 also includes some exceptions according to which 'where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply',⁹⁰ and 'where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country

⁸⁸ *Owusu v Jackson and Others*, C-281/02 [2005] ECR I-1383.

⁸⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁹⁰ Article 4(2) states that: 'However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply'.

other than indicated in paragraphs 1 or 2, the law of that other country shall apply'.⁹¹ In addition, Article 14 of the Rome II Regulation makes it possible for the parties to agree upon the applicable law after the dispute has arisen.

With regard to civil claims for environmental damage, Article 7 of the Rome II Regulation provides claimants with a choice between the law of the place where the damage occurred (*lex loci damni*) and the law of the place where the event giving rise to the damage occurred (*lex loci delicti commissi*).

The Rome II Regulation also contains two mechanisms of exception under which the forum can substitute the law normally applicable to the dispute for its own law or relevant provisions thereof. The first one concerns the overriding mandatory provisions of the forum which, by virtue of Article 16, should be applicable irrespective of the law otherwise applicable. The ECJ defined overriding mandatory as national provisions with which compliance 'has been deemed to be so crucial for the protection of the political, social or economic order in the EU MS concerned as to require compliance therewith by all persons present on the national territory of that EU MS and all legal relationships within that State'.⁹² Moreover, under the public policy exception, the forum can preclude the application of a foreign law that would be manifestly inconsistent with its public policy by virtue of Article 26 of the Regulation.

Finally, Article 17 of the Rome II Regulation provides that 'in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability'.

5.2. Member States Legal background

5.2.1. France

Article 121-2 of the French criminal code provides that legal persons such as companies can be held criminally liable for the offences committed on their behalf by their organs or representatives. In addition, by virtue of article 113-6 of the French criminal code, French courts can assert jurisdiction over crimes committed abroad by French nationals (whether legal or natural persons).

Civil liability claims are governed by Articles 1240 and 1241 of the French Civil Code. Article 1240 provides that: 'Any act of man that causes damage to another, shall oblige the person by whose fault it occurred to repair it.' In addition, Article 1241 states that: 'One shall be liable not only by reason of one's own acts, but also by reason of one's imprudence or negligence'. Under these articles, three elements are necessary before civil liability can be imposed on either legal or natural persons: a fault (which could be either the commission or omission of an act), a damage and a causal link between the two.

On 21 February 2017, France adopted the law on the Duty of Vigilance which places a legal duty on large companies to carry out human rights due diligence through a threefold obligation to put in place, disclose and effectively implement a vigilance plan (*plan de vigilance*) detailing the 'reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment resulting from the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with

⁹¹ Article 4(3) of the Rome II Regulation.

⁹² ECJ Cases C-369/96 and C-376/96, 23 November 1999, [1999] ECR I-8453 (Arblade).

whom they have an established business relationship'.⁹³ The legislation emerged as a result of the collaboration between civil society organisations, trade unions, academics, lawyers and Members of Parliament and is the result of a compromise following a nearly four years long legislative struggle involving much back-and-forth between the National Assembly and the Senate.⁹⁴ Its main originality lies in the fact that it implements the UNGPs by imposing a legal duty on the parent company to carry out human rights due diligence in relation to its own activities but also in relation to the activities of its subsidiaries and the companies that it controls directly or indirectly, as well as the activities of subcontractors and suppliers with whom the company maintains an established business relationship.⁹⁵ In addition, the legislation provides that a company may incur civil liability in the event in which failure to fulfill its obligations of vigilance results in a damage. The possibility of introducing legal actions on this basis only became available in 2019.⁹⁶

France adopted its first National Action Plan for Human Rights and Businesses on 26 April 2017.⁹⁷

5.2.2. Germany

Article 25 of the German Constitution provides that general rules of international law constitute an integral part of federal law.⁹⁸ As a result, 'human rights that have passed into customary international law accrue directly to natural persons and legal entities under the jurisdiction of the Federal Republic'.⁹⁹

Under German criminal law, companies cannot be prosecuted for crimes in application of the maxim *societas delinquere non potest*.¹⁰⁰ However, the company principals may be held criminally liable by virtue of their omission to prevent a corporate-related crime (Geschäftsherrenhaftung). This principle is based on Article 13 of the German Criminal Code, which states that 'whosoever fails to avert a result which is an element of a criminal provision shall be liable under this law if he is responsible under law to ensure that the result does not occur, and if the omission is equivalent to the realisation of the statutory elements of the offense through a positive act'.¹⁰¹

Under the German Civil Code (Bürgerliches Gesetzbuch), companies may be civilly liable for damages caused to third parties by illegal acts of their organs or representatives in the execution of their functions.¹⁰² German rules of tort attribution are complex, but the main rule is that 'whoever illegally causes injury to another's (a) life; (b) body; (c) health; (d) freedom; (e) property or (f) another

⁹³ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> (last accessed on 19 November 2018).

⁹⁴ C. 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?" (August 8, 2018). Available at SSRN: <https://ssrn.com/abstract=3262787> (last accessed on 19 November 2018).

⁹⁵ T. Beau de Loménie, S. Cossart and P. Morrow, "From Human Rights Due Diligence to Duty of Vigilance: Taking the French Example to the EU level", in A. Bonfanti (ed.), *Business and Human Rights in Europe* (Routledge, 2019), p. 133.

⁹⁶ Sherpa, 'Vigilance Plans Reference Guidance', 2019, available at: https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf.

⁹⁷ Plan National d'Action pour la mise en œuvre des Principes Directeurs des Nations Unies relatifs aux Droits de l'Homme et aux Entreprises, available at: https://www.diplomatie.gouv.fr/IMG/pdf/3_pnadh_fr_version_finale_bandeau_cle0be656.pdf (last accessed on 19 November 2018).

⁹⁸ Grundgesetz, Art. 25.

⁹⁹ Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse', University of Oxford, 3 November 2008, 142-143. However, the authors note that customary law is limited and difficult to prove.

¹⁰⁰ Oxford Pro Bono Publico, 'Obstacles to Justice and Redress...', 145. However, the German system provides an alternative quasi-criminal solution, see Ordnungswidrigkeitengesetz, Art. 30.

¹⁰¹ Strafgesetzbuch, Art. 13.

¹⁰² Bürgerliches Gesetzbuch, Art. 31 and 89(1).

'similar' right, through intentional or negligent conduct, is liable to compensate the injured party for damage caused'.¹⁰³ Moreover, the law of nuisance contained in Article 1004 of the Civil Code states that 'if the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference', which can be a relevant provision for climate change cases.¹⁰⁴

On 21 December 2016, Germany adopted its National Action Plan for Business and Human Rights.¹⁰⁵

5.2.3. Italy

The legal system of Italy is based on civil law.

On 8 June 2001, Italy adopted the Legislative Decree no. 231/2001 which introduced in the Italian legal system the administrative liability of legal persons such as corporations for crimes committed by certain natural persons insofar as the relevant conducts are committed in the company's interest.¹⁰⁶ These persons includes directors, managers or individuals who are subject to the direction and supervision of the managers or directors.¹⁰⁷ The administrative liability regime introduced in the Decree includes criminal offenses such as human rights abuses carried out by Italian companies in Italy or abroad. The Decree includes penalties akin to those available in criminal proceedings.¹⁰⁸

Civil liability claims are governed by the general provisions set forth in Article 2043 of the Italian Civil Code according to which any person who causes damage to another party (whether intentionally or through negligence) must compensate the injured party.¹⁰⁹

In December 2016, Italy adopted its first National Action Plan (NAP) on Business and Human Rights which was revised in 2018. The NAP identified six priorities relating to the Italian context,¹¹⁰ which should be subject to regular review and update by the Business and Human Rights Steering Group. These are 1) Promoting Human Rights due diligence processes aimed at identifying, preventing and mitigating the potential risks, with particular focus on SMEs; 2) Tackling *Caporalato* (especially in the agricultural and construction sector) and other forms of exploitation, forced labour, child labour, slavery, irregular work, with particular focus on migrants and victims of trafficking; 3) Promoting fundamental labour rights in the internationalization process of enterprises with particular regard to the global productive processes; 4) Strengthening the role of Italy in a Human Rights-based international development cooperation; 5) Tackling discrimination and inequality and promoting equal opportunities; 6) Promoting environmental protection and sustainability.

¹⁰³ Bürgerliches Gesetzbuch, Art 823(1).

¹⁰⁴ See RWE case below.

¹⁰⁵ National Action Plan. Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020, available at: <https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf> (last accessed 26 November 2018).

¹⁰⁶ Legislative decree no. 231/2001 of 8 June 2001.

¹⁰⁷ A. Giovanelli and R. Cursano, 'Civil Liability in Italy', available at: <https://globalcompliancenews.com/white-collar-crime/corporate-liability-in-italy/> (last accessed on 11 January 2019).

¹⁰⁸ HRC, 'Italian Legislative Decree N. 231/2001 on Administrative Liability of Legal Persons and B&HR Violations: A Brief Overview', July 2017, available at: https://docs.wixstatic.com/ugd/6c779a_ae42b0a57aad4620ba65b9708836f3ef.pdf (last accessed on 29 November 2018).

¹⁰⁹ Monza Legal, 'Italian Tort Law', available at: <https://www.monzalegal.com/senza-categoria/italian-tort-law/> (last accessed on 11 January 2019).

¹¹⁰ 'Imprese e Diritti Umani: Il Caso Italia - Analisi del Quadro Normativo e delle Politiche di Salvaguardia', available at: https://pcnitalia.mise.gov.it/attachments/article/2035843/Imprese_e_diritti_umani_II_caso_Italia_FINALE.pdf (last accessed on 11 January 2019).

5.2.4. Netherlands

Under Dutch criminal law, both natural and legal persons can be criminally liable for criminal offenses.¹¹¹ On the basis of Article 51 of the Dutch Criminal Code, it is possible to prosecute a company for international crimes,¹¹² however, the question of whether or not to prosecute a person is left to the discretion of the public prosecutor.¹¹³

The case-law of the Dutch Supreme Court has established that the basis for criminal liability of a legal person such as a company is whether there is an illegal act or omission that can be reasonably imputed to the company in question.¹¹⁴ This is the case if one or more of the following circumstances are present: the 'omission or act was committed by a person employed by the legal person, whether in an employment relationship or on any other basis; the behavior corresponds to the legal person's normal course of business or performance of duties; the behavior served the legal person in its business or performance of duties; the behavior was at the disposal of the legal person and it accepted or tended to accept such or similar behavior, including the failure to take reasonable care to prevent the behavior from occurring'.¹¹⁵

Civil liability claims are governed by the general provisions set forth in Articles 6:162 of the Dutch Civil Code which provides that a person who commits a tort towards another shall compensate the damage that the other party has suffered as a result. The burden of proof is on the claimant,¹¹⁶ who may request the corporate defendant to provide relevant documents if they can show that they have a legitimate interest to do so.¹¹⁷

On 7 February 2017, the Dutch Child Labour Due Diligence Bill was adopted by the lower chamber of the Dutch Parliament though it is still pending approval from the Senate. If adopted, it would require companies providing goods and services to the Dutch market, two or more times a year, to submit a statement to the Dutch regulatory authorities describing the steps taken to investigate whether there is a 'reasonable suspicion' that child labour occurs in their operations or in their supply chain; should there be reasonable suspicion, they are to put in place an action plan to address their findings in line with international guidelines (UNGPs or OECD Guidelines). Companies failing to submit a statement could be fined up to EUR 4,100. In addition, if concrete evidence can be found that goods or services have been produced with child labour, a third party complaint could be filed with the Dutch regulatory authorities that will assess whether the company has conducted sufficient due diligence.

The Netherlands launched its first National Action Plan for Human Rights and Business in 2007, which was revised in 2011 and in 2016.

¹¹¹ V. Van den Berg, 'Corporate Liability in the Netherlands', *Global Compliance News*, available at: <https://globalcompliancenews.com/white-collar-crime/corporate-liability-in-the-netherlands/> (last accessed 28 November 2018).

¹¹² Wetboek van Strafrecht, Art. 51.

¹¹³ Skinner et al., 'Third Pillar ...', *op. cit.*, p. 33.

¹¹⁴ B.F. Keulen and E. Gritter, 'Corporate Criminal Liability in the Netherlands', 14(3) *Electronic Journal of Comparative Law*, 2010, at 5.

¹¹⁵ Van den Berg, 'Corporate Liability', *op. cit.*

¹¹⁶ Wetboek van Burgerlijke Rechtsvordering, Art. 150.

¹¹⁷ Wetboek van Burgerlijke Rechtsvordering, Art. 843a.

5.2.5. Sweden

The legal system of Sweden, much like the other Scandinavian countries, has been influenced by both Anglo-Saxon common law and continental Europe's civil law. As to the sources of law in Sweden, they are, in order of importance: 1) statutory acts and legislation, 2) (higher) court praxis, 3) preparatory works and 4) scholarly doctrine. In particular, the considerable reliance on preparatory works as a method of interpreting statutes (teleological interpretation) is rather unique for Sweden. Along this line, the role of the Swedish judiciary in shaping social change has historically been limited; instead the main aim has been to apply statutes in line with the legislator's (political) intentions, even when in arguable conflict with constitutional provisions. With the Europeanisation of Swedish law (through Sweden's EU membership and incorporation of ECHR into Swedish law) a shift towards a wider role of the Swedish courts has taken place, including in prevention, reparation, control and judicial law-making.¹¹⁸

Civil liability claims are governed by the Swedish Tort Liability Act (Skadeståndslagen 1972:207). The Act serves as a framework law with generally formulated provisions, which in turn have been substantively developed through case-law. The general so-called *culpa-rule* (culpapregeln) in Chapter 2, §1 states that: 'He or she who intentionally or negligently causes a personal injury or damage on a property must compensate for the damage'.¹¹⁹

Criminal liability against legal persons in Sweden operates under a system of "corporate fines" (företagsbot).¹²⁰ Issuing a corporate fine however, requires that an offence has been committed by an individual 'in pursuance of an economic activity'; meaning that the offence needs to have a clear connection to the particular activity operated by the entrepreneur in question.¹²¹ Corporate fines are thus considered a complement to individual criminal liability rather than a self-standing penalty.¹²² It is not a prerequisite *per se* that an individual has been convicted. As individual criminal liability presupposes intent (*mens rea*) – unless it is specifically provided that negligence (*culpa*) is sufficient¹²³ – it is however more or less necessary to identify the perpetrator as his or her intent will be almost impossible to establish without identification of the person in question.¹²⁴ However, for offences requiring only negligence, so-called 'anonymous culpa' is more common.¹²⁵ In terms of the specific offences that are most commonly associated with corporate fines, violations of the Environmental Code (Miljöbalken 1998:808)¹²⁶ are particularly common. Other types of common offences underpinning corporate fines are accounting fraud¹²⁷ and violations for occupational safety laws.¹²⁸

Sweden launched its National Action Plan for Business and Human Rights in 2015.

¹¹⁸ Rasmus Kløcker Larsen, 'Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v Boliden Mineral AB*' [2014] 83 Nordic Journal of International Law 404, p 413-414; Swedish law journal SvJT 1997 s 426.

¹¹⁹ *Ibid.*, p. 423.

¹²⁰ Penal Code (Brottsbalken 1962:700), Chapter 36 § 7-10.

¹²¹ Penal Code, Chapter 36 § 7 and preparatory work (prop. 1985/86:23 p 28).

¹²² Penal Code, Chapter 1 § 3 and 8.

¹²³ Penal Code, Chapter 1 § 2.

¹²⁴ See preparatory work (prop. 1985/86:23 p. 62) and Supreme Court case (NJA 2014 s 139, para 7).

¹²⁵ In a Svea Court of Appeal's case (RH 1992:73) for example, a prohibited environmental toxin was found in waste oil which a company reused in its operations. The company was fined without it having been established who had been responsible for the negligent conduct.

¹²⁶ Environmental Code, Chapter 29.

¹²⁷ Penal Code, Chapter 11 § 5.

¹²⁸ Penal Code, Chapter 3 § 10.

5.2.6. United Kingdom

English law is a common law system, and as such, is largely based on precedent.

With regard to civil liability claims, English case-law has established that parent companies may, in certain circumstances, owe a duty of care to those affected by the operations of a subsidiary.¹²⁹ In the case of *Caparo Industries plc v Dickman*, the court set forth a threefold test in order to determine whether a duty of care may arise in a particular case which relies on (a) the foreseeability of the harm, (b) the proximity of the relationship between the parties and (c) whether it would be fair, just and reasonable for such duty of care to be imposed.¹³⁰

The circumstances in which a parent company may owe a duty of care to its subsidiary's employees may arise in particular where the parent company (a) has taken direct responsibility for devising a material policy (for instance with regard to health and safety) the adequacy of which is the subject of the claim or (b) controls the operations which give rise to the claim.¹³¹ In *Chandler v Cape Plc*,¹³² Arden LJ identified four indicia indicating the existence of a duty of care on a parent company in relation to the health and safety of its subsidiary's employees: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for employees' protection.¹³³ In addition, in the case of *Thompson v The Renwick Group Plc*, Tomlinson LJ added another circumstance in which a parent company may be responsible for the health and safety of a subsidiary's employee, which is when the parent company is better placed, because of its superior knowledge or expertise, than the subsidiary in respect of the harm; and that because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to avoid the harm.¹³⁴ English case law has also established that a duty of care may be owed, in analogous situations, not only to employees of the subsidiary but also to those affected by the operations of the latter.¹³⁵

Under English law, companies can be held criminally liable for a wide range of criminal offenses if it can be proven that the company committed the act prohibited by the offence (*actus reus*) and that the company (or rather its board of directors, managing director or other superior officers) had the required intention when committing such act (*mens rea*).¹³⁶

In 2015, the UK adopted the Modern Slavery Act 2015, which contains the 'transparency in supply chains clause' (section 54) requiring large companies carrying out business in the UK, with a turnover of at least £36 million, to prepare and publish a slavery and human trafficking statement for each

¹²⁹ Court of Appeal, *Ngcobo and others v Thor Chemicals Holdings Ltd and others*, October 9, 1995 (unreported).

¹³⁰ "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other". *Ibid.*, per Lord Bridge.

¹³¹ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2017] EWCA Civ 1528, at para. 83.

¹³² Court of Appeal, *Chandler v Cape*, [2012] EWCA Civ 525, April 25, 2012.

¹³³ *Ibid.*, para 80.

¹³⁴ High Court, *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, *cit.*, para 79.

¹³⁵ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2017] EWCA Civ 1528, at para. 83.

¹³⁶ J. Ludlam, 'Corporate Liability in the United Kingdom', available at: <https://globalcompliancenews.com/wcc/corporate-liability-in-the-united-kingdom/>

financial year. Such a statement must disclose the steps the company has taken, if any, to ensure that slavery and human trafficking are not taking place in any of its supply chains, or in any part of their own business.

The UK was the first country to adopt a National Action Plan for Business and Human Rights on 4 September 2013, which was updated on 12 May 2016.

5.3. Case Studies

5.3.1. Amesys and Nexa

History of the case

Amesys in Libya

The gross human rights abuses committed by Muammar Gaddafi's regime from 1969 to 2011 were well-known. These included 'the [alleged] systematic use of torture and repression against human rights defenders, or indeed anyone expressing dissent'.¹³⁷ From 2011, during the Arab Spring, Internet and social networks were of particular importance as '[c]alls for demonstrations were widely disseminated via social networks, as was information that enabled the media to cover the uprisings and tier brutal repression'.¹³⁸

In 2007, Amesys, a French surveillance equipment company, signed a contract with the Libyan authorities to deliver 'interception technologies'.¹³⁹ More specifically, the company sold a program called Eagle, 'designed to help Law Enforcement Agencies and Intelligence organisation to reduce crime levels, to protect from terrorism threats and to identify new incoming security danger'.¹⁴⁰ A former military officer stated during an interview with the French newspaper *Le Figaro*: 'we wiretapped the entire country. We did it massively: we intercepted all data passing through the Internet – emails, chat, Internet browsing and IP conversations'.¹⁴¹ For this contract, company executives were in contact with Adballah Senussi, Gaddafi's brother-in-law, and chief of the Libyan secret services.¹⁴² At the time of the contract, he had already been found guilty by the Criminal Court of Paris for acts of terrorism, and was the subject of an International Criminal Court international arrest warrant for crimes against humanity.¹⁴³

In March 2010, France adopted, in line with the EU dual-use regulation,¹⁴⁴ a regulation regarding dual-use goods, which are products and technologies that can be used for civilian purposes but which may also have military applications, and which included the program offered by Amesys. The

¹³⁷ Fédération Internationale des Droits de l'Homme (FIDH), 'The Amesys case', November 2014, p. 4. See also, for example, Human Rights Watch, 'The Gaddafi files', 20 October 2011, <https://www.hrw.org/news/2011/10/20/gaddafi-files> (last accessed 12 November 2018).

¹³⁸ *Ibid.*, p. 5.

¹³⁹ O. Tesquet, 'La Libye sur écoute française', *OWNI*, 10 juin 2011, <http://owni.fr/2011/06/10/la-libye-sur-ecoute-francaise/index.html> (last accessed 12 November 2018).

¹⁴⁰ Amesys, EAGLE GLINT OPERATOR Manual, 13 March 2009, p. 4 (document available via Wikileaks), https://wikileaks.org/spyfiles/files/0/99_AMESYS-EAGLE-GLINT-Operator_Manual.pdf (last accessed 26 November 2018).

¹⁴¹ F. Amedeo, 'Comment j'ai mis 5 millions de Libyens sur écoute', *Le Figaro*, 6 September 2011, available at: <http://www.lefigaro.fr/international/2011/09/01/01003-20110901ARTFIG00412-comment-j-ai-mis-8-millions-de-libyens-sur-ecoute.php> (last accessed on 11 January 2019). Free translation by the authors.

¹⁴² *Ibid.*

¹⁴³ FIDH, 'The Amesys case', p. 7. See Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-15, 27 June 2011.

¹⁴⁴ Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 134, 29.5.2009.

regulation required the approval of the Dual-Use Goods Department (Service des Biens à Double Usage, SBDU) for exports of any such goods.¹⁴⁵

The alleged involvement of Amesys in human rights abuses committed in Libya was first reported by two French online newspapers, *reflets.info* and *OWNI*, in June 2011.¹⁴⁶ The case garnered international attention when the Wall Street Journal published an investigation in a former Libyan security unit, with evidence of the company's involvement.¹⁴⁷

Nexa in Egypt

Following these revelations and an initial complaint against Amesys (see below), the commercial director, Stéphane Salies, established two different companies: Nexa Technologies, based in France, responsible for software development, and Advanced Middle East Systems (AMESys), responsible for distribution.¹⁴⁸ Salies also updated the Eagle programme and rebranded it as Cerebro. This new software was aimed at interception of communications on a national scale like its predecessor Eagle, and was described as 'a core technology designed to monitor and analyse in real time communications on very high data rate networks... [it] is able to interact with several probes, including SMS, GSM calls, billing data, emails, voice over IP conversations, webmail, chat sessions, social networks...'.¹⁴⁹

In 2014, the Egyptian government bought Cerebro from Amesys for EUR 10 million.¹⁵⁰ This occurred in spite of the EU position on exports to Egypt. In particular, in 2013, the EU MS agreed to 'suspend export licenses to Egypt for any equipment which might be used for internal repression'.¹⁵¹ In addition, even though the French regulations regarding dual-use technologies had been strengthened, the French SBDU did not refuse this deal on the basis that 'Egypt [was] considered as a strategic partner'.¹⁵² According to the International Federation for Human Rights (FIDH), this equipment was used by the Egyptian government to track, imprison and torture opponents.¹⁵³ The

¹⁴⁵ <https://www.entreprises.gouv.fr/biens-double-usage> (last accessed on 14 November 2018).

¹⁴⁶ Tesquet, 'La Libye sur écoute française'.

¹⁴⁷ P. Sonne and M. Coker, 'Firms aided Libyan spies', *The Wall Street Journal*, 30 August 2011, <https://www.wsj.com/articles/SB10001424053111904199404576538721260166388> (last accessed 12 November 2018).

¹⁴⁸ According to CorpWatch, "it is common practice for companies that sell weapons and surveillance technology to use intermediaries to hide details of the transactions, [a] tactic that can be used to circumvent laws, sanctions, and taxes". See E. Gifford, 'Nexa investigated for sale of surveillance equipment linked to Egypt abuses', *CorpWatch*, 22 January 2018, <https://corpwatch.org/article/nexa-investigated-sale-surveillance-equipment-linked-egypt-abuses> (last accessed 12 November 2018).

¹⁴⁹ Advanced Middle East Systems, Cerebro Brochure, available at http://sii.transparencytoolkit.org/docs/Advanced-Middle-East-Systems_Cerebro_Brochuresii_documents (last accessed 12 November 2018). See also O. Tesquet, 'Amesys : les tribulations égyptiennes d'un marchand d'armes numériques français', *Télérama*, 5 July 2017, <https://www.telerama.fr/monde/amesys-les-tribulations-egyptiennes-d-un-marchand-d-armes-numeriques-francais,160002.php> (last accessed 15 November 2018). Free translation by the authors.

¹⁵⁰ D. Leloup, 'Après la Libye de Kadhafi, Amesys a vendu son système de surveillance à l'Egypte de Sissi', *Le Monde*, 5 July 2017.

¹⁵¹ Council of the European Union, Council conclusions on Egypt, Foreign Affairs Council meeting, Brussels, 21 August 2013, following which the European Parliament called "for an EU-wide ban on the export to Egypt of intrusion and surveillance technologies which could be used to spy on and repress citizens" in January 2015, see European Parliament, Resolution 2014/3017(RSP), 15 January 2015. This position was repeated in a resolution in March 2016, where the Parliament called "calls for exports of surveillance equipment to be suspended when there is evidence that such equipment would be used for human rights violations". See European Parliament, Resolution 2016/2608(RSP), 10 March 2016.

¹⁵² Tesquet, 'Amesys : les tribulations égyptiennes...'.
¹⁵³ FIDH, 'Sale of surveillance equipment to Egypt: Paris Prosecutor opens a judicial investigation', 22 December 2017, <https://www.fidh.org/en/region/north-africa-middle-east/egypt/sale-of-surveillance-equipment-to-egypt-paris-prosecutor-opens-a> (last accessed 12 November 2018).

alleged implication of Nexa in these human rights abuses was reported by the French weekly magazine *Télérama* in July 2017.¹⁵⁴

Discussion of the case

Amesys in Libya

On 19 October 2011, FIDH and the French Human Rights League (LDH) filed criminal charges and ancillary civil proceedings before the Paris Tribunal de Grande Instance, accusing Amesys of complicity in acts of torture in Libya.¹⁵⁵ According to these human rights groups, by signing and executing a commercial agreement for the provision of surveillance technology to the Libyan regime in 2007, Amesys violated Article 221-1 of the French Criminal Code, which states that ‘submitting a person to acts of torture or barbarity is punishable by fifteen years of imprisonment’.¹⁵⁶ The FIDH sustained that the system supplied by Amesys effectively enabled the Gaddafi regime to suppress dissidents. They claimed that, given the fact that the regime was well-known for its record of gross human rights abuses, Amesys must have known that the Libyan regime would use the technology as a means of oppression.¹⁵⁷

According to FIDH, the French judge could assert extraterritorial jurisdiction over the case (regardless of the nationality of the perpetrator or the victim and of the fact that the alleged crimes were committed outside France)¹⁵⁸ on the basis of Article 689 of the French Code of Criminal Procedure which provides that a person on the French soil who has committed one of the offenses listed in the Convention against Torture of 10 December 1984 can be prosecuted and tried by French courts.¹⁵⁹ In addition, the FIDH sustained that the fact that Amesys had its headquarters in France at the time when the alleged crimes were perpetrated, conferred jurisdiction to the French courts over the acts of torture committed outside France even though the main perpetrators were non-French nationals.¹⁶⁰

On 26 March 2012, the State Prosecutor found that there was no basis for a criminal investigation on the grounds that it ‘would be difficult to consider the sale of equipment as constituting acts of complicity in crimes committed with said materials by the buyers... Even the possibility of a relation between the facts and the existence of an offence does not exist, because selling equipment to a State would not, as such, constitute an offence’.¹⁶¹

Following this initial decision, the FIDH submitted additional evidence and, on 23 May 2012, an investigating judge decided to open a criminal investigation, explaining that ‘the objective of the investigation is precisely to determine if the facts alleged in the complaint are acts of a criminal nature, and that there are consequently grounds for opening a criminal investigation’.¹⁶² The State Prosecutor appealed that decision. However, on 15 January 2013, the Chamber of Criminal Investigations of the Court of Appeal (*Chambre d’instruction de la Cour d’appel*) rejected the

¹⁵⁴ The same journalist revealed both cases in 2011 and 2017. Tesquet, ‘Amesys : les tribulations égyptiennes...’.

¹⁵⁵ FIDH, ‘La FIDH et la LDH déposent une plainte mettant en cause la société Amesys pour complicité d’actes de torture’, 19 October 2011, <https://www.fidh.org/fr/regions/maghreb-moyen-orient/libye/La-FIDH-et-la-LDH-deposent-une> (last accessed 12 November 2018).

¹⁵⁶ Code pénal, article 221-1. Translation provided by FIDH, ‘The Amesys case’, p. 6.

¹⁵⁷ FIDH, ‘The Amesys case’, p. 7.

¹⁵⁸ FIDH, ‘The Amesys case’, p. 5.

¹⁵⁹ Code de procédure pénale, article 689-2. Translation provided by FIDH, ‘The Amesys case’, p. 6.

¹⁶⁰ *Ibid.*

¹⁶¹ Decision of the State Prosecutor, quoted and translated in FIDH, ‘The Amesys case’, p. 9.

¹⁶² FIDH, ‘The Amesys case’, p. 9.

Prosecutor's application and approved the opening of an investigation.¹⁶³ The investigation is now in the hands of the unit of the Paris Tribunal specialized in war crimes, crimes against humanity and genocide.¹⁶⁴

In January 2013, five Libyan citizens joined the criminal proceedings as *parties civiles*. They claimed that the surveillance technology system delivered by Amesys enabled the Gaddafi regime to arrest and torture them.¹⁶⁵ They were heard by the investigating judges in June and July 2013.¹⁶⁶

On 30 May 2017, the company was declared an "assisted witness".¹⁶⁷ This status is specific to French law, and is applicable to persons accused in a criminal case without being indicted (but can precede a formal indictment). In particular 'a placement under assisted witness status is ordered when there are charges that are less serious than the ones that led to an indictment'.¹⁶⁸ In practice, this means that the investigation has shown some evidence against the company, but not enough for an indictment. The claimant requested a formal indictment of Amesys.¹⁶⁹

Amesys has always contested very strongly the accusations of complicity in acts of torture.¹⁷⁰

In an interview, the claimants' lawyer explained that the difficulty in proving the subjective element of the crime (i.e. the fact that Amesys had the required intent to be found complicit in such crime) could play in the favour of Amesys during the course of the criminal proceedings.¹⁷¹

Nexa in Egypt

On 9 November 2017, FIDH and LDH requested the Paris Prosecutor to open an investigation for complicity in torture and forced disappearances, in relation to the alleged participation of the French company Nexa Technologies to the operations of repression led by the El-Sisi regime, by virtue of the sale of surveillance equipment.¹⁷²

On 22 December 2017, the crimes against humanity division of the Paris Prosecutor's office opened a judicial investigation. The FIDH stated that, in doing so, the Prosecutor 'acknowledge[d] the gravity

¹⁶³ FIDH, 'Amesys Case: The Investigation Chamber green lights the investigative proceedings on the sale of surveillance equipment by Amesys to the Kadhafi regime, Press release, 15 January 2013, <https://www.fidh.org/en/region/north-africa-middle-east/libya/Amesys-Case-The-Investigation-12752> (last accessed 15 November 2018). See also 'Libye : l'enquête visant la société française Amesys va se poursuivre', *Libération*, 15 January 2013, https://www.liberation.fr/planete/2013/01/15/libye-l-enquete-visant-la-societe-francaise-amesys-va-se-poursuivre_874118 (last accessed 14 November 2018).

¹⁶⁴ Phone interview with Patrick Baudouin, claimants' lawyer, 19 December 2018. See also 'Amesys : Information judiciaire ouverte pour complicité de torture en Libye', *L'Humanité*, 22 May 2012, <https://www.humanite.fr/amesys-information-judiciaire-ouverte-pour-complicite-de-torture-en-libye> (last accessed 14 November 2018).

¹⁶⁵ Patrick Baudouin, FIDH lawyer, quoted in 'Libye : l'enquête visant la société française Amesys va se poursuivre'. Free translation by the authors.

¹⁶⁶ FIDH, 'The Amesys case', p. 10.

¹⁶⁷ Leloup, 'Après la Libye de Kadhafi...'. This decision does not have an impact on the Egyptian case.

¹⁶⁸ <https://www.service-public.fr/particuliers/vosdroits/F1807> (last accessed 15 November 2018). See also Code de Procédure pénale, articles 113-1 à 113-8.

¹⁶⁹ Phone interview with Patrick Baudouin, 19 December 2018.

¹⁷⁰ 'La société de sécurité française accusée de complicité avec Tripoli se défend', *Libération*, 22 May 2012, https://www.liberation.fr/planete/2012/05/22/la-societe-de-securite-francaise-accusee-de-complicite-avec-tripoli-se-defend_820483 (last accessed 14 November 2018). Free translation by the authors.

¹⁷¹ Phone interview with Patrick Baudouin, 19 December 2018.

¹⁷² A. Guiton, 'La succession d'Amesys, ou le "business as usual" de la surveillance', *Libération*, 16 November 2017, https://www.liberation.fr/planete/2017/11/16/la-succession-d-amesys-ou-le-business-as-usual-de-la-surveillance_1610376 (last accessed 15 November 2018).

of the allegations, giving Egyptian victims the opportunity to become civil parties to the case and testify in France'.¹⁷³

Barriers

Access to evidence

It was reported that the security situation in Libya and Egypt made proceedings in this case particularly difficult and costly.¹⁷⁴ Evidence, in particular a stash of archived documents from an abandoned internet monitoring centre in Tripoli, was retrieved by researchers from Human Rights Watch and the Wall Street Journal,¹⁷⁵ on the basis of which the case against Amesys could be brought. However, a lot of other evidence was destroyed during the conflict.¹⁷⁶ The claimants' lawyer also reported that criminal investigation is particularly difficult in a non-democratic state.¹⁷⁷

Participation and safety of witnesses

In the Libyan case, difficulties were reported with regard to the actual ability of the *parties civiles* to fully participate in the criminal proceedings owing to the difficulty in bringing them to France in order to testify before the Court.¹⁷⁸ The FIDH and LDH reported that they had to identify appropriate partners within the local Libyan civil society with whom they could work on the case, which proved to be challenging given Libya's complex political situation.¹⁷⁹ Finally, it was reported that many victims were 'not willing or not able to talk about the torture they had suffered', which resulted in only five of them agreeing to be *parties civiles* in French criminal proceedings, as 'many of those still living in Libya had genuine concerns about revealing their identities in legal documents where their names could not be kept confidential'.¹⁸⁰ According to the claimants' lawyer, a number of victims were afraid to testify, fearing reprisals.¹⁸¹

Time barriers

Time, and more specifically the slow pace of proceedings, was a significant legal barrier: victims had to wait for six years just to see the investigation through and the accused declared an assisted witness, without any formal indictment.

Language barriers

The claimant's lawyer explained that language issues also constituted a significant constraint, 'as many of the case materials were in English or Arabic and needed to be translated to ensure their relevance to the claim'.¹⁸²

¹⁷³ FIDH, 'Sale of surveillance equipment to Egypt: Paris Prosecutor opens a judicial investigation', Press release, 22 December 2017, <https://www.fidh.org/en/region/north-africa-middle-east/egypt/sale-of-surveillance-equipment-to-egypt-paris-prosecutor-opens-a> (last accessed 15 November 2018).

¹⁷⁴ G. Skinner, R. McCorquodale and O. De Schutter, 'The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business', December 2013, p. 78.

¹⁷⁵ Who then revealed the alleged violations, see Sonne and Coker, 'Firms aided Libyan spied'.

¹⁷⁶ Skinner, McCorquodale and De Schutter, 'The Third Pillar', p. 78.

¹⁷⁷ Phone interview with Patrick Baudouin, 19 December 2018.

¹⁷⁸ Skinner, McCorquodale and De Schutter, 'The Third Pillar', p. 78.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Phone interview with Patrick Baudouin, 19 December 2018.

¹⁸² Ibid.

5.3.2. Boliden

History of the case

Boliden Mineral AB is one of the largest Swedish mining corporations.¹⁸³ In the 1970s and 1980s, as Sweden started to tighten its environmental regulations, mining companies were increasingly encouraged to reprocess mining residue and thus minimize the amount of mining material needed to be treated as waste. Thus, in order to deal with the growing amount of waste emanating from the mining site Rönnskärsverken in Skellefteå (at the time the largest producer of copper, lead, silver and gold in the Nordic region), Boliden began exporting its mining waste (smelter sludge) to Chile, through the Chilean mining company Promel S.A. (Promel). Aside from operating its own mines, Promel was engaged in purchasing residue and waste from the mining industry. Between 1984 and 1985, Boliden exported 20,000 tons of sludge to its Chilean contractor, Promel. The sludge was shipped to Arica in the course of three shipments which took place between August 1984 and July 1985.¹⁸⁴ Although the details of the contract are unknown, it is an undisputed fact that Boliden paid Promel 10 million SEK (approx. EUR 1 million) for taking care of the sludge.¹⁸⁵

In spite of Promel's alleged intention to reprocess the sludge and extract the arsenic, the sludge was dumped (unprocessed and unprotected)¹⁸⁶ at a location called Sitio F, in the areas of Polygano in the port city of Arica, which was subsequently used as a playground for children and where social housing was constructed.¹⁸⁷

In December 1993, Promel was requested by the local authorities to transfer the sludge to another location, but this was not done.¹⁸⁸ Three years later the Health Authority of Arica (AHS) investigated the possibility of removing the waste. In October 1997, samples of the sludge were sent for analysis after the environmental NGO SERPAJ claimed it was toxic. The results showed that the waste contained high levels of arsenic, lead, cadmium, mercury, copper and zinc.¹⁸⁹ In the spring of 1998, Chilean authorities acted by removing the sludge from Sitio F to an area known as Quebrada Encantada, located in the desert east of Arica.¹⁹⁰

Boliden claims no knowledge of or involvement in the chain of events.¹⁹¹ The company alleges that it was only in the spring of 1998, when media started to report about a wave of serious diseases observed in the area (which included cases of cancer, impaired breathing, skin diseases, neurological disorders, increased rate of miscarriages and birth defects), that the company became aware of the situation in Arica.¹⁹²

¹⁸³ R.K. Larsen 'Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?', 83(4) *Nordic Journal of International Law*, 2014, 404.

¹⁸⁴ District Court's judgement (T-1012-13) ('Judgment') p. 10.

¹⁸⁵ *Ibid.*, p. 124.

¹⁸⁶ Business and Human Rights Resource Centre, 'Boliden lawsuit (re Chile)', available at: <https://www.business-humanrights.org/en/boliden-lawsuit-re-chile> (last accessed on 11 January 2019).

¹⁸⁷ Larsen, 'Foreign Direct Liability', *op. cit.*, p. 405.

¹⁸⁸ The primary reason for Promel's failure to take care of the sludge was most likely due to economic difficulties. Between 1984 and 1992, the market prize for arsenic dropped about one-third, thereby taking away any incentive Promel had to reprocess the sludge (see Judgment p 66).

¹⁸⁹ Judgment, p. 32.

¹⁹⁰ Larsen, 'Foreign Direct Liability', *op. cit.*, p. 405 and Judgment, p. 65-66.

¹⁹¹ Judgment, p. 65-67.

¹⁹² *Ibid.*, pp. 33, 65-66.

Discussion of the Case

Proceedings in Chile

In 2000, 374¹⁹³ residents of Polygono filed civil proceedings against Promel and the AHS in Chile. The claimants¹⁹⁴ argued, on the one hand, that Promel should restore the contaminated area, and on the other, that AHS should compensate the claimants for the material and immaterial damages they had suffered due to the toxic waste. The case reached the Chilean Supreme Court,¹⁹⁵ which, in 2007 ordered AHS to pay eight million peso (approx. EUR 10,000) in damages to every one of the 374 injured parties, and ordered Promel to restore the site.¹⁹⁶ However, Promel was declared bankrupt prior to the judgment and did not comply with the order.¹⁹⁷

In 2009, the Chilean government acknowledged, through the document Progamma Maestro, that Arica was heavily contaminated with excessive levels of, *inter alia*, lead, cadmium and arsenic in and around Sitio F. One of the document's conclusions was that approximately 1,880 houses around Sitio F had to be demolished.¹⁹⁸

Proceedings in Sweden

On 12 September 2013, the association Arica Victims KB, representing 796 Chilean citizens, filed a lawsuit with the District Court of Skellefteå ('DC' or 'the Court') against Boliden, in the first Swedish case on foreign direct liability for environmental damage against a corporation.¹⁹⁹ Prior attempts to reach an out-of-court settlement had been rejected by the defendant, who claimed to be eager to have the matter tried in a court of law in order to expunge themselves of the grave accusations.²⁰⁰

The claimants sustained that Boliden, through its negligent conduct, was liable for that they had suffered. In other words, they argued that Boliden owed them a duty of care and that it had breached that duty by failing to ensure that the sludge was appropriately processed by its Chilean contractor.²⁰¹

Chilean substantive law was determined to be applicable in the case. The Court reasoned that the harmful events took place in the mid-1980s which predates the European legislations providing for uniform choice of law rules.²⁰² Instead the Court determined Chilean law to be applicable based on a longstanding assumption in Swedish private international law that claimants can decide the applicable law on which to base their claim. According to the Court, in a situation such as the one at hand in the present case, the interest of an injured party to be able to rely on the legal system of their

¹⁹³ There seems to be some uncertainty as to the exact number of both claimants and claimants awarded damages. In the present judgment (at p. 33) 374 is stated, whereas other sources state that the claimants awarded damages were 353: see <https://www.filminstitutet.se/contentassets/da135bb319ce44e19a49db7483a2177c/blybarne4.pdf?fbclid=IwAR0YKT7ViAiH0wpI3KNZIGpUilLhIF29HAJgL7KWnydFhH2NicqhV7O8ONOO>).

¹⁹⁴ There is no material difference between the individuals in the Promel case and the once suing Boliden in the present case. But none of the them appeared in both cases. According to one of the lawyers representing the individuals against Boliden, they main reason why "only" 374 individuals filed a claim against Promel and AHS back in 2000, seem to be lack of resources to gather more individuals (Phone call with Advokat Johan Öberg, Tuesday the 20th of November 2018).

¹⁹⁵ Case 3174-2005.

¹⁹⁶ Judgment, p. 33.

¹⁹⁷ <https://www.filminstitutet.se/contentassets/da135bb319ce44e19a49db7483a2177c/blybarne4.pdf?fbclid=IwAR0YKT7ViAiH0wpI3KNZIGpUilLhIF29HAJgL7KWnydFhH2NicqhV7O8ONOO>

¹⁹⁸ *Ibid.*, p. 34.

¹⁹⁹ Larsen, 'Foreign Direct Liability', *op. cit.*, p. 404.

²⁰⁰ <https://www.norran.se/nyheter/boliden-forlikning-ar-inte-aktuellt/>

²⁰¹ Larsen, 'Foreign Direct Liability', *op. cit.*, p. 405.

²⁰² Judgment, p. 103.

home jurisdiction supersedes a defendant's interest of foreseeability.²⁰³ Swedish procedural law was, however, ruled to be applicable to the procedural aspects of the case, in accordance with principles in Swedish private international law.²⁰⁴

Medical tests carried out on the inhabitants between 2009 and 2019 revealed the existence of an excessive level of arsenic, amongst other things, in the blood stream.²⁰⁵ The claimants presented the heightened levels of arsenic in their urine as an injury in itself;²⁰⁶ an injury considered having increased the risk of related illnesses such as cancer, deformities at birth, etc. The defendant opposed the existence and extent of claimed injury, citing the urine tests as unreliable and imprecise.²⁰⁷ Boliden also denied negligence, maintaining their actions did not involve a foreseeable risk of injury, and lacked adequate causality in relation to the perceived injury.

The reasoning behind this litigation strategy appears to be two-fold. First, Chilean law stipulates a statute of limitation of five years after an injury has noticeably manifested itself. Since the test results were analysed from 2009 onwards, using the heightened levels of arsenic as the definition of injury made it possible to argue that the injury had manifested within a five year period of the interruption of prescription in 2013 and 2014,²⁰⁸ in accordance with Chilean law. Had the claimants instead chosen to base their claim on the actual health issues suffered, the claim would have been dismissed as the health issues generally manifested themselves earlier than five years before the interruption of prescription. Basing the definition of injury on the results also simplified the evidentiary situation, as the results themselves were not contested, and the correlation between the actual health issues and the heightened levels of arsenic did not have to be substantiated.

Second, the strategy was constructed around the Chilean Supreme Court ('SC') judgment *Farfán*, in which 19 µg arsenic per litre urine was considered constituting an injury in and of itself. The DC however concluded that the consideration in *Farfán* constituted an evidentiary assessment and not a question of law.²⁰⁹ Without the support of *Farfán*, the Court reasoned that Arica Victims had not sufficiently demonstrated that the risk for serious health disturbances started at the claimed 30 µg/l, but instead accepted a level of 100 µg/l, as suggested by the defendant's expert, as a threshold for constituting injury. As most of the claimants did not exhibit such high levels of arsenic in their urine, the majority of claimants was dismissed already at this stage.²¹⁰

In addition to demonstrating injury, Chilean tort law requires adequate causation between the injury and the tortious act; in this case between the heightened levels of arsenic and the transfer of the toxic waste. As the case pertains to personal injury, the evidentiary requirement under Swedish procedural law is that the claim is 'distinctively more likely than any other explanation',²¹¹ a slight alleviation of the ordinary evidentiary burden in civil cases.²¹²

Despite the evidentiary alleviation, the Court concluded that there were several possible explanations for the heightened arsenic levels, primarily through the food and water consumed by the claimants, and waste from other mining actors in the area. The Court also pointed to the lack of correlation between levels of arsenic present in the environment and the levels present in the

²⁰³ Judgment, p. 103.

²⁰⁴ *Ibid.*, p. 105.

²⁰⁵ *Ibid.*, p. 404.

²⁰⁶ *Ibid.*, p. 107.

²⁰⁷ Judgment, p. 21.

²⁰⁸ That is to say, when the claimants filed the claims against Boliden.

²⁰⁹ Judgment, p. 110.

²¹⁰ *Ibid.*, p. 111.

²¹¹ Swedish Supreme Court case NJA 1981 s 622.

²¹² Judgment, p. 115.

claimants. For the areas Sica and Alborada, the Court therefore concluded that causation could not be established. With regards to the areas to the east and northeast of the waste site however, the Court found that the direction of the wind had made the transfer of toxic particles from the sludge an explanation 'distinctively more likely than others'. Nevertheless, the Court assessed the causation as inadequate on the basis that the affected area was an unpopulated desert area at the time of the transfer and that Boliden could therefore not have reasonably foreseen its development, breaking the chain of causality.

On this basis, the court dismissed the action completely, but continued addressing the (irrelevant) question of negligence. Had adequate causation been at hand, Chilean law requires a tortious act to have been carried out with intent or through negligence. Negligence is determined through ordinary culpa, demonstrated through a lack of care or carefulness of the *bonus pater familias*, with stress placed on the possibility for the defendant to foresee the injury.

The claimants argued that Boliden was negligent on the ground that it ought to have realized that Promel did not have the resources or technology to properly handle and dispose of toxic waste, and that the export was a cheap way of getting rid of the waste under the guise of a sale. The claimants argued that Boliden was aware of the health risks associated with exporting the waste and pointed to the fact that, in March 1980 (four years before the first shipment to Chile), Boliden, submitted a patent application for a new technology to reprocess mining residue rich in arsenic. In the patent application, Boliden stated that: 'depositing residues with high levels of arsenic is associated with grave inconveniences', and that such residues 'constitute a huge environmental problem' and 'no method for reprocessing residues rich in arsenic has yet been successful'.²¹³

The Court rejected most of the claimants' arguments, but found it remarkable and negligent of Boliden to have continued the contractual relationship with Promel after realizing any exported waste would end up in an uncovered pile in close proximity to already populated areas, despite knowing such storage conditions would not be accepted at their plant in Sweden.²¹⁴

Upcoming proceedings before the Court of Appeal for Övre Norrland

The claimants appealed the judgment to the Court of Appeal for Övre Norrland, which on the 25th of May 2018 granted leave to appeal.²¹⁵ Arica Victims sustained that the DC erred in a number of its considerations, specifically relating to the application of Chilean law and its Supreme Court jurisprudence.²¹⁶

Firstly, the claimants argued that the DC erred in its interpretation of what constitute injury under Chilean law. In particular the claimants, supported by the Chilean law professor Ramón Domínguez Aguila, argued that, contrary to what the DC concluded, the conclusion in *Farfán* that a minimum of 19 µg arsenic per litre urine constitutes in itself injury under Chilean law, is a question of law and not of fact. The claimants thus argued that it follows from *Farfán* that, as a matter of law, a measured minimum level of 30 µg/l in itself constitutes "immaterial injury" (daño moral), irrespective of proof of individual diagnosis on behalf of the injured parties.

Secondly, in terms of negligence under Chilean law, the claimants argued that by not acting according to established standards of cautiousness (aktsamhetsnorm) in relation to treatment of toxic waste, Boliden acted negligently under Chilean law. Lastly, the claimants affirmed that the DC

²¹³ Judgment, p. 28.

²¹⁴ *Ibid.*, p. 134.

²¹⁵ Case T 294-18.

²¹⁶ <http://caratlaw.se/en/pm-overklagande/>

erred in its decision not to apply the principle of presumption of causality²¹⁷ as the SC did in *Farfán*, and under which the burden of proof is passed over to the defendant. In this regard the claimants sustained that the DC failed to take into account that, under Chilean law, even extremely small contributions to an injury will cause a tortfeasor to be held jointly and severally liable for the injury caused.

Barriers

Difficulty of proving causality

As is illustrated by the outcome of the case, the main legal barrier to accessing legal remedies encountered by the claimants was the difficulty in proving adequate causality between Boliden's actions and the injury that they had suffered. In particular, this obstacle seems to be attributed to the difficulty in proving injuries that appear gradually over time and that can potentially have multiple causes. This is further exacerbated by the apparent inadequacy of the method of measuring exposure to arsenic as the tests at hand can only measure the level of exposure within two weeks of the test.

Applicable law and interpretation of foreign law

A barrier inherent to international conflicts is the difficulty in interpreting and applying the substantive law of another jurisdiction. As tort suits in Sweden operate using the adversary principle, the Court itself has no obligation to investigate the contents of Chilean law, and the principle of *jura novit curia*²¹⁸ only applies to Swedish law. Instead, the parties presented their own interpretation of the law, supplemented by information on the content of the law through experts. The experts however, expressed vastly different opinions in many significant matters, leading the Swedish court to deduce the most accurate one without having any background in Chilean law.

Costs of bringing claims

The case also highlights a number of procedural and practical barriers to bringing civil proceedings before a Swedish court, the main one being cost. As litigation costs follow the principle of "loser pays", the monetary risk of action is steep.²¹⁹ The costs include the opposing party's attorney fees, the cost of producing evidence and expert opinions, as well as travel expenses and loss of income for witnesses and parties. The costs can nevertheless be limited by the Court, if they appear excessive or unreasonable in relation to the claim.²²⁰ In a tort case such as this, the risk might not outweigh the reward as the Swedish legal system does not allow for punitive damages; meaning that damages under Swedish law is only intended to compensate the victim for the damages suffered, but not punish the tortfeasor.²²¹ Foreign claimants will also have to demonstrate an ability to cover the opposing party's litigation costs before bringing an action before the Court.²²²

In the case at hand, Boliden's cost were deemed reasonable by the Court, requiring Arica Victims to pay a sum of 32,5 million SEK (approx. EUR 3.2 million) to the defendant, in addition to their own

²¹⁷ The principle of presumption of causality has been developed in Chilean legal doctrine on the basis of the Chilean Civil Code and springs from the lowering of the burden of proof that courts tend to offer claimants in difficult cases. This alleviation of the burden of proof is done in order to avoid that claimants are put before a "devils test" (una prueba diabólica) in terms of proving adequate causality (see Appeal submitted by Arica Victims in T 294-18, p. 33).

²¹⁸ Jura novit curia is a legal maxim expressing the principle "the court knows the law".

²¹⁹ Chapter 18 § 1 of the Code of Judicial Procedure (Rättegångsbalken 1942:740).

²²⁰ Chapter 18 § 8 of the Code of Judicial Procedure.

²²¹ Preparatory work to the Tort Liability Act (Prop. 1975:12 s 99-100).

²²² 1 § of the Law on the duty of foreign plaintiffs to provide security for legal expenses (Lag (1980:307) om skyldighet för utländska käreande att ställa säkerhet för rättegångskostnader).

costs for bringing forth the claim. Knowing a suit will result in such high costs is in itself a deterrent to taking legal action, and restricts the possibility of appeal in many cases if the winning party requires reimbursement immediately. Additionally, while Arica Victims' own litigation costs were vastly lower than Boliden's, capital is required to even begin to produce evidence in order to bring forth a claim with a chance of success.²²³

The ordinary ways claimants can acquire monetary assistance, such as through legal expenses insurance, is only available to Swedish residents or companies through their home or business insurance.²²⁴ Additionally, these policies have a cap well below 32 million, and often require an excess of minimum twenty per cent.

Public legal aid also carries limitations for foreign claimants, and can only be granted to them if the suit in question concerns matters in Sweden and there are "special circumstances",²²⁵ such as strong humanitarian reasons.²²⁶

It must be noted here that Boliden has the right to demand payment of their litigation costs before the matter is tried in the Court of Appeal. If such a request was to be made, they would block the chance to have the matter reviewed in the second instance as Arica Victims simply could not afford to proceed at this stage, while paying the litigation costs.²²⁷ No such request has yet been made however.

5.3.3. Danzer

History of the case

Danzer is a German-owned logging business, which is headquartered in Austria,²²⁸ but used to be Swiss-based. The company started to work in the DRC in the early 1970s, and in the Bosanga area in 1993.²²⁹ It maintained its operations in the country through a wholly-owned subsidiary, Société Industrielle et Forestière du Congo (Siforco),²³⁰ which was sold in February 2012 to the American group Blattner Elwyn.²³¹

Greenpeace has accused the Danzer group of having a history of recourse to violence in the DRC,²³² through its alleged involvement in bribery and illegal logging,²³³ and through an allegedly large number of clashes with local forests-communities, 'escalating in several cases to police violent

²²³ <https://www.edlc.org/cases/remedying-health-and-environmental-harms/mining-waste-from-sweden-poisons-chileans/>

²²⁴ Isabel Schoultz, 'Legal Aid in Sweden' in: Halvorsen Rønning, Hammerslev, 'Outsourcing Legal Aid in the Nordic Welfare States', [2018] p. 70.

²²⁵ 12 § of the Legal Aid Act (Rättshjälpslagen (1996:1619)).

²²⁶ Larsen, 'Foreign Direct Liability', *op. cit.*, p. 431.

²²⁷ <http://caratlaw.se/en/pm-overklagande/>

²²⁸ <https://www.danzer.com/en/company/corporate-information/portrait> (last accessed 17 September 2018).

²²⁹ Greenpeace International, 'Stolen future', November 2011, p. 3.

²³⁰ Skinner et al., 'The Third Pillar', *op. cit.*, p. 84.

²³¹ <https://www.greenpeace.ch/fr/2012/03/27/deforestation-en-afrique-danzer-vend-ses-activites-dexploitation-forestiere/> (last accessed 17 September 2018).

²³² See for example Greenpeace International, 'Logging sector briefing for the Democratic Republic of Congo', October 2008 and 'Stolen future', *op. cit.*

²³³ Greenpeace International, 'Danzer Group involved in bribery, illegal logging, dealings with blacklisted arms trafficker and suspected of forgery', 2nd edition, November 2004.

repression'.²³⁴ Danzer has denied these allegations and retorted that its 'economic activity and social investments (...) foster local development'.²³⁵

In January 2005, Siforco, a subsidiary of Danzer, signed an agreement with chiefs of the traditional communities in the Bosanga area, including Yalisika village. Such agreements, or "cahiers des charges", are a mandatory part of a forest concession contract, and are meant to ensure that the local population also benefits from it.²³⁶ In this context, the company agreed to build a school and a medical facility for the Yalisika *groupement*. However, the company failed to meet its obligations,²³⁷ invoking, as a justification, 'the international financial crisis and the rebellions, which raged in the region in past years'.²³⁸

On 20 April 2011, reportedly in an act of protest against the business for its failure to fulfil its obligations to the community, and in a misguided attempt to enhance their bargaining power,²³⁹ Yalisika villagers stole equipment belonging to Siforco (radio equipment, batteries, solar panel, etc.).²⁴⁰ The manager of Danzer's Congolese subsidiary, Klaus Hansen, immediately filed a criminal complaint against members of the community.²⁴¹ The Yalisika chief Ambena promised Hansen that the stolen material would be recovered by the 2nd of May, and presided over a village meeting on the previous day, during which it was agreed that all items would be returned.²⁴² In the meantime, Danzer held a meeting of the territorial security committee, during which the decision to dispatch military officers and police to the village was allegedly taken.²⁴³

On the 2nd of May at around 3 a.m., around 60 members of the police and military forces raided the village and committed gross human rights violations, which included sustained beatings of the villagers (in one case, leading to the death of a man, Frédéric Moloma Tuka), the rape of many women and girls, as well as the arbitrary arrest of 16 villagers, and the destruction and burning of property.²⁴⁴

Danzer was accused of having aided and abetted the human rights abuses in several ways. In particular, Greenpeace claimed that the perpetrators of the crimes were transported in Danzer vehicles driven by a Danzer employee;²⁴⁵ that one of these vehicles was also used to transport the arrested villagers to prison; and that the local manager of the Congolese subsidiary, Klaus Hansen, paid the security forces after the raid.²⁴⁶

²³⁴ Greenpeace International, 'Stolen future', *op. cit.*, p. 6.

²³⁵ Danzer Group, 'Statement of Danzer Group responding to the Greenpeace Report "Carving up the Congo"', 27 April 2007, p. 8.

²³⁶ Loi N° 011/2002 du 29 Août 2002 portant Code Forestier en République démocratique du Congo, Art. 88 and 89.

²³⁷ European Center for Constitutional and Human Rights (ECCHR), 'Special Newsletter. Criminal Complaint against Senior Manager of Danzer', 25 April 2013, p. 6. See also A. Böhm, 'Der Mord im Dorf', *Zeit Online*, 25 April 2013, available at <https://www.zeit.de/2013/18/kongo-verbrechen-danzer-verantwortung> (last accessed 1 October 2018) and U. Kurz, 'Reutlinger Firma Danzer soll Mitschuld am Tod eines Kongolesen haben', *Tagblatt*, 22 November 2011, available at <https://www.tagblatt.de/Nachrichten/Reutlinger-Firma-Danzer-soll-Mitschuld-am-Tod-eines-Kongolesen-haben-170644.html> (last accessed 1 October 2018).

²³⁸ Greenpeace International, 'Stolen future', *op. cit.*, p. 3.

²³⁹ Skinner et al., 'The Third Pillar', *op. cit.*, p. 84.

²⁴⁰ Greenpeace International, 'Stolen future', *op. cit.*, p. 3.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, p. 2. See also Greenpeace International, 'Stolen future', *op. cit.*, p. 3.

²⁴⁴ Greenpeace International, 'Stolen future', *op. cit.*, p. 2. See also 'Der Mord im Dorf', *op. cit.*, and 'Reutlinger Firma Danzer soll Mitschuld am Tod eines Kongolesen haben', *op. cit.*

²⁴⁵ 'Der Mord im Dorf', *op. cit.*

²⁴⁶ Greenpeace International, 'Stolen future', *op. cit.*, p. 2.

Discussion of the case

Proceedings in the Democratic Republic of the Congo

On 31 August 2011, the counsel for the Yalisika victims announced that he had filed criminal proceedings on behalf of his clients against the security forces, as well as against Siforco and Hansen, the site manager,²⁴⁷ for rape, attempted rape, grievous bodily harm, wrongful death, destruction of moveable property, torture and incitement to soldiers to break the law'.²⁴⁸ This complaint was filed despite the anonymous phone calls reportedly received by the lawyer advising him to drop the case.²⁴⁹

In March 2012, *Avocats Sans Frontières* took over the claimants' defence.²⁵⁰ After more than three years of investigation, the trial opened on 8 June 2015.²⁵¹ However, the NGO condemned the fact that some accomplices had not been taken to court, and expressed concern that these persons might disrupt the trial and interfere with the victims and witnesses.²⁵² In December 2015, five Congolese soldiers and police officers were sentenced to terms of two to three years imprisonment.²⁵³ While the defendants were initially accused of crimes against humanity, torture and rape, they were ultimately only convicted of torture and failure to report a crime.²⁵⁴ The defendants' lawyer explained that they enjoyed very wide mitigating circumstances on the basis that the population had displayed violent behaviour, and that they had not responded using firearms.²⁵⁵ The Siforco employees were acquitted. The greatest hurdle that the proceedings in DRC faced 'was the chronic underfunding of the Congolese legal system. This led to constant delays; witnesses could not be examined and their protection could not be guaranteed'.²⁵⁶

Proceedings in Germany

On 25 April 2013, the European Centre for Constitutional and Human Rights (ECCHR) and Global Witness filed criminal proceedings against the German manager of the Danzer group, Olof Von Gagern.²⁵⁷ The complaint was submitted to the State Prosecutor's office (Staatsanwaltschaft) in Tübingen.²⁵⁸ Von Gagern was accused by the claimants of 'aiding and abetting, through omission,

²⁴⁷ 'RDC: reprise du procès des exactions du village de Yalisika', *RFI*, 5 October 2015, available at <http://www.rfi.fr/afrique/20151005-rdc-reprise-proces-massacre-village-yalisika> (last accessed 1 October 2018); 'Mbandanka : Siforco va comparaître comme accusé dans le procès de Yalisika', *Radio Okapi*, 19 October 2015, available at <https://www.radiookapi.net/2015/10/19/actualite/justice/mbandanka-siforco-va-comparaître-comme-accuse-dans-le-proces-de-yalisika> (last accessed 1 October 2018).

²⁴⁸ Greenpeace International, 'Stolen future', *op. cit.*, p. 5.

²⁴⁹ *Ibid.*

²⁵⁰ <https://www.asf.be/fr/blog/2013/04/26/logging-and-human-rights-in-dr-congo/> (last accessed 20 September 2018).

²⁵¹ <https://www.asf.be/fr/blog/2015/06/08/yalisika-trial-logging-and-human-right-in-drc/> (last accessed 20 September 2018).

²⁵² *Ibid.*

²⁵³ <https://www.voafrique.com/a/conflit-forestier-rdc-cinq-soldats-policiers-condamnes-pour-bavures/3103565.html> and <https://www.vivafrik.com/2015/12/16/rdc-cinq-soldats-et-policiers-condamnes-pour-des-bavures-dans-un-conflit-forestier-a2650.html> (last accessed 20 September 2018).

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ CorA Network for Corporate Accountability, 'Toward global Regulation on Human Rights and Business: Position paper of the Treaty Alliance Germany on the UN treaty process on transnational corporations and other business enterprises', 2017, at 13.

²⁵⁷ ECCHR, 'Special Newsletter', *op. cit.*; 'The Third Pillar', *op. cit.*, p. 85.

²⁵⁸ *Ibid.*

crimes against sexual self-determination as well as grievous bodily harm, unlawful imprisonment and arson'.²⁵⁹

In an interview, the ECCHR gave two main reasons to explain its decision to pursue criminal rather than civil proceedings. Firstly, the ECCHR explained that it was difficult to stay in contact with the victims, as they lived in remote villages: and it would therefore have been difficult for them to gain ownership over a civil legal action that was happening so far away. Secondly, the burden of proof lies on the claimants in civil proceedings, which meant that they were less likely to win a civil case. The ECCHR explained that they would have had to gather evidence in order to pierce the corporate veil which might have proven difficult, whereas in a criminal case, this task falls to the public prosecutor. A civil case is also potentially more costly as the claimants bear the risk of losing the case, and thus potentially having to pay the defendant's legal costs.²⁶⁰

Non-judicial mechanisms, such as OECD NCPs, were not used either as, according to the ECCHR, it would have been almost impossible, logistically speaking, to put a true dialogue in place with people living so far away. Moreover, the ECCHR considers it difficult to negotiate and to build a dialogue with a company in a case relating to criminal behaviour.²⁶¹

Before the German court, the ECCHR sustained that Congolese security forces are well-known for their record of gross human rights abuses and sexual violence during conflicts between logging companies and forest communities, and the high risk associated with this scenario should have been taken into account by Danzer's manager.²⁶² As a result, the latter was accused of having failed to give clear instructions to the employees of Danzer's Congolese subsidiary on whether and how to engage with the local security forces in the event of a dispute with the local communities.²⁶³ The claimants gave examples of what such instructions could have looked like which include the following: 'the company should not let conflicts in relation with its wood concessions arise, and should therefore comply with its social obligations in due time', and, in case of a conflict does arise, 'the deployment of security forces in weak governance zones is to a large extent to be excluded... calling security forces in should be considered as *ultima ratio*'.²⁶⁴

The legal arguments of the claimants were based on the existing jurisprudence of the German Federal Court of Justice on the liability of principals (*Geschäftsherrenhaftung*),²⁶⁵ as well as on international standards, and particularly the UNGPs, requiring companies operating in regions where human rights are under threat to undertake comprehensive risk analyses.²⁶⁶

The defendant argued that evidence was lacking and contested the veracity of the facts and reports presented by the claimants.²⁶⁷ Danzer commissioned the SGS (*Société Générale de Surveillance*), a Swiss certification company, as independent investigator to investigate the events in Yalisika. The

²⁵⁹ Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, pp. 2-3. See also ECCHR, 'Case Report: Danzer', August 2014, p. 1.

²⁶⁰ Telephone interview with ECCHR, 10 October 2018.

²⁶¹ Ibid.

²⁶² ECCHR, 'Special Newsletter', op. cit., p. 8.

²⁶³ Ibid.

²⁶⁴ See full list at Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, pp. 3-4. Free translation by the authors.

²⁶⁵ See supra about the German legal background.

²⁶⁶ ECCHR, 'Special Newsletter', op. cit., pp. 8-9.

²⁶⁷ See in particular Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, pp. 5-8.

resulting report concluded that the company was not responsible for any omission.²⁶⁸ It specifically emphasized that providing vehicles to the local authorities was common, and that the violent actions by the security forces were not influenced by Siforco.²⁶⁹

In March 2015, the prosecutor dismissed the case. In his decision, he found that proceedings requiring mutual judicial assistance with “African states” were very lengthy and costly (for instance witness statements had to be translated), and that the case did not justify such expense. The prosecutor also found that the causal connection between the inaction of the manager and its consequences required to establish liability through omission was missing.²⁷⁰

Barriers

Access to evidence

As evident from the prosecutor’s submissions,²⁷¹ the main barrier in this case was access to evidence as to the facts and crimes allegedly committed in Yalisika. The ECCHR points out the underuse of resources by the prosecutor when it came to gathering evidence. According to the organisation, the public prosecutor should have asked for legal assistance from the Congolese authorities to lead the investigation on what happened in Yalisika, especially because there already had been a Congolese investigation on these same facts for the criminal proceedings in the DRC.²⁷² Moreover, information about the company and exact role of the manager was difficult to obtain, ‘due to the fact that information in the public domain was severely limited’.²⁷³

Establishing the liability of a certain individual within the company is made difficult by the limited access to internal information, even more so in the Danzer case, given that the company is a private, family-owned company, and that, as such, is not legally required to release materials into the public domain to the same extent that a listed business is required to.²⁷⁴

Lack of funding

Another barrier in this case was the lack of funding, as legal assistance was not granted and the claimants and their lawyers were discouraged to attempt an appeal.²⁷⁵

Safety of witnesses

Some victims and witnesses were reportedly threatened and pressured during the proceedings, including through the payment of undisclosed sums of money,²⁷⁶ although it is unclear who exactly is behind those threats and payments.

²⁶⁸ SGS, ‘Forest Management – Controlled Wood Certification Report’, AD 54-E-03, 10 May 2010, available at https://www.sgs.com/~/_media/Global/Documents/Technical%20Documents/Reports/Certification%20Reports/SGS-SSC-Forest-9459-CD-SiforcoSA2011-CD-11-AD54E.ashx (last accessed 7 January 2019).

²⁶⁹ Email exchange with Danzer, 10 October 2018.

²⁷⁰ Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, pp. 8-10.

²⁷¹ ‘Given the fact that the effects of the corporate decisions are located in regions at risk that are factually and legally difficult to access, and that, similarly, the relevant structure of the company for disclosure of corporate decisions is divided between different States, the possibilities of elucidation in these regions quickly reach their limits, with comparatively limited resources of appointed judicial authorities’. Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, p. 12, quoted in C. Müller-Hoff, ‘Unternehmen als Täter – internationale Perspektiven und Herausforderungen für das deutsch Straf- und Prozessrecht’, in M. Krajewski, F. Oehm and M. Saage-Maaß (eds.), *Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen. Interdisciplinary Studies in Human Rights*, vol. 1, Springer, Berlin, 2018, p. 234. Free translation by the authors.

²⁷² Telephone interview with ECCHR, 10 October 2018.

²⁷³ Skinner et al., ‘The Third Pillar’, *op. cit.*, p. 86.

²⁷⁴ *Ibid.*

²⁷⁵ Telephone interview with ECCHR, 10 October 2018.

²⁷⁶ Skinner et al., ‘The Third Pillar’, *op. cit.*, p. 86.

Cultural barriers

Transnational cases can be challenging for regional courts and prosecutors who are not necessarily specialized in dealing with this sort of cases, and the cultural interpretation of facts can sometimes be problematic.²⁷⁷ These difficulties are amplified when the alleged victims are living very far away from the actual proceedings.²⁷⁸

In addition, cultural issues may impact the building of a case. For instance, traditionally in DRC, it is the chief of the village or of the “groupement” who engages in all decision-making.²⁷⁹ Difficulties may also arise in the gathering of testimonies. In particular, in the DRC, ‘there is a significant stigma attached to rape, making it extremely difficult for the women who were raped in Yalisika to discuss what happened in any public forum’.²⁸⁰ The public prosecutor referred to these issue in his decision, and pointed out that, when a women’s organisation attempted to have a dialogue with victims of sexual violence, male persons were always present, which consistently prevented clear testimonies to be given.²⁸¹

Language barriers

In the case, all materials and interviews had to be translated, which had negative implications regarding costs, but also raised concerns with regard to the consistency of testimonies.²⁸² These concerns undoubtedly impacted the prosecutor’s decision, which referred several times to consistency issues in the testimonies.²⁸³ According to the ECCHR, these language and cultural barriers boil down to a more general problem faced by claimants in legal proceedings for alleged corporate human rights abuses: the lack of time and resources.²⁸⁴

5.3.4. ENI

History of the case

Over the years, recurrent issues linked to oil spills across the Niger Delta have affected the health, welfare and livelihood of the communities living in the surrounding areas. NGOs have estimated that, to date, eleven million barrels of oil have been spilled in the Niger Delta, and that new spills are a weekly occurrence.²⁸⁵

Eni is an Italian oil and gas company and one of the global leaders in this industry.²⁸⁶ Eni began its oil exploitation activities in Nigeria in 1962 through a wholly owned subsidiary, Nigerian Agip Oil Company (NAOC).²⁸⁷

On the 5th of April 2010, an oil pipeline operated by Eni’s Nigerian subsidiary (NAOC) burst, as a result of which an estimated 150 barrels of oil leaked into a creek affecting the creek itself, fishing ponds, plants and trees essential to the local community, and more generally affecting their livelihood.²⁸⁸

²⁷⁷ Telephone interview with ECCHR, 10 October 2018.

²⁷⁸ Ibid.

²⁷⁹ See Loi fixant le statut des chefs coutumiers, Août 2015.

²⁸⁰ Ibid.

²⁸¹ Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015, p. 7. Free translation by the authors.

²⁸² Skinner et al., ‘The Third Pillar’, *op. cit.*, p. 86.

²⁸³ Einstellungsbescheid der Staatsanwaltschaft Tübingen, Az.21 Js 8104/13, 3 March 2015.

²⁸⁴ Telephone interview with ECCHR, 10 October 2018.

²⁸⁵ Friends of Earth Europe, “Nigerian community sue Italian oil giant Eni”, 4 May 2007, available at:

<http://www.foeeurope.org/nigerian-community-sues-italian-oil-giant-040517> (last accessed on 16 November 2018).

²⁸⁶ https://www.eni.com/en_IT/company/company-profile.page

²⁸⁷ https://www.eni.com/en_NG/eni-in-nigeria/eni-in-nigeria.page

²⁸⁸ Friends or Earth Europe, “ENI and the Nigerian Ikebiri case”, *op. cit.* n. 2.

This occurred just a few of hundred meters away from the villages where the Ikebiri community live,²⁸⁹ which is a community formed of inhabitants of several villages in the State of Bayelsa in Nigeria,²⁹⁰ whose main economic activities revolve around fishing, farming, animal trapping, traditional medical practices, canoe carving and palm-wine tapping.²⁹¹

The Ikebiri Community made several attempts to engage with NAOC and Eni in order to obtain compensation and the clean-up after the leak, and an initial offer of approximately EUR 14 000 was made by NAOC. However, this was deemed insufficient by the community and rejected.²⁹²

NAOC claims to have cleaned up the site, however, the only remedial action that it took reportedly consisted in burning the surrounding area, without seeking prior consent.²⁹³ According to the NGO Friends of Earth, the clean-up was unsatisfactory and the negative consequences of the oil spill persist.²⁹⁴

Discussion of the case

In May 2017, the King of the Ikebiri community, Francis Ododo, representing the community and supported by Friends of Earth, brought legal proceedings in Italy against both the Italian parent company, Eni s.p.a., and its Nigerian subsidiary NAOC. They claimed EUR 2 million in compensation for the damages that they allegedly suffered as a result of the oil spill and the clean-up of the site.

The claimants sustained that lack of effective access to justice and poor enforcement in Nigeria deterred them from bringing legal proceedings in Nigeria.²⁹⁵ As an example of their contention, they mentioned a judgment from the Benin Judicial Division of the Federal Court of Nigeria of 14 November 2005 in which the court held that gas flaring violates the right to life and dignity of persons, and Shell and NNPC were ordered to take immediate steps to stop gas flaring in the community, which, to date, has still not been enforced.²⁹⁶ This led them to bring their legal proceedings in Europe, before the courts of the home state of the company.

The legal proceedings against the parent company were filed in Italy on the basis of the Brussels I Recast Regulation. Since Eni has its statutory seat in Italy, the claimants sustained that Italian courts have jurisdiction to hear the claims. However, the scope of application of the Brussels I Recast Regulation is limited to EU domiciled defendants, therefore excluding the Nigerian subsidiary as its statutory seat is in Nigeria. The claimants invoked Italian domestic law as a basis for adding the Nigerian subsidiary as a co-defendant.

However, the defendants contested the jurisdiction of the Italian courts and contended that the proceedings against the parent company were instrumentally filed solely to bring the Nigerian subsidiary under Italian jurisdiction, thereby constituting an abuse of procedural law.²⁹⁷ At the moment of writing, the case is still pending and the Italian will therefore decide whether the claim

²⁸⁹ Friends of Earth Europe, "Nigerian community sue Italian oil giant Eni", *op. cit.* n. 1.

²⁹⁰ Friends of Earth Europe, "ENI and the Nigerian Ikebiri case", Press briefing, 4 May 2018. available at: http://www.foeeurope.org/sites/default/files/extractive_industries/2017/foee-eni-ikebiri-case-briefing-040517.pdf (last accessed on 15 November 2018).

²⁹¹ *Ibid.*, p. 1.

²⁹² *Ibid.*, p. 1.

²⁹³ Friends of Earth Europe, "Nigerian community sue Italian oil giant Eni", *op. cit.* n. 1.

²⁹⁴ Friends of Earth Europe, "ENI and the Nigerian Ikebiri case", *op. cit.*, p. 1.

²⁹⁵ *Ibid.*, p. 2.

²⁹⁶ *Ibid.*, p. 3.

²⁹⁷ Essex Business and Human Rights Project, "Legal Opinion on English Common Law Principles on Tort Case: Ododo Francis Timi v ENI and Nigerian Agip Oil Company (NAOC)", 7 February 2018, p. 4.

should be summarily dismissed as an attempt to abuse procedural law, or whether to assert jurisdiction over the case.

In their submission, the claimants stated two possible causes of action for their claims.²⁹⁸ Under the first one, they argued that the corporate veil should be lifted so as to find the parent company liable for the action of its subsidiary. Under the second one, they sustained that the parent company should be directly liable for breach of the duty of care that it owed the Nigerian claimants. The Italian court will therefore be called upon to establish whether Eni owed the Ikebiri community a duty of care and whether, as a result, it can be liable for the damages resulting from the operations of NAOC. In particular, the claimants are arguing that the parent company was responsible for the equipment failure.

In accordance with the Rome II Regulation, the applicable law is Nigerian law as the law of the place where the damage occurred. The Italian court will therefore have to decide whether, under Nigerian law, it is likely that the claim against the parent company can be awarded. The claimants sustained that, in doing so, the court will need to look not only into Nigerian law, but also into English law since Nigerian law is a *common law* system, and as such, is based on English law. In particular, the claimants argued that English case-law has recognised that a parent company may, in certain circumstances, owe a duty of care to the workers or local communities affected by the operations of its subsidiaries.²⁹⁹ In their legal opinion on the case, the Essex Business and Human Rights Projects argued that Eni owed such a duty of care to the Ikebiri community.³⁰⁰ They referred, amongst other things, to the governance framework elaborated by the parent company through which Eni aimed to 'identify, measure, manage and monitor', the main risks (which include human rights and environmental risks) in the Group's activities.³⁰¹ According to them, 'it emerges from this normative framework and from Eni's own representations, that the parent company took it upon itself to decisively influence the implementation of its subsidiary's HSE policies making sure that, notwithstanding the degree of operational autonomy enjoyed by NAOC, its own directives be implemented'.³⁰² They sustained that Eni breached that duty of care by failing to ensure that the standards that it had set, with regard to human rights and environmental protection in particular, were observed by the subsidiary.³⁰³ At the time of writing, the case is pending.

Barriers

Attribution of legal responsibility

In their submission, the claimants are asking the Italian court to lift the corporate veil to find the parent company liable for the action of its subsidiary. However, the principle of separate legal personality entails that each of the entities that makes up the multinational companies is autonomous and liable separately. Piercing the corporate veil is complex and often poses a major hurdle to the imposition of liability on the parent company for the activities of their subsidiaries.³⁰⁴

²⁹⁸ *Ibid.*, p. 4.

²⁹⁹ Court of Appeal, *Ngcobo and others v Thor Chemicals Holdings Ltd and others*, October 9, 1995 (unreported).

³⁰⁰ Essex Business and Human Rights Project, "Legal Opinion on English Common Law Principles on Tort Case: *Ododo Francis Timi v ENI and Nigerian Agip Oil Company (NAOC)*", *op. cit.*, p. 8.

³⁰¹ *Ibid.*, p. 9.

³⁰² *Ibid.*, p. 9.

³⁰³ *Ibid.*, p. 15.

³⁰⁴ P I Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2004) 24 *Hastings International and Comparative Law Review* 297, p. 304.

Issues of Jurisdiction

The fact that the Brussels I Recast Regulation is applicable only to EU domiciled defendants means that EU private international law rules on jurisdiction are only applicable to the legal proceedings brought in Europe against the parent company, but are not applicable to the legal proceedings against the Nigerian subsidiary. The latter might be added as a co-defendant if the domestic law of the forum (here Italian law) allows it, but this can create a number of difficulties and give rise to legal uncertainty.

Applicable Law

The fact that the applicable law is Nigerian law under the Rome II Regulation can create some difficulties for the claimants. Generally speaking, making the law of the host state - a developing country generally with lower standards of protection - the applicable law, can create an obstacle to accessing substantive justice for the claimants.³⁰⁵

Establishing a duty of care

As case-law on business-related human rights abuses has shown in the past, establishing the existence of a duty of care owed by a parent company to those affected by the acts or omissions of its subsidiaries is not an easy task. It depends on the circumstances of each specific case and on a series of factors such as the degree of control and oversight that the parent company exercises over the activities of its subsidiary. This creates some major hurdles for the claimants that must demonstrate from a very early stage of the proceedings and generally, with no or very limited access to information such as internal documentation necessary to substantiate their claim, that the circumstances of the case justify the recognition of the existence of a duty of care on the parent company.

5.3.5. KiK

History of the case

KiK Textilien und Non-Food GmbH (KiK) is a German textile discount retailer headquartered in Bönen (Germany).

On 11 September 2012, a garment factory in Pakistan caught fire, causing the death of more than 250 workers.³⁰⁶ 32 people were also injured, some critically.³⁰⁷ A federal report on the fire revealed that the ground floor and an illegally built mezzanine were entirely destroyed in the fire.³⁰⁸ According to the ECCHR, the high number of victims was due to inadequate health and safety measures, as 'many of the windows were barred, emergency exits were locked and the building had only one unobstructed exit, impeding the exit of employees who suffocated or were burned alive inside'.³⁰⁹ In

³⁰⁵ V. Van Den Eeckhout, 'Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor', (2011) *Working Paper Series* (July 26, 2011), Available at SSRN: <http://ssrn.com/abstract=1895690> p. 12.

³⁰⁶ Clean Clothes Campaign, 'Ali Enterprises: A Factory Inferno', <https://cleanclothes.org/safety/ali-enterprises> (last accessed 17 October 2018).

³⁰⁷ *Ibid.*

³⁰⁸ Clean Clothes Campaign, 'Time Line of the Ali Enterprises Case', <https://cleanclothes.org/safety/ali-enterprises/time-line-for-the-ali-enterprises-case> (last accessed 26 October 2018), p. 1.

³⁰⁹ European Center for Constitutional and Human Rights (ECCHR), 'Case report: Pakistan – cheap clothes, perilous conditions', April 2017, p. 1. See also, for example, N. Klawitter, 'Katastrophenfabrik produzierte für Discounter Kik', *Spiegel Online*, 18 September 2012, <http://www.spiegel.de/wirtschaft/unternehmen/pakistan-kik-liess-jeans-bei-der-abgebrannten-textilfabrik-produzieren-a-856530.html> (last accessed 29 October 2018).

addition, some workers were allegedly requested to save garments first and were prevented from escaping the building.³¹⁰

The factory was owned by Ali Enterprises which was one of the subcontractors of KiK.³¹¹ According to police investigators, the former employed 1,293 workers.³¹²

In August 2012, just three weeks before the fire, Ali Enterprises had received the SA8000 certification, a certification which is meant to be awarded to companies upholding 'a safe and healthy environment' and taking 'effective steps to prevent potential health and safety incidents and occupational injury or illness arising out of, associated with or occurring in the course of work'.³¹³ The certification was awarded by the Italian auditing company RINA, who itself subcontracted the inspection to a Pakistani company, which, reportedly, never set foot in the factory.³¹⁴

In the aftermath of the fire, KiK agreed to pay USD 1 million in emergency aid to the survivors and families of the victims. This compensation was coordinated by an independent commission, set up by the High Court of Sindh.³¹⁵

On 10 September 2016, an agreement on long-term compensation was reached, through a negotiation facilitated by the International Labour Organisation (ILO),³¹⁶ whereby KiK agreed to pay 5 million USD to affected families and survivors through monthly pensions.³¹⁷ The ILO had been involved in the negotiations since May 2016, at the request of the German Federal Ministry of Economic Cooperation and Development and the Pakistani Ministry of Overseas Pakistanis and Human Resource Development.³¹⁸ The ILO took on a role of facilitation and coordination. Under the leadership of the ILO Country Office Director, it also undertook a fact finding mission in Pakistan 'to review the [...] situation and to explore the most rapid way forward to finance and deliver the compensation due to the victims of the accident of Ali Enterprises'.³¹⁹ The agreement reached was based on the principles of the ILO Convention 121 on employment injury benefits, which covers material damages, such as loss of income and medical costs, but does not include immaterial damages, such as pain and suffering.³²⁰

³¹⁰ D. Walsh, 'Anger rolls across Pakistani city in aftermath of factory fire', *The New York Times*, 13 September 2012.

³¹¹ A Clean Clothes Campaign and Center for Research on Multinational Corporations report was sent to KiK, revealing that 90% of Ali Enterprises production was intended for them. KiK did not contradict this information. See Clean Clothes Campaign, 'Time Line', *op. cit.*, p. 6.

³¹² Clean Clothes Campaign, 'Time Line', *op. cit.*, p. 1.

³¹³ Social Accountability International, 'SA8000 Guidance – 2008 Standard', June 2013.

³¹⁴ Clean Clothes Campaign, 'Complaint filed against Italian auditor for ignoring fatal flaws in garment factory', 11 September 2018, <https://cleanclothes.org/news/2018/09/11/complaint-filed-against-italian-auditor-rina-for-ignoring-fatal-flaws-in-garment-factory-on-anniversary-of-deadly-factory-fire-in-pakistan> (last accessed 26 October 2018). See also D. Walsh and S. Greenhouse, 'Inspectors certified Pakistani factory as safe before disaster', *New York Times*, 19 September 2012, <https://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html> (last accessed 30 October 2018).

³¹⁵ ECCHR, 'Case report: Pakistan', *op. cit.*, p. 1.

³¹⁶ Clean Clothes Campaign, 'Time Line', *op. cit.*, pp. 14-16.

³¹⁷ Business & Human Rights Resource Centre, 'KiK lawsuit (re Pakistan)', available at: <https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan> (last accessed on 11 December 2018).

³¹⁸ ILO, 'Compensation arrangement agreed for victims of the Ali Enterprise factory fire in Pakistan', 10 September 2016, available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang-en/index.htm (last accessed 8 January 2019).

³¹⁹ ILO, 'ILO to coordinate compensation process for victims of Ali Enterprises' tragedy', 26 May 2016, available at http://www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_484975/lang-en/index.htm (last accessed 8 January 2019).

³²⁰ Clean Clothes Campaign, 'Time Line', *op. cit.*, p. 9.

KiK continued to deny responsibility for the tragedy, asserting that the fire was the result of arson and that no safety issues were reported by the auditors.³²¹

This case is of particular importance as it is the first time that the liability of a European company was invoked before European courts for human rights abuses that occurred within one of its suppliers in a third country.³²²

Discussion of the case

Proceedings in Pakistan

Legal proceedings commenced the day after the fire in Pakistan under the section 302 of the Pakistan Penal Code (punishment for murder)³²³ against the factory owner and his son-in-law.³²⁴ If the investigation for criminal negligence was discontinued, a number of complaints brought by the victims of the fire against the Pakistani regulatory and law enforcement authorities remain pending.³²⁵ They stand accused of negligence in the investigations into the causes of the fire. The European Center for Constitutional and Human Rights (ECCHR) is lending its support to the legal proceedings in Pakistan, and has been granted permission to provide expert evidence to the court. In that capacity, the ECCHR has submitted a legal opinion to the High Court of Sindh in Karachi in May 2014, setting out the Pakistani State's obligations under international law.³²⁶ According to the ECCHR, the role of the submission is to ensure that the investigation covers not only local actors but also examines the roles played by buyer company KiK and auditing firm RINA.³²⁷

Proceedings in Italy

In 2014, the lawyers of 180 affected families submitted a report on the factory fire and the role of RINA, the Italian auditing company, to the Italian State prosecutor in Turin. The prosecutor opened criminal investigations into the matter and ordered an independent assessment by fire experts. In early 2016, the case was transferred to the prosecutor in Genoa where RINA's headquarters are located.³²⁸ In March 2015, an official request for compensation was brought to RINA by the lawyers of 180 affected families, but RINA rejected the possibility of compensation.³²⁹ At the time of writing, the case is still pending.

In parallel to the criminal proceedings, on 11 September 2018, the ECCHR, together with an international coalition of seven NGOs from Pakistan, Germany, Italy and the Netherlands filed an OECD complaint with the Italian National Contact Point (NCP) against the Italian auditor RINA for

³²¹ Business & Human Rights Resource Centre, 'KiK lawsuit (re Pakistan)', *op. cit.*

³²² 'Pakistanische Brandopfer: Kik wappnet sich mit Aderhold in Musterprozess', *JUVE*, 4 September 2015, <https://www.juve.de/nachrichten/verfahren/2015/09/musterprozess-kik-wappnet-sich-mit-aderhold-gegen-klage-pakistanischer-brandopfer> (last accessed 29 October 2018).

³²³ The article states that "Whoever commits murder shall be punished with death or [imprisonment] for life, and shall also be liable to fine". See http://bdlaws.minlaw.gov.bd/sections_detail.php?id=11§ions_id=3131 (last accessed 26 October 2018).

³²⁴ D. Walsh and S. Greenhouse, 'Certified safe, a factory in Karachi still quickly burned', *New York Times*, 7 December 2012, <https://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html> (last accessed 30 October 2018); The News Tribe, 'Karachi factory fire: Owner says ready to compensate victims', 13 September 2012, <http://www.thenewstribes.com/2012/09/13/karachi-factory-fire-owner-says-ready-to-compensate-victims/> (last accessed 26 October 2018).

³²⁵ ECCHR, 'Case report: Pakistan', *op. cit.*, at. 2.

³²⁶ *Ibid.*, p. 2.

³²⁷ *Ibid.*, p. 2.

³²⁸ ECCHR, "Case report: RINA certifies safety before factory fire in Pakistan", November 2016, at. 2.

³²⁹ *Ibid.*

failing to detect and act upon safety and labour abuses at the Ali Enterprises factory.³³⁰ They asked RINA to publish the audit report of Ali Enterprises, and ensure a more transparent audit procedure in the future. The complaint also demands that RINA engages into the access and provision of remedy.³³¹

Proceedings in Germany

On 13 March 2015, civil proceedings were filed against KiK before the District Court of Dortmund (*Landgericht Dortmund*) in Germany by four Pakistani citizens - one survivor and three relatives of victims who died in the fire³³² - supported by ECCHR and Medico International, and represented by the German lawyer Remo Klingner.

The claimants were seeking EUR 30,000 each in compensation for the damages that they suffered as a result of the fire³³³ - which include the loss of income of the main breadwinner,³³⁴ but also the pain and suffering for loss of life - as well as an apology from the company and a pledge to ensure safety at its outsourced clothing production facilities.³³⁵ The compensation was meant, among other things, to complement the compensation resulting from the negotiation facilitated by the ILO which, following ILO Convention 121, excluded immaterial damages such as pain and suffering.³³⁶

The jurisdiction of the German courts was based on Articles 4 and 63 of the Brussels I Recast Regulation, since KiK has its statutory seat in Germany

Under article 4(1) of the Rome II Regulation, Pakistani law was the law applicable to the dispute as the law of the place where the damage occurred. Pakistani law is, to a large extent, based on principles of English Common Law, and Pakistani courts often refer to English case-law as persuasive authority, particularly in the field of tort law.³³⁷

The claimants argued that KiK owed them a direct duty of care to ensure a healthy and safe working environment. The claimants underlined that KiK 'regularly intervened in the factory's operations, including by directing and monitoring safety management',³³⁸ and that KiK had assumed responsibility for the health and safety of the employees of Ali Enterprises.³³⁹

³³⁰ Business and Human Rights Resource Centre, 'NGO coalition files OECD complaint with Italian NCP against auditor RINA for allegedly failing to detect safety & labour abuses at Ali Enterprises factory in Pakistan', available at: <https://www.business-humanrights.org/en/ngo-coalition-files-oecd-complaint-with-italian-ncp-against-auditor-rina-for-allegedly-failing-to-detect-safety-labour-abuses-at-ali-enterprises-factory-in-pakistan-incl-co> (last accessed on 11 Januar 2019).

³³¹ Clean Clothes Campaign, 'Complaint', *op. cit.*

³³² ECCHR, 'Case report: Pakistan', *op. cit.*, at. 2; ECCHR, 'Pressemitteilung – Klage gegen KiK: Landgericht Dortmund darf Verfahren nicht an Verjährung scheitern lassen!', 5 June 2018.

³³³ 'KiK-Verfahren wird nach pakistanischem Recht entschieden', *Legal Tribune Online*, 30 August 2016, <https://www.lto.de/recht/nachrichten/n/lg-dortmund-prozesskostenhilfe-kik-brand-schadensersatz-pakistanisches-recht/> (last accessed 29 October 2018).

³³⁴ ECCHR, 'KiK: Paying the price for clothing production in South Asia', available at: <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/> (last accessed on 18 December 2018).

³³⁵ Business & Human Rights Resource Centre, 'KiK lawsuit (re Pakistan)', available at: <https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan> (last accessed on 11 December 2018).

³³⁶ Clean Clothes Campaign, 'Time Line', *op. cit.*, p. 9.

³³⁷ M. Lau, 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract', 1 *Yearbook of Islamic and Middle Eastern Law*, 1994, 3, p. 10

³³⁸ P. Wesche, M. Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*', 16 *Human Rights Law Review* 2016, 370, p. 373.

³³⁹ Sh. Leader, J. Wright and A. Yilmaz, 'Legal Opinion on English Common Law Principles on Tort - *Jabir and Others v KiK Textilien Und Non-Food BmbH*', 7 December 2015, available at: https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Legal_Opion_Essex_Jabir_et_al_v_KiK_2015.pdf (last accessed on 11 January 2019).

In particular, KiK had its own code of conduct, forming part of its supply chain contracts, which required suppliers entering into business relationships with KiK to comply with certain standards ensuring safe working conditions. KiK monitored compliance with such standards, notably through audits carried out by third parties, and was able to impose sanctions, such as cancelling orders or ceasing to do business, in case of non-compliance.³⁴⁰ The claimants highlighted that KiK purchased 75 per cent of the factory's output and was therefore its main customer,³⁴¹ and that KiK regularly visited the Pakistani factory which meant that the business ties between KiK and the Pakistani factory were sufficiently close.³⁴² As a result, they argued that KiK was responsible for ensuring compliance with these standards.³⁴³

The claimants maintained that KiK breached its duty of care by failing to do its share to prevent the harm suffered by the workers of Ali Enterprises in breach of its legal obligation to ensure compliance with health and safety standards at the factory.³⁴⁴ At the request of the ECCHR, Forensic Architecture at Goldsmiths, University of London put together a computer simulation of the fire that occurred in Ali Enterprises textile factory which was submitted to the Regional Court in Dortmund in January 2018.³⁴⁵ The simulation showed that inadequate fire safety measures, such as the lack of stairs, emergency exits, fire extinguishers and fire alarms in the factory, contributed to the death and injury of hundreds of factory workers. The simulation demonstrated that minor improvements to the safety measures in place - in particular, accessible stairways and clearly signposted escape routes - would have significantly altered the progression of the fire and spared many lives.³⁴⁶

KiK sustained that they could not be held liable for the events because of the lack of a sufficiently close relationship between KiK and its supplier. Moreover, the defendant argued that they were not aware of the safety defects in the factory, as compliance with the safety standards was verified by an independent third party, the auditing company RINA.³⁴⁷ Finally, the defendant argued that the codes of conduct between KiK and its suppliers were only voluntary and not enforceable. The defendant also argued that the fire was the result of a perfidious arson rather than the consequence of a lack of fire safety measures.³⁴⁸ On 29 August 2016, the Regional Court of Dortmund rendered a first decision, asserting its jurisdiction over the case and granting legal aid to the claimants (Prozesskostenhilfe).

Despite having agreed to a limitation waiver in 2004, KiK argued that the claims were time-barred under Pakistani law.³⁴⁹ However, the claimants sustained that German law should apply in this matter, as KiK agreed to waive statutory limitation at the beginning of the proceedings, and that

³⁴⁰ ECCHR, 'Kik: Paying the Price for Clothing Production in South Asia', *op. cit.*

³⁴¹ P. Wesche, M. Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses ...', *op. cit.*, p. 373.

³⁴² *Ibid.*, p. 373.

³⁴³ LG Dortmund, 'Pressmitteilung. Landgericht Dortmund gewährt pakistanischen Klägern Prozesskostenhilfe für ein Klageverfahren gegen „KiK“ auf Zahlung von Schmerzensgeld und holt in der Hauptsache schriftliches Rechtsgutachten zum Pakistanischen Recht ein', 30 August 2016.

³⁴⁴ Hogan Lovells, 'Supply chain liability under the law of negligence: What does *Jabir and Others v KiK Textilien und Non-Food GmbH* mean for European companies with supply chains in the sub-continent and other common law countries?', available at: <https://www.hiregulation.com/2018/12/10/supply-chain-liability-under-the-law-of-negligence-what-does-jabir-and-others-v-kik-textilien-und-non-food-gmbh-mean-for-european-companies-with-supply-chains-in-the-sub-continent-and-other-common-la/> (last accessed on 11 January 2019).

³⁴⁵ Video simulation available at: https://www.youtube.com/watch?v=aa9NcklW3_4 (last accessed on 18 December 2018).

³⁴⁶ *Ibid.*

³⁴⁷ 'Sh. Leader and al., 'Legal Opinion on English Common Law Principles on Tort ...', *op. cit.*, p. 3.,

³⁴⁸ KiK Press release, 'KiK begrüßt Prozess vor deutschem Gericht', 30 August 2016, https://www.kik.de/unternehmen/kik_news_feed/kik-begruesst-prozess-vor-deutschem-gericht/ (last accessed 29 October 2018).

³⁴⁹ 'Vor dem Kadi', *op. cit.*

under German law, the complaints were not time barred.³⁵⁰ The claimants' lawyer affirmed in particular that 'when a German lawyer agrees with the German lawyer of a German company on a prescription waiver that only exists in German law, then the parties have agreed to use German law for the evaluation of the waiver in question.'³⁵¹

The court commissioned a written legal opinion from a Professor from the University of Bristol, in order to clarify, according to Pakistani law, if and under which conditions the liability of the defendant could be established, on which party the burden of proof fell,³⁵² and whether the statute of limitations had passed.

On 10 January 2019, the Court decided it would not investigate the facts in this case.³⁵³ The Court rejected the lawsuit on the basis that the claims were time-barred under Pakistani law,³⁵⁴ and that the waiver signed by both parties was inadmissible.³⁵⁵

Barriers

Inadequate options for aggregating claims

German law does not provide for collective redress mechanisms which would allow for a large number of claimants to seek compensation for human rights abuses by multinational companies in a cost-efficient manner. Rather 'German law only provides for a joinder of claims based on the same or an essentially identical factual and legal cause. (...) However, each claimant is considered to be an individual party and pursues the lawsuit independently, which implies that lawyers cannot usually submit one petition on behalf of all claimants. Instead, the lawyers have to treat each claim as a separate lawsuit and file each motion individually.'³⁵⁶ The significant administrative effort that this requires might in turn discourage law firms from filing claims on behalf of all those affected by the abuse.³⁵⁷ And indeed, the proceedings reported against KiK were filed on behalf of four claimants only rather than a whole group, even though a much greater number of people were affected by the fire.³⁵⁸

Access to evidence

Difficulties may arise in relation to the evidentiary burden imposed on the claimants and the difficulty to access evidence to substantiate their claim. In this case, difficulties arose in particular in relation to the claim against the Italian auditing company RiNA, which reportedly refused to disclose relevant information in the name of confidentiality obligations thereby hampering the work of human rights advocates and external independent parties to establish the facts and speed up the remediation process.³⁵⁹ In the absence of specific rules on discovery or disclosure, access to evidence

³⁵⁰ ECCHR, 'Kik: Paying the Price for Clothing Production in South Asia', *op. cit.*

³⁵¹ ECCHR, 'Pressemitteilung', *op. cit.* Free translation by the authors.

³⁵² LG Dortmund, Beschluss vom 29. August 2016 – 7 O 95/15.

³⁵³ ECCHR, 'KiK evades its legal responsibility for factory fire', Press release, 10 January 2019.

³⁵⁴ 'Landgericht Dortmund weist Klage gegen KiK ab', Die Zeit, 10 January 2019, available at: <https://www.zeit.de/wirtschaft/unternehmen/2019-01/fabrikbrand-pakistan-kik-landgericht-dortmund> (last accessed 11 January 2019).

³⁵⁵ 'Klage gegen Kik wegen Verjährung abgewiesen – Ruf nach neuem Gesetz', NRW Justiz, 10 January 2019, available at: https://www.justiz.nrw/JM/Presse/dpa_ticker/DPA_10019/index.php (last accessed 11 January 2019).

³⁵⁶ P. Wesche, M. Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses ...', *op. cit.*, p. 382.

³⁵⁷ *Ibid.*, p. 382.

³⁵⁸ C. Müller-Hoff and C. Terwindt, 'Anyone can make claims' - Is the KiK case proof of access to remedy against corporate human rights violations?, OxHRH Blog, 26 February 2018, available at: <http://ohrh.law.ox.ac.uk/anyone-can-make-claims-is-the-kik-case-proof-of-access-to-remedy-against-corporate-human-rights-violations/> (last accessed on 11 December 2018).

³⁵⁹ Clean Clothes Campaign, 'Complaint', *op. cit.*

can constitute a significant barrier to accessing legal remedies in civil proceedings brought in Germany and more generally in continental Europe.³⁶⁰

Attribution of legal responsibility

In this case, an important barrier is the difficulty in attributing direct liability to a subcontracting company arising out of the failure to exercise due diligence in ensuring that human rights are complied with within their global supply chains.³⁶¹ Although this approach is perfectly consistent with the human rights due diligence obligations on parent companies set out in UNGPs and that extend to their sphere of influence,³⁶² in practice, it requires the claimants to demonstrate a number of elements such as the degree and control and oversight that the parent company exercised over the activities of its suppliers, which may be extremely difficult to prove. The fact that the access to information (such as internal documentations) is generally very limited makes it even more challenging for the claimants to substantiate their claims.³⁶³

Jurisdiction

The proceedings in Germany were filed only against KiK and did not include its Pakistani supplier, Ali Enterprises. This might be explained by the fact that the scope of application of the Brussels I Recast Regulation is limited to EU domiciled defendants, meaning that the Regulation does not apply to non EU domiciled defendants such as foreign subsidiaries or suppliers. This entails that German private international law rules were therefore applicable to determine whether German courts have jurisdiction over Ali Enterprises. Under German private international law rules, apart from a narrow set of exceptions, German courts cannot normally exercise jurisdiction over foreign subsidiaries or suppliers which excluded the possibility of extending the jurisdiction of German courts over Ali Enterprises in this case.³⁶⁴

Applicable law

Under the Rome II Regulation, the applicable law in this case was Pakistani law, as the country where the damaged occurred. The fact that the law of the host State was the applicable law created major hurdles for the claimants. First of all, because Pakistani law has lower health and safety standards and labour standards than German law, linked to weaker governance structures but also to the lack of enforcement of local laws.³⁶⁵ In addition, the claims were time-barred under Pakistani law whereas they could have proceeded had German law been applicable.

Time limitations

The limitation period for civil claims is usually between one and three years which is short and does not take into consideration the fact that 'transnational cases need more time to work with affected groups, lawyers and investigators across borders, languages, and cultures'.³⁶⁶ In this case, time limitations constituted a major obstacle for the claimants who were unable to access legal remedies in Germany despite of the fact that KiK had agreed to a limitation waiver.

³⁶⁰ G. Skinner et al., 'The Third Pillar', *op. cit.*, p. 43.

³⁶¹ *Ibid.*, p. 58.

³⁶² *Ibid.*, p. 58.

³⁶³ P. Wesche, M. Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses ...', *op. cit.*, p. 373.

³⁶⁴ *Ibid.*, p. 374.

³⁶⁵ *Ibid.*, p. 374.

³⁶⁶ *Ibid.*

Opportunities

An opportunity in this case is the legal aid (Prozesskostenhilfe) granted by the court to the claimants, which allowed them to undertake the proceedings, and limited potential cost-related barrier to accessing legal remedies.

5.3.6. Lafarge

History of the case

Lafarge S.A. is a French company, created in 1833, and is one of the global leaders in construction material, cement, aggregates and concrete production.³⁶⁷ Following its merger with the Swiss company Holcim in 2015, it became LafargeHolcim and moved its headquarters to Switzerland.³⁶⁸

Lafarge began its operations in north-eastern Syria in 2007 when the decision was taken to build a cement plant in Jalabiya.³⁶⁹ The plant started production in May 2010 and was operated by Lafarge Cement Syria (LCS), the Syrian subsidiary of the then French parent company Lafarge SA.³⁷⁰ The following year, the Syrian conflict erupted as the first wave of political unrest began. As the political situation quickly deteriorated, the plant became increasingly subject to disruption by local armed groups.³⁷¹ Growing security concerns led Lafarge to issue a repatriation order in 2012 for approximately 135 of its foreign employees together with the executives of LCS (also non-Syrian) who were relocated to Cairo from where they oversaw remotely the operations of the Syrian plant.³⁷² While other companies operating in Syria - such as Total or Schneider Electric - stopped their activities in the country, Lafarge decided to keep the Jalabya plant running with the remaining workers, who were mostly Syrian and Chinese.³⁷³ In order to address the security issues at the Syrian plant and to secure key supplies (such as petroleum, coal and pozzolan), which by then were controlled mainly by local rebel groups, LCS decided to hire intermediaries to negotiate with them. The local employees expressed their concerns to the management that they were exposed to serious threats to life on their journey to work as they had to cross dangerous armed checkpoints or were required to stay in the factory overnight.³⁷⁴ In his statement filed with the French judges, one former plant engineer reported that: 'On the road to the plant there were daily kidnappings and shots fired on our cars ... I always lived in fear to be killed or kidnapped'.³⁷⁵ The workers were reportedly told by the company to continue coming to work, and that failure to do so would be sanctioned with

³⁶⁷ ECCHR, "Case Report - Lafarge in Syria: accusations of complicity in war crimes and crimes against humanity". Available at: https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf (last accessed on 29 October 2018).

³⁶⁸ P. Waldie, "Transactions with terrorists", The Globe and Mail, June 23 2018, available at: <http://www.globeinvestor.com/servlet/ArticleNews/story/GAM/20180623/RBCDLAFARGEDESMARAIS> (last accessed on 24 October 2018).

³⁶⁹ A. Tofan, 'The Lafarge Affair: A First Step Towards Corporate Criminal Liability for Complicity in Crimes Against Humanity', Asser Institute, 2 October 2018, available at: <https://www.asser.nl/DoingBusinessRight/Blog/post/the-lafarge-affair-a-first-step-towards-corporate-criminal-liability-for-complicity-in-crimes-against-humanity-by-alexandru-tofan> (last accessed on 11 January 2019).

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Lafarge, "LafargeHolcim concludes independent investigation into legacy Syria operations and issues summary of investigation findings", available at: <https://www.lafargeholcim.com/summary-syria-investigation-findings> (last accessed on 21 November 2018).

³⁷³ P. Waldie, "Transactions with terrorists", *op. cit.*

³⁷⁴ C. Tixeire, "Can the Lafarge case be a game changer? French multinational company indicted for international crimes in Syria" available at: <https://www.business-humanrights.org/en/can-the-lafarge-case-be-a-game-changer-french-multinational-company-indicted-for-international-crimes-in-syria> (last accessed on 18 October 2018).

³⁷⁵ P. Waldie, "Transactions with terrorists", *op. cit.*, p. 7.

suspension of salaries or even dismissal.³⁷⁶ Several employees of Lafarge were victims of kidnapping on their way to the factory. In his statement filed before the French judge, Nidal Wahbi, the human resources manager of the plant, described how, in August 2012, he was kidnapped in a small city close to the plant by five gunman from a branch of the Free Syrian Army, who then asked the company to pay a \$200,000 ransom.³⁷⁷ He was held for three days as the intermediary hired by the company refused to pay, on the grounds that this might encourage further hostage-taking; eventually he managed to gather just enough money from his relatives (\$20,000) to buy his release. He subsequently requested reimbursement from the company but his request was turned down.³⁷⁸ Two months later, nine employees were taken hostage on their commute to work and held for a month. Lafarge eventually paid the \$200,000 ransom.³⁷⁹

The claimants sustained that Lafarge took no adequate precautionary protection measures for its employees in spite of the increasing security threats and had no evacuation plan of the plant in place in case of an emergency.³⁸⁰ When the plant was attacked and taken over by the so-called Islamic State of Iraq and Syria (ISIS) on 19 September 2014, the employees were told to hide in the plant's cement tunnels. They had to find their own way to escape and reportedly barely managed to escape with their lives. One former employee reported that: 'The management and the safety managers (...) knew that ISIS was near the plant and nobody took any action to protect employees. (...) we knew where Daesh was, how many kilometers away. We tried to make personal arrangements to keep safe, but nothing was made by Lafarge's management to protect us. We made this 'evacuation' individually as simple people, on our own'.³⁸¹ The company stopped operating the Jalabiya plant altogether after ISIS overran the plant in September 2014.

The amount of payments made by the company to the various armed group allegedly totals 13 million euro.³⁸² Such groups included the Kurdish Popular Protection Unit, the Free Syrian Army, the "Euphrates Bridge checkpoint", the "Aleppo people", and ISIS who gradually took control of the region.³⁸³ Documents revealed that LCS executive authorized payments of as much as \$20,000 a month to ISIS fighters to get Lafarge workers through checkpoints, and that in April 2014, an ISIS affiliate started to print permits for Lafarge workers.³⁸⁴

On the 2nd of March 2017, LafargeHolcim communicated the initial findings of an internal investigation commissioned by the Board of Directors of LafargeHolcim and carried out by PricewaterhouseCoopers, which found that LCS made and continued to make payments to intermediaries in furtherance of operations. The investigation revealed that 54 different bank accounts were used across the Middle East to channel the money. The parent company had knowledge of the situation as the investigation stated that 'LCS management kept Lafarge SA well-informed of developments and security-related concerns through their appointed chain of

³⁷⁶ ECCHR, "Case Report - Lafarge in Syria ...", *op. cit.*

³⁷⁷ P. Waldie, "Transactions with terrorists", *op. cit.*

³⁷⁸ *Ibid.*

³⁷⁹ C. Tixeire, "Can the Lafarge case be a game changer?", *op. cit.*

³⁸⁰ ECCHR, "Case Report - Lafarge in Syria ...", *op. cit.*

³⁸¹ *Ibid.*

³⁸² C. Tixeire, "Can the Lafarge case be a game changer?", *op. cit.*

³⁸³ *Ibid.*

³⁸⁴ P. Waldie, "Transactions with terrorists", *op. cit.*, p. 7. The permits, issued by the IS "treasury ministry" read: "Kindly allow the employees of Lafarge Cement Syria to pass after the needed check since they have paid their dues to us".

authority.³⁸⁵ Lafarge sustained that 'LCS management believed it was serving the best interests of the company and its employees who depended on LCS salaries for their livelihood.'³⁸⁶

Discussion of the case

In November 2016, Sherpa and the Centre for Constitutional and Human Rights (ECCHR) together with eleven former Syrian employees of Lafarge, acting as *parties civiles* filed a criminal complaint in France against Lafarge, and more specifically against the former French parent company (Lafarge SA) as well as the Syrian subsidiary (Lafarge Cement Syria) and a number of executives including Lafarge's CEO at the time of the allegations (Bruno Lafont), and the CEOs of its Syrian subsidiary (Bruno Pescheux who was CEO until June 2014 and Frédéric Jolibois who was CEO thereafter).

The defendants were accused of having committed a number of crimes in violation of the French criminal law in order to maintain the running of their Jalabiya plant between 2012 and 2014, and in particular of deliberate endangerment of people's lives (article 223-1 of the French criminal code), working conditions incompatible with human dignity, exploitative and forced labour (on the basis of articles 225-13, 225-14-1 and 225-14-2 of the French criminal code),³⁸⁷ complicity in war crimes (Art. 461-2s of the French criminal code), complicity in crimes against humanity (Art. 212-1s of the French criminal code), as well as financing of terrorist enterprise (art. 421-2-2 of the French criminal code). The claimants sustained that the actions of the defendants (e.g. purchasing raw materials from ISIS, paying large amounts of money in exchange for official passes issued by ISIS to the Lafarge workers, selling them cement, etc..) empowered ISIS to perpetrate war crimes and crimes against humanity, which included the mass slaughter of ethnics or religious groups, sexual violence, sexual slavery and forced impregnation, and summary executions in Syria during that time.³⁸⁸ They further sustained that the company itself was criminally liable on the basis of article 121-2 of the French criminal code, which provides that legal persons such as companies can be held criminally liable for the offences committed on their behalf by their organs or representatives.

The claimants argued that the jurisdiction of the French courts over the alleged crimes was based on article 113-6 of the French criminal code which grants French courts jurisdiction for crimes committed abroad by French nationals (whether legal or natural persons). The claimants also sustained that the jurisdiction of the French courts was expanded on the basis of the principle of universal jurisdiction in relation to the charges of complicity in war crimes and crimes against humanity as well as the charge of financing a terrorist enterprise under articles 689-1, 689-19 and 689-11 of the French Criminal Procedure Code. This allows, under certain conditions, for the prosecution and trial of serious international crimes committed abroad when the person accused of the crime is usually resident in French territory.³⁸⁹

Between 2017 and 2018, eight former executives were indicted for the financing of a terrorist enterprise, deliberate endangerment of people's lives, and working conditions incompatible with human dignity.³⁹⁰ These indictments included Frédéric Jolibois (The Director of the Jalabiya plant

³⁸⁵ Ibid.

³⁸⁶ Lafarge, "LafargeHolcim concludes independent investigation into legacy Syria operations and issues summary of investigation findings" available at: <https://www.lafargeholcim.com/summary-syria-investigation-findings> (last accessed on 21 November 2018).

³⁸⁷ ECCHR, "Case Report - Lafarge in Syria ...", *op. cit.*

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ Sherpa, "Submission from Sherpa and ECCHR on an Indictment of Lafarge for Complicity in Crimes Against Humanity", 15 May 2018, available at: <https://www.asso-sherpa.org/submission-from-sherpa-and-ecchr-on-an-indictment-of-lafarge-for-complicity-in-crimes-against-humanity> (last accessed on 21 November 2018).

since the summer of 2014), Bruno Pescheux (his predecessor), Jean-Claude Veillard (The Director of Security), Bruno Lafont (the former CEO of Lafarge between 2007 and 2015), Christian Herrault (the former Director-General of Operations) and Eric Olsen (Director of Human Resources between 2007 and 2013 and then executive vice president of operations).³⁹¹ The public prosecutor originally disregarded the accusations against the company Lafarge itself, as a legal person, however the judges in charge of the investigation subsequently returned to the accusations.³⁹² On 9 May 2018, Sherpa and ECCHR filed a legal note with the investigative judges in order to request that the then parent company, Lafarge SA, as a legal entity, be indicted for complicity in crimes against humanity.³⁹³ Sherpa and ECCHR sustained that the crimes committed by ISIS in that region of Syria between 2012 and 2015 must be considered as crimes against humanity and that 'Lafarge acted as an accomplice to these crimes by maintaining its business activities there, by neglectfully managing its employees' security, and by financing IS in various ways with up to several million euro'.³⁹⁴

Lafarge SA was indicted for complicity in crimes against humanity on 28 June 2018. The fact that the company itself, as a legal person, was indicted is unique. If found guilty, it will be the first time that a company is found criminally liable for complicity in crimes against humanity in France.

Barriers

Attribution of legal responsibility

In this case, one potential barrier that the claimants may face lies in the high threshold required to establish corporate complicity. In particular, in order to establish the mental element for complicity, French criminal law requires that the accomplice knowingly provided assistance and facilitated the crime. In other words, 'the accessory must have virtually, if not exactly, the same intent as the primary offender'.³⁹⁵ This might constitute an obstacle for the claimants in establishing Lafarge's criminal complicity in war crimes and crimes against humanity.

Opportunities

Public international law principles on jurisdiction

The willingness, by certain MS courts, to make use some of the traditionally accepted bases for the exercise of extraterritorial jurisdiction under international law, can provide an enhanced access to justice to third country claimants by opening the jurisdiction of their courts to hear criminal proceedings for business-related human rights abuses. These bases are, in particular, the principle of active personality, under which a State may exercise jurisdiction to regulate the conduct of its nationals including when it takes place in third countries,³⁹⁶ and the principle of universal jurisdiction, under which extraterritorial jurisdiction can be exercised in order to prosecute certain universally condemned crimes.

³⁹¹ A. Tofan, 'The Lafarge Affair ...' *op. cit.*

³⁹² *Ibid.*

³⁹³ Press Release - submission from Sherpa and ECCHR on an Indictment of Lafarge for Complicity in Crimes Against Humanity. Available at: https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_CP-CCH_Lafarge-EN_150518.pdf (last accessed on 29 October 2018).

³⁹³ *Ibid.*

³⁹⁴ Press Release - submission from Sherpa and ECCHR on an Indictment of Lafarge for Complicity in Crimes Against Humanity. Available at: https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_CP-CCH_Lafarge-EN_150518.pdf (last accessed on 29 October 2018).

³⁹⁵ J. Zerk, 'Corporate liability for gross human rights abuses ...', *op. cit.*, p. 38.

³⁹⁶ O. De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', *Faculté de Droit de l'Université Catholique de Louvain* (2006), p. 24.

The recognition of the concept of corporate complicity

The legal concept of corporate complicity delineates the extent to which businesses can be held responsible for the acts of third parties.³⁹⁷ It can lead to the recognition that, in certain circumstances, businesses providing financial support to perpetrators of war crimes or crimes against humanity may be found complicit in gross human rights abuses. The indictment of Lafarge by the French court opens up the possibility of holding the company liable for its alleged complicity in war crimes and crimes against humanity.

5.3.7. RWE

History of the case

RWE is a German electricity supply company, with headquarters in Essen, and operations in Europe, Asia and the USA.³⁹⁸ The company is the biggest CO2 emitter among European electricity suppliers.³⁹⁹

In 2015, a climate change case was brought against RWE by a Peruvian farmer (Saúl Luciano Lliuya) from the village of Huaraz, in the Peruvian Andes. The claimant sustained that his house, which is located near a glacial lake, was at imminent risk of being flooded or destroyed as the glacier melted into the lake.⁴⁰⁰ In particular, the claimant affirmed that 'the glacier loses stability because of the glacial melting which causes a higher risk of a glacial avalanche and thus makes it possible for a flood wave to emerge from the lake'.⁴⁰¹ The claimant alleged that the melting of the glacier was due to greenhouse gas emissions which are responsible for global warming, and that RWE had contributed to it.

This case is symbolic, as it is the first German lawsuit in which a company was sued for its role in the negative impacts of climate change.⁴⁰²

Discussion of the case

On 23 November 2015, Lliuya filed civil proceedings against RWE in Germany, before the regional court of Essen. He was represented by a German law firm and financially supported by the Stiftung Zukunftsfähigkeit foundation. The German NGO Germanwatch provided assistance with communication.⁴⁰³ The claimant argued that RWE was 'liable, proportionate to its level of impairment (share of global greenhouse gas emissions), to cover the expenses for appropriate safety

³⁹⁷ J. Zerk, "Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies", A report prepared for the Office of the UN High Commissioner for Human Rights, p. 16.

³⁹⁸ <https://www.group.rwe/en> (last accessed 3 October 2018).

³⁹⁹ See for example PwC, 'Climate Change and Electricity. European carbon factor Benchmarking of CO2 emissions by Europe's largest electricity utilities', Les Cahiers du Développement Durable, 15th ed., November 2016.

⁴⁰⁰ Business & Human Rights Resource Centre, 'RWE lawsuit (re climate change)', available at: https://www.business-humanrights.org/en/rwe-lawsuit-re-climate-change?utm_source=Corporate%20Legal%20Accountability%20Bulletin&utm_campaign=34f7f2275f-EMAIL_CAMPAIGN_2016_11_15&utm_medium=email&utm_term=0_7734b4f86e-34f7f2275f-&dateorder=dateasc (last accessed on 11 January 2019).

⁴⁰¹ Claim by Saúl Ananiás Luciano Lliuya against RWE AG to the Landgericht Essen, 23 November 2015, translation provided by Germanwatch e.V., available at www.germanwatch.org/en/14841 (last accessed 3 October 2018), p. 3.

⁴⁰² 'Peruanischer Bauer bringt RWE vor Gericht', Die Zeit, 30 November 2017, available at <https://www.zeit.de/wirtschaft/2017-11/klimawandel-rwe-klage-bauer-peru?print> (last accessed 3 October 2018).

⁴⁰³ Telephone interview with claimant's lawyer, 29 October 2018. See also <https://germanwatch.org/de/11284> (last accessed 3 October 2018).

precautions in favour of the claimant's property from a glacial lake outburst flood from Lake Palchacoa'.⁴⁰⁴

Before deciding to file civil proceedings, the claimant and his legal counsel analysed all possible mechanisms that might be available with regard to climate change, but funding was only available to national governments.⁴⁰⁵ In an interview, the claimant's legal counsel explained their decision not to bring legal proceedings in Peru on the basis that: 'the only option in Peru would have been for [the claimant] to sue his own government (...) and his own government is, in his own eyes but also *de facto*, not a main polluter'.⁴⁰⁶

The claim in Germany was based on Article 1004 of the German Civil Code on general nuisance, which states that, if one's ownership is interfered with, the owner may require the person causing the nuisance to discontinue it.⁴⁰⁷ The claimant argued that under Article 7 of the Rome II Regulation, German law was applicable to the case. The reasoning being that although the damage itself (i.e. the melting of the glacier) had occurred in Peru, the event giving rise to the damage occurred in Germany since this was where the greenhouse gases were emitted. This view has not been challenged by the defendant or the Court.

The claimant alleged that RWE was partly responsible for the flooding risk, as it significantly contributed to global greenhouse gas emissions, and thus to climate change. In particular, the claimant argued, citing a study,⁴⁰⁸ that RWE's share in global total CO₂ emissions from 1751 to 2010 was about 0.47%.⁴⁰⁹ According to the claimant, the company should therefore pay 0.47% of the preventative measures (such as drainage) required to avoid, or at least effectively mitigate the consequences of global warming in the claimant's area and protect his home.⁴¹⁰ More specifically, the total costs of flood defences amounted to approximately EUR 3.5 million, and the claimant argued that RWE should cover these expenses in proportion to its share of responsibility (i.e. by paying 0.47% of this sum which amounts to EUR17.000.⁴¹¹). His claim was therefore not for compensation, but merely for removal of impairment.⁴¹²

The claimant's lawyer explained their decision to bring legal proceedings against just one specific company amongst all the public and private greenhouse gas emitters in the world, by the fact that it was 'not very advisable to make things more complicated by joining lots of other companies to such a case', and it made more sense to 'start with one company', being in this case Europe's largest polluter.⁴¹³ This case could therefore be seen as a merely symbolic case, as the claimant would only get, at best, 0.47% of what was needed to save his property. However, In the words of the legal counsel, 'a judgment like that [recognizing the partial responsibility of a private polluter] is not just symbolic..., but would actually enable my client to seek redress from other polluters in a similar

⁴⁰⁴ Claim, op. cit., p. 2.

⁴⁰⁵ Telephone interview with claimant's lawyer, 29 October 2018.

⁴⁰⁶ Telephone interview with claimant's lawyer, 29 October 2018.

⁴⁰⁷ § 1004 Bürgerliches Gesetzbuch (translation provided by Germanwatch e.v. in Claim, op.cit., p. 25).

⁴⁰⁸ R. Heede, 'Carbon Majors: Accounting for carbon and methane emissions 1854-2010 – Methods and Results Report', Climate Mitigation Services, 7 April 2014. See Claim, op. cit., p. 18.

⁴⁰⁹ Claim, op. cit., p. 18.

⁴¹⁰ Ibid., p. 19.

⁴¹¹ Ibid., p. 20.

⁴¹² Ibid., p. 26.

⁴¹³ Telephone interview with claimant's lawyer, 29 October 2018. It is not known why a European company was chosen rather than one from other polluting countries (United States, China...). It might be because access to justice is easier in Europe, which underlines the need for international rules. See the recommendations chapter below.

manner'. In other words, such a case could set a precedent, allowing the law to evolve, and filling an existing regulatory gap.⁴¹⁴

As a defence, RWE argued that there was no legal basis for the claim since civil claims presuppose the existence of a damage and a causal relationship between that damage and the defendant's conduct.⁴¹⁵ The defendant disputed the alleged danger of flooding, and thereby the very existence of an actionable damage.⁴¹⁶ In addition, the defendant argued that, in this case, there was no identifiable linear chain of causation between one particular source of emission and one particular damage,⁴¹⁷ and no causal relationship between emissions and global warming. RWE sustained in particular that 'the Earth's climate is a product of a highly complex system affected by many factors'.⁴¹⁸ In other words, the defendant argued that a single company cannot be held responsible (or partly responsible) for the consequences of climate change.⁴¹⁹

Moreover, RWE stated that the claim was both inadmissible, due to the lack of legitimate interest of the claimant, and the lack of specificity of the claim,⁴²⁰ and unfounded as 'climate change cannot be addressed through individual civil liability' but must be tackled through national and inter-governmental measures.⁴²¹

On 15 December 2016, the regional court of Essen dismissed the claim.⁴²² According to the court, the principal motion of the claimant was inadmissible for lack of precision. Moreover, the court found that there was an 'absence of adequate and equivalent causation of the impairment'. The court stated that 'the pollutants, which are emitted by the defendant, are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted. Every living person is, to some extent, an emitter'. It is therefore, according to the court, impossible to identify a linear chain of causation from any particular source of emission to any particular damage.⁴²³

The claimant appealed the decision to the Higher Regional Court of Hamm.⁴²⁴

On 30 November 2017, the Higher Regional Court reversed the decision of the regional court of Essen. The court stated that the claimant had demonstrated a sufficient interest on the basis of the fact that the present case did not concern 'an amount of 33 cents, but an amount of roughly

⁴¹⁴ Ibid.

⁴¹⁵ Summary of the written statements of the defendant's legal counsel, 15 November 2016, translation available at www.germanwatch.org/en/14841 (last accessed 3 October 2018), p. 2.

⁴¹⁶ Business & Human Rights Resource Centre, 'RWE lawsuit ...', *op. cit.*

⁴¹⁷ Summary of the submission of the defendant's legal counsel, 28 April 2016, translation available at www.germanwatch.org/en/14841 (last accessed 3 October 2018), p. 1.

⁴¹⁸ Summary of the submission of the defendant's legal counsel, *op. cit.*, p. 2.

⁴¹⁹ 'German court to hear Peruvian farmer's climate case against RWE', *The Guardian*, 30 November 2017, available at <https://www.theguardian.com/environment/2017/nov/30/german-court-to-hear-peruvian-farmers-climate-case-against-rwe> (last accessed 3 October 2018).

⁴²⁰ Summary of the submission of the defendant's legal counsel, *op. cit.*, p. 6.

⁴²¹ Ibid., p. 7.

⁴²² 'Bauer verliert gegen RWE', *TAZ*, 16 December 2016, available at <http://www.taz.de/!5363985/> (last accessed 3 October 2018).

⁴²³ Landgericht Essen, Urteil, 2 O 285/15, 15 December 2016. Translation provided by Germanwatch e.V., available at www.germanwatch.org/en/14841 (last accessed 3 October 2018). The Court relied on a decision cited by both parties, the "Waldschadensurteil", or "forest damage decision": "the principles of the 'forest damage decision' are also applicable to the present case. In the former, the problem of causation lies particularly in that it is unclear whether specific emissions, contingent on wind direction and air pressure, indeed led to a specific damage to a specific forest", p. 6.

⁴²⁴ Berufungsbegründung, Az. 2 O 285/15, 23 February 2017. Translation provided by Germanwatch e.V., available at www.germanwatch.org/en/14841 (last accessed 3 October 2018).

EUR17,000, assessed in accordance with the defendant's alleged contribution to the cause of damage, which, the claimant has stated, would be required to avert potential damage to his property'.⁴²⁵ The court also stated that the alleged threat to the claimant's property was attributable to the defendant's actions, since 'the starting point of the chain of causation... [is] the role of the energy companies' operations as an active (contributory) cause of the flood risk'.⁴²⁶ The Court, however, specified that this does not prejudge the final decision, and that 'the case is not ready for judgment without taking evidence'.⁴²⁷ The court therefore required the parties to designate appropriate experts in order to proceed to the evidentiary stage. These experts were required to provide evidence in respect of the following allegations by the claimant: 'a flood and/or mudslide resulting from the significant expansion and increase in the volume of water in Lake Palacocha poses a serious threat to the claimant's property'; the CO₂ emissions released by the defendant's power plants rise into the atmosphere, which leads to a higher concentration of greenhouse gases, which in turn results in an increase in average local temperatures, accelerating the melting of the glacier; and the defendant's share in the contributory causation accounts for 0.47% of the total emissions.⁴²⁸ At the time of writing, the case is still pending.

Barriers

Lack of adequate options for climate change related claims

A more general barrier to which the claimant's legal counsel points is the fact that people whose human rights are affected by climate change lack adequate judicial and non-judicial mechanisms to bring their claims. In her view, there needs to be some regulations in this field at the EU or at the international level that would 'enable people to go somewhere without going to Court'. Such mechanisms should address the regulatory gap that currently exists regarding shared responsibility for climate change.⁴²⁹

Access to evidence

Lack of access to evidence poses a number of difficulties in this case. In particular, the Court is required to appoint two experts in order to start with the evidentiary phase. However, evidence in Peru with regard to the development of the glacier is difficult to gather as there is no Peruvian databank on glaciers. In addition, the absence of disclosure rules in the German legal system means that relevant data regarding the actual CO₂ emissions of RWE are not easily accessible.⁴³⁰

Difficulty of proving causality

Proving causation can also be difficult, as shown by the different conclusions reached by the regional court of Essen and the Higher Regional Court on the matter. Proving the causal link between the actions of a single company and global phenomena such as climate change may prove challenging.

Time barriers

⁴²⁵ Oberlandesgericht Hamm, Hinweis- und Beweisbeschluss, Az. 5 U 15/17 OLG Hamm, 30 November 2017. Translation provided by Germanwatch e.V., available at www.germanwatch.org/en/14841 (last accessed 3 October 2018), p. 2.

⁴²⁶ Ibid.

⁴²⁷ Oberlandesgericht Hamm, Beschluss, Az. 5 U 15/17 OLG Hamm, 5 February 2018. Translation provided by Germanwatch e.V., available at www.germanwatch.org/en/14841 (last accessed 3 October 2018), p. 5.

⁴²⁸ Oberlandesgericht Hamm, Hinweis- und Beweisbeschluss, Az. 5 U 15/17 OLG Hamm, 30 November 2018. Translation provided by Germanwatch e.V., available at www.germanwatch.org/en/14841 (last accessed 3 October 2018). See also 'German court to hear Peruvian farmer's climate case against RWE', *op. cit.*; 'Peruanischer Bauer bringt RWE vor Gericht', *op. cit.*

⁴²⁹ Ibid.

⁴³⁰ Ibid.

The significant length of this type of proceedings constitutes a significant constraint. In particular, 'the fact that [the case] is still in Court in the evidentiary phase three years after the case was launched... is a barrier in itself'.⁴³¹ The cost and huge amount of resources required in such a case is also an issue, and without the help of a foundation, it would not have been possible for the claimant to bring this case to Court.

Opportunities

This case demonstrates the usefulness of the choice of law option offered to the claimant by Article 7 of the Rome II Regulation, between the law of the place where the damage occurred (*lex loci damni*) and the law of the place where the event giving rise to the damage occurred (*lex loci delicti commissi*). In particular, the claimant was able to submit that German law was the applicable law on the basis that the event giving rise to the damage occurred in Germany since this is where the greenhouse gases were emitted. This is beneficial to the case as the environmental protection standards are higher in German law than they are in Peruvian law.

5.3.8. Shell

History of the case

Royal Dutch Shell (RDS) is one of the world's major oil and gas companies.⁴³² Its headquarters are in the Netherlands and its registered office is in the United Kingdom.

The company began its oil exploitation activities in Nigeria in 1958 and has established itself as the single most dominant of the independent oil companies to have exploited the oil resources of Nigeria.⁴³³ Shell operates in the Niger Delta and adjoining shallow offshore areas through its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria (SPDC).⁴³⁴ SPDC is the operator of a joint venture agreement formed between itself, the Nigerian National Petroleum Corporation (NNPC), a state-owned company, Total Exploration and Production Nigeria Ltd and Nigerian Agip Oil Company Ltd.⁴³⁵

SPDC has more than 6,000 kilometers of pipelines and flow-lines, as well as 87 flow-stations, 8 gas plants and more than 1,000 producing wells.⁴³⁶ Oil spills from the pipelines have been reported to be frequent since the 1950s and have caused widespread oil contamination in the surrounding areas.⁴³⁷ In particular, a 2011 study carried out by the United Nations Environment Programme found that oil spills caused an extensive pollution of the surrounding soil and water and had a severe detrimental impact on the vegetation, crops as well as on fisheries sector, affecting the livelihood of those living and working on the contaminated land.⁴³⁸ In addition, the report highlighted that the Ogoni community, which has lived with chronic oil pollution throughout their lives, has been exposed to elevated concentrations of petroleum hydrocarbons in outdoor air and drinking water,

⁴³¹ Ibid.

⁴³² <https://www.shell.com/about-us.html>

⁴³³ D. Blackburn, 'Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims', August 2017, 21. Available at: <https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf> (last accessed on 4 October 2018).

⁴³⁴ SPDC was originally known as Shell D'Arcy and then as Shell-BP which was jointly financed by the Royal Dutch/Shell Group of Companies and the British Petroleum (BP) Group (<https://www.shell.com.ng/about-us/what-we-do/spdc.html>).

⁴³⁵ High Court, His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, 2017 EWHC 89 (TCC), at para 4.

⁴³⁶ Ibid.

⁴³⁷ UNEP, 'Environmental Assessment of Ogoniland', 25 (2011), 6 and 9, available at: https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (last accessed on 4 October 2018).

⁴³⁸ Ibid., p. 9-10.

as well as through dermal contact with contaminated soil, sediment and surface water,⁴³⁹ and that the pollution was posing 'serious threats to human health'.⁴⁴⁰ The report highlighted several causes of the spills, in particular problems of corrosion linked to the fact that the pipelines 'are not being maintained adequately',⁴⁴¹ and illegal extraction of oil.⁴⁴²

Discussion of the case

Proceedings in Nigeria

The environmental damage and human rights harm allegedly resulting from the oil spills have given rise to numerous proceedings before the Nigerian courts, many of them against SPDC.⁴⁴³ However, claimants have faced many obstacles in accessing justice in Nigeria, ranging from delays, to issues linked to the under-development and reported lack of independence of the justice system having led Nigerian communities to affirm that Nigerian courts are unfit to hear the case against SPDC.⁴⁴⁴ More generally there are concerns over the actual ability and willingness of the host state to provide effective remedy when it is an actual Joint Venture Partner of SPDC and the industry accounts for more than 90 per cent of export earnings.⁴⁴⁵ These barriers have prompted a number of claimants to seek justice before the courts of the home states of the company: the Netherlands and the United Kingdom.

Proceedings in the Netherlands

Five interrelated cases were brought before the Dutch civil courts – by four Nigerian farmers from the villages of Goi, Oruma and Ikot Ada Udo, together with a Dutch NGO (*Milieudéfensie*) – against Shell, and more specifically against the parent company (RDS), and former parent company Shell Petroleum N.V., as well as its Nigerian subsidiary, SPDC, and former subsidiary Shell Transport and Trading Company.

This case is particularly important as it was the first time that a Dutch multinational company was sued in the Netherlands for environmental damage and human rights abuses allegedly caused abroad by its foreign subsidiary.

The claimants were seeking compensation for the environmental damage caused by oil spillages, which affected their health and their livelihood. The claimants were also seeking that Shell be ordered to effectively remedy the soil and water pollution and make provision for the prevention of new leakages and environmental damage.⁴⁴⁶ In addition, they requested the disclosure of key evidentiary documents from Shell with regard to the condition of the oil pipelines and the internal policies and operational practices of the Shell Group.⁴⁴⁷

⁴³⁹ *Ibid.*, p. 10.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*, p. 25.

⁴⁴² *Ibid.*

⁴⁴³ Amnesty International and al., 'Seeking justice, the rising tide of court cases against Shell', May 2018, available at: http://www.greenpeace.nl/Global/nederland/report/2018/klimaat_en_energie/Investor%20Briefing%20Seeking%20justice%20the%20rising%20tide%20of%20court%20cases%20against%20Shell.pdf (last accessed on 11 January 2019).

⁴⁴⁴ 'Shell battles Nigerian Communities in high-stakes London lawsuit', Reuters, 6 January 2017, available at: <https://www.reuters.com/article/us-shell-nigeria-lawsuit-idUSKBN14Q1BR> (last accessed on 15 October 2018).

⁴⁴⁵ D. Blackburn, 'Removing Barriers to Justice ...', *op. cit.*, p. 22.

⁴⁴⁶ District Court of The Hague, *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050 / HA ZA 09-1580, January 30, 2013, para. 3.1.

⁴⁴⁷ G. Skinner, R. McCorquodale and O. De Schutter, *The Third Pillar - Access to Judicial Remedies for Human Rights Violations by Transnational Business*, December 2013, p. 44

The claimants argued, in particular, that the Nigerian subsidiary had committed a tort of negligence in failing to protect them from the oil spillage, as a result of which they had suffered harm and loss.⁴⁴⁸

The cases against the parent company were filed in the Netherlands under the Brussels I Regulation. Since RDS has its headquarters in the Netherlands, the Dutch Courts had jurisdiction to hear the claims against the parent company under Article 2(1) and Article 60(1) of the Brussels I Regulation. The situation was a bit more complex with regard to the claims against the Nigerian subsidiary as its statutory seat is located outside of Europe, and the Brussels Regime was therefore not applicable to it. Instead, the Dutch court applied Dutch national law to determine whether it could assume jurisdiction in the claims against SPDC. In Dutch national law, Article 7(1) of the Dutch Code of Civil Procedure gives a Dutch court with jurisdiction over one of the defendants, jurisdiction over the other defendants who are called to the same proceedings, provided that the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint treatment.⁴⁴⁹ Since the Dutch court had jurisdiction to hear the claims against the parent company, the claimants argued that it also had jurisdiction over the claims against the Nigerian subsidiary, as the claims against RDS and SPDC were interconnected.

On 30 January 2013, the District Court of The Hague dismissed the claims concerning the villages of Goi and Oruma, ruling, amongst other things, that the oil spills resulted from acts of sabotage by third parties -such as the practice of bunkering whereby people illegally tap into pipelines to siphon off some of the oil for themselves⁴⁵⁰ - rather than poor maintenance of the materials on the part of the Nigerian subsidiary. The District Court found, however, that the Nigerian subsidiary was liable under the tort of negligence for the oil spills near the village of Ikot Ada Udo and ordered the defendant to pay compensation on the basis that SPDC had breached its duty of care under Nigerian law by failing to take the necessary measures to secure the wellhead (which could have easily been done) in order to prevent the acts of sabotage (in this case a simple adjustable spanner had been used to open the well).⁴⁵¹ However, the court rejected the claims against the parent company, finding that under Nigerian law there was no general duty of care on parent companies to prevent their subsidiaries from inflicting damage on others through their business operations.⁴⁵²

On appeal, SPDC contested the Dutch courts' jurisdiction and asserted that the claimants abused procedural law by initiating claims against the parent company that were obviously bound to fail and merely designed as a means to bring the action against the Nigerian subsidiary before the Dutch court as co-defendant on the grounds of Article 7(1) of the Dutch Code of Civil Procedure.⁴⁵³ SPDC asserted that the test that should be applied was whether the claims against the parent company

⁴⁴⁸ M.T. Kamminga, 'Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel' in C. Ryngaert, E.J. Molenaar and S.L.H. Nouwel (eds.) *What's Wrong with International Law - Liber Amicorum A.H.A. Soon* (Brill Nijhoff, 2015), 154, p. 158.

⁴⁴⁹ Article 7(1) of the Dutch Code of Civil Procedure provides that: "If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency".

⁴⁵⁰ Earthrights International, 'Shell May Have to Compensate Villagers for Oil Damage from Sabotage or Theft', 27 June 2014, available at: <https://earthrights.org/blog/shell-may-have-to-compensate-villagers-for-oil-damage-from-sabotage-or-theft/> (last accessed on 31 December 2018).

⁴⁵¹ District Court of The Hague, *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050 / HA ZA 09-1580, January 30, 2013, para. 5.1.

⁴⁵² *Ibid.*

⁴⁵³ C. Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of its Subsidiary: The Example of the Dutch Shell in the UK and in the Netherlands', in A. Bonfanti (ed.) *Business and Human Rights in Europe: International Law Challenges* (Routledge, 2018), p. 212.

had any prospect of success, and if this was not the case, then the claim against the subsidiary should not proceed.⁴⁵⁴ The Court of Appeal of The Hague was therefore called upon to decide whether the claim against the parent company had reasonable prospect of being awarded.

The claimants argued that the spill and the resulting environmental damage were the foreseeable consequence of a corrosion problem, which was due to the systematic maintenance failure by the Nigerian subsidiary.⁴⁵⁵ They further asserted that the parent company knew, or ought to have known, about the systematic failure of the Nigerian subsidiary in terms of maintenance of the pipelines and that the resulting environmental damage was a foreseeable consequence of such failure.⁴⁵⁶ They sustained that the parent company had the knowledge, possibility and means to take action in order to prevent it.⁴⁵⁷ In other words, according to the claimants, the parent company was negligent and failed to adequately control and supervise the maintenance of the pipelines and the clean-up of oil spills in Nigeria. By failing to utilize its knowledge and control its Nigerian subsidiary in such a way as to prevent the oil spill and its consequences, the parent company breached the duty of care that it owed to the Nigerian farmers and fishermen.⁴⁵⁸

On 18 December 2015, the Court of Appeal rendered an interim judgment covering a number of procedural aspects, as well as the international jurisdiction of the Dutch Court.⁴⁵⁹

Although the substantive debate will be assessed in the next stage of the appeal, the Court of Appeal of The Hague indicated some aspects that should be taken into consideration when deciding the outcome of the case. In particular, the Court of Appeal stated that, considering the foreseeable serious consequences of oil spills to the local environment from a potential spill source, it could not be excluded that the parent company may be expected to take an interest in the oil spills,⁴⁶⁰ or in other words that the parent company may owe a duty of care in accordance with the criteria set out in *Caparo v Dickman* [1990] UKHL 2, [1990] 1 All ER 56.⁴⁶¹ The Court of Appeal went on to add: 'the more so if it has made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies, which is not to say that without this attention and involvement a violation of the duty of care is unthinkable and that culpable negligence with regard to the said interests can never result in liability.'⁴⁶² This is an interesting assertion as it suggests that, according to the Dutch court, the codes of conduct voluntarily adopted by the company can serve as a basis for establishing its duty of care, as well as the standard of overview and monitoring expected from the parent company.⁴⁶³

⁴⁵⁴ Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, 200.126.843 (case c) + 200.126.848 (case d), December 18, 2015, at para 3.2.

⁴⁵⁵ Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, op. cit. <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:3586>>, last accessed on 27 November 2018, at 3§2.

⁴⁵⁶ *Ibid.*, at 3§2.

⁴⁵⁷ *Ibid.*, at 3§2.

⁴⁵⁸ C. Bright, 'Quelques réflexions à propos de l'affaire Shell aux Pays-Bas', in SFDI, *L'entreprise multinationale et le droit international* (A. Pédone, 2016), p. 127.

⁴⁵⁹ Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, op. cit.

⁴⁶⁰ *Ibid.* at para 3.2.

⁴⁶¹ *Ibid.*, at para 3.2.

⁴⁶² *Ibid.*, at para 6.9.

⁴⁶³ In this respect, the Court of Appeal stated at para 6.9 that: Considering, inter alia, (i) that Shell sets itself goals and ambitions with regard to, for instance, the environment, and has defined a group policy to achieve these goals and ambitions in a coordinated and uniform way, and (ii) that RDS (like the former parent company) monitors compliance with these group standards and this group policy, such questions arise as: (a) which (maintenance) standards applied to

The Court of Appeal also pointed out that the assertion that the parent company did not know about the spillage and the condition and maintenance of the pipeline locally 'was not an adequate defense in all cases'.⁴⁶⁴

As regards the applicable law, the Court of Appeal of The Hague stated that there was a consensus between the parties on Nigerian law being the law applicable to all claims in the dispute.⁴⁶⁵ Shell argued that since there are no decisions by Nigerian courts recognizing the liability of a parent company for the damages arising out of the operations of its subsidiary then Nigerian law by definition provides no basis for assuming a violation of a duty of care by the parent company in the context of cleaning up pollution and preventing repeated spills; this argument was rejected by the court.⁴⁶⁶ The court affirmed that since Nigerian law, as a *common law* system, is based on English law, common law and in particular English case-law are relevant sources of Nigerian law. English case-law has established, in cases like *Chandler v Cape*, that parent companies may, in certain circumstances, owe a duty of care to the workers of their subsidiaries and the local communities directly affected by their operations.⁴⁶⁷

The Court of Appeal concluded that it could not be ruled out that the parent company could be liable for damages resulting from the conduct of its subsidiary. It considered that the claims against the parent company and the Nigerian subsidiary were so closely connected that it was essential to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. The court also ordered Shell to disclose a number of internal documents requested by the claimants.⁴⁶⁸

Proceedings in the United Kingdom

On 23 March 2012, approximately 15,000 Nigerian claimants, members of the Bodo community, filed civil proceedings in the London High Court against Shell, seeking compensation and damages for two oil spills that occurred in 2008 and 2009 in the regions of Bodo and Gokana.⁴⁶⁹ The claim against the parent company was filed in the UK under the Brussels I Regulation as Shell has its statutory seat in the UK, and the subsidiary joined the case voluntarily.⁴⁷⁰ Following a preliminary issues hearing, the UK High Court ruled, on 20 June 2014, that failure by the company to ensure adequate protection, maintenance and repair of its pipelines – which enabled the practice of illegal bunkering responsible for the spillage – could give rise to liability. In other words, the company may be expected to take reasonable steps to ensure the proper maintenance and protection of its infrastructure, which includes effective shielding and caring of the pipelines but also the use of appropriate up-to-date technology including leak detection systems, the provision of anti-tamper

an old pipeline whose insides were no longer monitored like the one in question; (b) were these maintenance standards complied with; (c) if so, what is this evidenced by, and if not, shouldn't this have been noted within the context of the supervision performed by the parent company (the audits); (d) shouldn't it have been noted with an adequate reporting system in place and (e) why was it not. Another question is (f) whether the parent company -considering the autonomy and individual responsibility of (the management of) SPDC- was sufficiently equipped (as far as knowledge, possibilities and means are concerned) to intervene adequately in case of evident negligence by SPDC.

⁴⁶⁴ *Ibid.*, para. 6.8.

⁴⁶⁵ Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, at para 1.3

⁴⁶⁶ *Ibid.* para 3.2.

⁴⁶⁷ C. Bright, 'Le devoir de diligence de la société mère dans la jurisprudence anglaise', *Droit Social*, 2017, p. 828.

⁴⁶⁸ Court of Appeal of The Hague, *Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others*, at para 7.3.

⁴⁶⁹ *The Bodo Community & Ors v The Shell Petroleum Development Company of Nigeria Ltd*, [2014] EWHC 958 (TCC).

⁴⁷⁰ D. Blackburn, 'Removing Barriers to Justice ...', *op. cit.*, p. 24.

equipment and effective surveillance.⁴⁷¹ It became apparent in the course of the trial that Shell was aware of the lack of adequate maintenance of its infrastructure years before the spills occurred.⁴⁷² Amnesty International also reported on an internal Shell email of December 2009 in which the company stated that it was 'corporately exposed as the pipelines in Ogoniland have not been maintained properly or integrity assessed for over 15 years'.⁴⁷³ However, the case did not proceed to a full hearing as it was settled for a total of £55 million plus costs prior to the substantive trial. SPDC accepted liability for the spill.

Following the Bodo litigation, civil proceedings were also filed in the London High Court in the *Okpabi* case, by around 42,500 Nigerian residents represented by the law firm Leigh Day, members of two communities (the Bille community and the Ogale community) occupying land adjacent to the oil pipelines and infrastructure operated by SPDC.⁴⁷⁴

The claimants relied on the Brussels I Regulation to establish the jurisdiction of the UK courts over the claim against the parent company, since Shell had its registered office in the UK.⁴⁷⁵ As the Brussels I Regulation is not applicable to non EU-domiciled defendants, the claimants relied on English domestic law to establish the jurisdiction of the UK courts over the Nigerian subsidiary, and more specifically Paragraph 3.1(3) of Practice Direction 6B. This provides that a claimant may serve a claim form out of the jurisdiction with the permission of the court, where a claim is also made against another defendant and (a) there is between the claimant and the defendant a real issue which is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim. Under this rule also known as the 'necessary or proper party gateway', the courts has to decide, first, if there is a real issue which is reasonable for the court to try in the claim against the UK-domiciled parent company, in order to ensure that the claim is not a specious one, only used as a way or bringing the foreign defendant before the UK forum.⁴⁷⁶ If the court is satisfied that this is the case, it must then be established that the foreign subsidiary is a necessary or proper party to the legal proceedings against the UK-domiciled parent company in order for SPDC to be able to join the proceedings in the UK against the RDS.

English case-law has recognized that a duty of care may be owed not only to the employees of the subsidiary,⁴⁷⁷ but also, in appropriate circumstances, to the local communities adversely affected by the operations of the subsidiary.⁴⁷⁸ Relying on this case-law, the claimants asserted that, as a result of RDS's knowledge of and control over SPDC's operations and their foreseeable effect on the environment and communities, there was a relationship of proximity between RDS and the claimants. According to the claimants, it was fair, just and reasonable to impose a duty of care in the light of the fact that both companies were involved in exploration, extraction and transportation of crude oil. RDS had (or ought reasonably to have had) superior expertise, knowledge and resources

⁴⁷¹ Amnesty International, "Shell's Growing Liabilities in the Niger Delta: Lessons from the Bodo court case" 2015, available at: https://www.amnesty.org.uk/files/amnesty_international_briefing_on_shell_for_investors.pdf (last accessed on 15 October 2018).

⁴⁷² *Ibid.*, p. 3.

⁴⁷³ *Ibid.*

⁴⁷⁴ High Court, *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, 2017 EWHC 89 (TCC).

⁴⁷⁵ Art. 4 of the Recast Brussels Regulation is the successor of the art. 2 of the Regulation 44/2001 and has the same wording. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

⁴⁷⁶ E. Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction', 14 *Utrecht Law Review* 2018, p. 6.

⁴⁷⁷ Court of Appeal, *Ngcobo and others v Thor Chemicals Holdings Ltd*, *cit.*; Court of Appeal, *Chandler v Cape*, *op. cit.*

⁴⁷⁸ House of Lords, *Lubbe and others v Cape Plc*, [2000] 1WLR 1545, July 20, 2000.

in respect of health and safety, and environment protection; and knew (or ought reasonably to have foreseen) that SPDC would rely on its superior expertise, knowledge and resources in those respects.

Justice Fraser (Fraser J), sitting as a judge in the Technology and Construction court in this case, gave a ruling upon preliminary issues of law on 26 January 2017.⁴⁷⁹ On the basis of an analysis of the Shell Group's corporate structure, the judge found that the *Caparo* test (and in particular the second and third limbs regarding proximity and reasonableness) was not satisfied.⁴⁸⁰ The judge noted that in particular that (1) RDS did not hold shares directly in SPDC; (2) RDS did not conduct any operations in Nigeria; (3) only a minority (two) of officers of RDS were members of the Executive Committee of the Shell Group; (4) RDS was in fact not permitted to conduct operations in Nigeria due to licensing requirements; (5) there was a joint venture in existence engaged in such activity in Nigeria of which RDS was not a member; and (6) imposing a duty of care upon RDS would potentially impose 'liability in an indeterminate amount, for an indeterminate time, to an indeterminate class'.⁴⁸¹ On this basis, the judge found that the relationship between the ultimate holding company of the Shell Group and the claimants in the Niger Delta was not a close one,⁴⁸² and that the second limb of the *Caparo* test was not satisfied.⁴⁸³ The judge also considered it would not be fair, just and reasonable to impose a duty of care upon RDS (third limb of the *Caparo* test),⁴⁸⁴ and that RDS was not better placed than SPDC in respect of the harm; therefore it would not be fair to infer that the subsidiary would rely upon the parent deploying its superior knowledge, in application of the principle set out by Tomlinson LJ in *Thompson v Renwick Group*.⁴⁸⁵ Fraser J found that the factors listed by Arden LJ in *Chander v Cape* to indicate the existence of a duty of care on the part of the parent company were not present either.⁴⁸⁶ The court stated that 'RDS simply has no experience whatsoever of oil operations in Nigeria, which is an extraordinarily difficult place to carry on such activities'.⁴⁸⁷ The judge concluded that: 'Absent the existence of proceedings on foot in England against RDS, there is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a

⁴⁷⁹ High Court, His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, *op. cit.*

⁴⁸⁰ E. Aristova, 'Tort Litigation against Transnational Corporations ...', *op. cit.*, p. 15.

⁴⁸¹ High Court, His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, *op. cit.*, para. 114.

⁴⁸² *Ibid.*, para 114.

⁴⁸³ C. Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of its Subsidiary ...', *op. cit.*

⁴⁸⁴ The judge noted that (1) SPDC had statutory liability under the law of Nigeria for oil spills (which was one of strict liability) and that concepts of fairness, justice and reasonableness did not therefore require (or argue in favor of) the imposition of a duty of care upon RDS; (2) it was difficult to see how the test of fairness, justice and reasonableness could justify the claimants in seeking further and far wider damages from RDS than those to which they are entitled from SPDC; (3) RDS was prohibited, by the law of Nigeria, from performing operations in Nigeria; (4) RDS merely held shares in its subsidiaries as if it were an investment holding company (...), para 115.

⁴⁸⁵ High Court, His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd, *op. cit.*, para. 114.

⁴⁸⁶ The judge noted that (1) RDS was not operating the same business as SPDC and that, as the ultimate holding company, it limited itself to holding shares, and dealing with the financial matters that affected it; (2) RDS did not have superior or specialist knowledge compared to the subsidiary and in fact SPDC was the one with all the specialist knowledge relevant to a licensed operating company; (3) RDS could have only a superficial knowledge or overview of the systems of work of SPDC and, given the scale of the activities of the many companies in the Shell Group, the degree of knowledge held by RDS could never sensibly be considered as comprehensive, or anything other than knowledge at a very high or superficial level; and (4) RDS could not be said to know that SPDC was relying upon it to protect the claimants as SPDC was a wholly autonomous subsidiary with considerable income and sizeable assets of its own and there was simply no evidence that SPDC ever did rely upon RDS. (para 116-117).

⁴⁸⁷ *Ibid.*, para.117.

Nigeria company'.⁴⁸⁸ The High Court therefore concluded that the claim against the parent company had no prospect of success and that, as a result, the claim against SPDC could not proceed in English courts.⁴⁸⁹

The claimants appealed this decision. However, on 14 February 2018, the Court of Appeal affirmed the High Court's ruling on the basis that the claimants could not demonstrate a properly arguable case that the parent company owed them a duty of care and that, therefore, the case against RDS was bound to fail.⁴⁹⁰ The decision of the Court of Appeal was a split one, and the leading judgment, delivered by Lord Justice Simon (Simon LJ), focused on issues of proximity and evidence of the exercise by the parent company of control over the operations of the subsidiary.⁴⁹¹ Simon LJ considered that the mandatory policies and standards set out by the parent company for the whole group were insufficient to establish that the parent company exercised material control over the operations of its subsidiary.⁴⁹² This suggests that, in the court's view, the establishment of a duty of care of the parent company would require 'evidence of significant involvement of RDS in the day-to-day operations of SPDC and of operations control, including imposition (as opposed to promulgation) and enforcement of mandatory design and engineering practices'.⁴⁹³ The Court of Appeal concluded that the English Court did not have jurisdiction over the claims. Amnesty International warned that this ruling 'sets an especially dangerous precedent. If it stands, then the UK Courts have given free rein to multinational companies based in the UK to abuse human rights in third countries. Poor communities and developing countries will pay the price'.⁴⁹⁴

The claimants applied for permission to appeal the lawsuit. On 27 April 2018, more than 40 UK and international NGOs submitted a letter to the UK Supreme Court supporting the claimants' application to appeal. They affirmed that the ruling of the Court of Appeal could severely limit access to justice for the victims of the global operations of UK-based companies.⁴⁹⁵ On 9 July 2018, the Supreme Court announced its intention to defer its decision on the claimants' application to appeal until judgment had been given in a similar case concerning the liability of a parent company for the operations of its subsidiaries in third countries: *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*⁴⁹⁶ (see case study below).

⁴⁸⁸ Ibid., para.119.

⁴⁸⁹ Leigh Day, "Nigerian Villagers Vow to Take Shell to the UK Supreme Court", available at: <https://www.leighday.co.uk/News/News-2018/February-2018/Nigerian-villagers-vow-to-take-fight-over-Shell-oil-spill-impacts> (last accessed on 30 October 2018).

⁴⁹⁰ 2018] EWCA Civ 191

⁴⁹¹ E. Aristova, 'Tort Litigation against Transnational Corporations ...', *op. cit.*, p. 15.

⁴⁹² Ibid., p. 15.

⁴⁹³ Ibid., at 15.

⁴⁹⁴ Amnesty International, 'Shell ruling gives green light for corporations to profit for abuses overseas', available at: www.amnesty.org/en/latest/news/2017/01/uk-shell-ruling-gives-green-light-for-corporations-to-profit-from-abuses-overseas/, last accessed on 24 November 2018.

⁴⁹⁵ Business and Human Rights Resource Centre, "NGO urge UK Supreme Court to allow Nigerian communities to appeal decision that barred them from suing Shell in the UK over oil spill impacts", available at: <https://www.business-humanrights.org/en/ngos-urge-uk-supreme-court-to-allow-nigerian-communities-to-appeal-decision-that-bared-them-from-suing-shell-in-the-uk-over-oil-spill-impacts> (last accessed on 30 October 2018).

⁴⁹⁶ Business and Human Rights Resource Centre, Vedanta Resources lawsuit (re water contamination), available at: <https://www.business-humanrights.org/en/vedanta-resources-lawsuit-re-water-contamination-zambia> (last accessed on 30 October 2018). See also section 5.3.10 about Vedanta.

Barriers

Attribution of legal responsibility

The principle of separate legal personality normally entails that each of the entities that make up the multinational company is considered autonomous and normally liable separately. As a result, a parent company will not generally be held responsible for the acts and omissions of its subsidiary. However, certain EU MS laws acknowledge that a parent company may, in certain circumstances, owe a duty of care to the persons affected by the activities of its subsidiaries. For instance, in the Shell case, the Dutch Court of Appeal affirmed that it could not be ruled out that the parent company may owe a duty of care to the claimants and be found liable for the human rights impacts arising out of its subsidiary's activities because of its own negligence in managing and monitoring its subsidiary. In doing so, the court opened the door to the possibility of circumventing the corporate veil. However, the English court reached the opposite conclusion by finding that the claimants could not demonstrate a properly arguable case that the parent company owed them a duty of care and that, therefore, the case against RDS was bound to fail. This illustrates the legal uncertainty surrounding the extent to which parent companies may have legal responsibilities, in different jurisdictions, in relation to the human rights abuses connected to the operations of its subsidiaries.⁴⁹⁷ This constitutes an obstacle to access to remedy in itself, but also gives rise to further barrier by creating delays and adding to legal costs.⁴⁹⁸

Jurisdiction

EU private international law rules on jurisdiction set out in the Brussels I Regulation are applicable to the legal proceedings brought in Europe against the parent company but are not applicable to the legal proceedings brought in Europe against the foreign subsidiary. The latter might be added as a co-defendant when the domestic law of the forum allows it, but this creates a number of difficulties as illustrated in the English proceedings. In addition, it imposes a high evidential burden on the claimants at an early stage of the proceedings in which they have rarely had access to the internal documentation of the company that they need to substantiate their claims.⁴⁹⁹

Applicable law

Article 4(1) of the Rome II Regulation provides that the applicable law is the law of the place where the damage occurred. In practice, the solution pointing at the law of the host state, a developing country generally with lower standards of protection, as the applicable law often results in lack of access to substantive justice for the victims of corporate human rights abuses. For example, in the Shell case, the District Court had found that under Nigerian law there was no general duty of care on parent companies to prevent their subsidiaries from inflicting damage on others through their business operations.

Opportunities

Giving teeth to the codes of conduct through judicial activism

In the Dutch proceedings, the Court of Appeal of The Hague referred to the codes of conduct voluntarily adopted by the company as a potential basis for establishing its duty of care as well as the standard of overview and monitoring expected from the parent company. This shows that,

⁴⁹⁷ Report of the United Nations High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse', A/HRC/32/19, 10 May 2016, p. 10.

⁴⁹⁸ *Ibid.*, at 10.

⁴⁹⁹ E. Aristova, 'Tort Litigation against Transnational Corporations ...', *op. cit.*, p. 17.

through the work of the judge, soft law instruments have the potential of giving rise to harder-edged legal duties.

5.3.9. Trafigura

History of the case

Trafigura is one of the world's largest oil, metals and minerals traders.⁵⁰⁰ The parent company, Trafigura Beheer BV (TBBV), was founded and incorporated in the Netherlands in 1993.⁵⁰¹ It has an English subsidiary, Trafigura Ltd., which, in October 2004, chartered the Panamanian-registered ship Probo Koala.⁵⁰² Between April and June 2006, gasoline blend stocks were transferred to the Probo Koala. An oil refining process known as 'caustic washing' was carried out aboard the Probo Koala so as to 'remove corrosive and pungent sulphur compounds from poor quality crude oil so that it can be blended into petrol and diesel'.⁵⁰³ It has been reported that the treatment with caustic soda generates 'highly hazardous substances' as a result of which it has been banned in most countries but continues to be used on board tankers at sea.⁵⁰⁴

On 30 June 2006, the Probo Koala docked at the port of Amsterdam in order to refuel and offload the content of its slop tanks.⁵⁰⁵ Because of the strong odours emanating from the waste, the Amsterdam port services decided to carry out an analysis of samples from the waste, which revealed 'a significantly higher chemical oxygen demand than it was permitted and able to process on its premises, in addition to a high quantity of mercaptans, which was causing the foul stench'.⁵⁰⁶ Amsterdam port services revised the cost estimate and provided the company with a new and substantially increased quote (from EUR 20 per cubic meter to EUR 900 per cubic meter) for processing the waste because of the higher level of toxicity revealed by sample analysis which required a more complex and costly treatment to be carried out in Rotterdam.⁵⁰⁷ Trafigura rejected the new quote and had the substance reloaded onto the Probo Koala which subsequently left the port of Amsterdam.⁵⁰⁸

The Probo Koala berthed in Abidjan (Côte d'Ivoire) on 19 August 2006.⁵⁰⁹ Trafigura arranged for the unloading and disposal of the waste with a local contractor, the newly created company Tommy Ltd, through its Ivorian subsidiary, Puma Energy, and with the assistance of its shipping agent in Abidjan,

⁵⁰⁰ <https://www.trafigura.com/about-us/structure/>

⁵⁰¹ D. Blackburn, 'Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims', August 2017, 21. Available at: <https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf> (last accessed on 4 October 2018).

⁵⁰² Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, Mission to Côte d'Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008). Available here: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-26-Add2.pdf> (last accessed on 3 October 2018), p. 7.

⁵⁰³ I. Sample "Trafigura case: toxic slop left behind by caustic washing" available at: <https://www.theguardian.com/environment/2009/sep/16/trafigura-case-toxic-slop> (last accessed on 10 October 2018).

⁵⁰⁴ A. Cardesa-Salzmänn, "The Trafigura Case", EJOLT Factsheet N° 45, available at: <http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-45.pdf> (last accessed on 14 November 2018), at 1.

⁵⁰⁵ Report of the Special Rapporteur ..., *op. cit.*, p. 8.

⁵⁰⁶ *Ibid.*, p. 8.

⁵⁰⁷ A. Cardesa-Salzmänn, "The Trafigura Case", EJOLT Factsheet N° 45, available at: <http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-45.pdf> (last accessed on 14 November 2018).

⁵⁰⁸ Report of the Special Rapporteur ..., *op. cit.*, p. 8.

⁵⁰⁹ FIDH, "Corporate Accountability for Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms", 2006, p. 360.

WAIBS for a cost of \$30-\$35 per cubic meter.⁵¹⁰ 528 cubic meters of liquid waste were offloaded from the Probo Koala and loaded onto 12 trucks rented by Tommy before being dumped that evening, the following day and a few weeks later in 18 dumping points in 8 sites around the city.⁵¹¹ It was reported that 'none of the dumping sites had proper facilities for the treatment of chemical waste.'⁵¹²

According to a report carried out by the United Nations Disaster Assessment & Coordination (UNDAC), the main chemicals found in the original waste - hydrogen, mercaptans, phenols, hydrocarbons (a mixture of paraffins, olefins, naphthenes and aromatics) - 'can be harmful to humans and the environment if serious exposure takes place.'⁵¹³ Direct exposure to the waste by residents of the surrounding area was reported to have occurred through skin contact and through the breathing in of volatile substances, while secondary exposure was reported to have occurred through contact with surface water, groundwater and eventually through the consumption of food grown on or extracted from contaminated land and water.⁵¹⁴ An overwhelming number of people sought medical assistance in the immediate aftermath of the dumping. According to the World Health Organisation, the symptoms they suffered, which included nosebleeds, nausea and vomiting, headaches, skin lesions, eye irritation and respiratory symptoms, 'are consistent with exposure to the chemicals known to be in the waste'.⁵¹⁵ In total, the Ivorian authorities reported that over 100,000 people sought medical assistance, 69 persons were hospitalized and 15 people died, and that these figures may well be higher taking into account additional deaths and long-term health consequences.⁵¹⁶ In addition, it was reported that a number of residents had to abandon their homes and 'many businesses forewent commercial earnings for a significant period of time following the contamination'.⁵¹⁷

Discussion of the case

Proceedings in Côte d'Ivoire

On the 1st of September 2006, following an investigation carried out by the judicial authorities of Côte d'Ivoire, several persons were arrested including Salomon Ugborugbo, the director of the company Tommy, N'Zi Kablan, an executive of the society PUMA Energy and Noba Amonka, the director of the society WAIBS.⁵¹⁸ A few days later, former harbour officer, Marcel Bombo Dagui, three custom officials, Anne-Marie Tétialou, Théophie Ambroise and Yao Kouassin who were in charge of overseeing the offloading of the waste from the Probo Koala, and the former director of the *Affaires maritimes et portuaires* within the Ministry of Transport, Jean-Christophe Tibé Bi Balou, were also arrested. On 18 September 2006, Trafigura Chairman and co-founder Claude Dauphin and his manager for Africa Jean-Pierre Valentini were arrested at Abidjan airport as they were about to leave the country following a visit to investigate the matter.⁵¹⁹ The pair were held in custody until 14 February 2007 on charges of complicity in poisoning and violation of the law protecting public

⁵¹⁰ Report of the Special Rapporteur ..., *op. cit.*, p. 8.

⁵¹¹ UNEP, 'Environmental Audit of the Sites Affected by the Dumping of Toxic Wastes from the "Probo Koala"', 2018.

⁵¹² Report of the Special Rapporteur ..., *op. cit.*, p. 8.

⁵¹³ UNDAC, "Cote d'Ivoire: Urban Hazardous Waste Dumping", 11-19 September 2006, at 4.

⁵¹⁴ Report of the Special Rapporteur ..., *op. cit.*, p. 9.

⁵¹⁵ World Health Organisation, 'Chemical dump in Côte d'Ivoire', notes for the media, 2006, available at: <http://www.who.int/mediacentre/news/notes/2006/np26/en/> (last accessed on 10 October 2018).

⁵¹⁶ "Ten years on, the survivors of illegal toxic waste dumping in Côte d'Ivoire remain in the dark", 2016, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384> (last accessed on 10 October 2018).

⁵¹⁷ Report of the Special Rapporteur ..., *op. cit.*, p. 9.

⁵¹⁸ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 359.

⁵¹⁹ *Ibid.*, p. 360.

health and the environment.⁵²⁰ On 13 February 2007, Trafigura reached a settlement with the Ivorian government - acting in its own name and in the name of all the victims - under the terms of which Trafigura agreed to contribute to the building of a waste treatment plant and pay USD198 million to the state 'for the compensation of the damages suffered by the state, as well as compensation to the victims and a complete remediation of the sites', in return for which the State of Côte d'Ivoire undertook to guarantee Trafigura 'that it would take care of any claim relating to the events and take all appropriate measures to guarantee the compensation of the victims of the said event',⁵²¹ and also agreed that it would waive 'once and for all its right to prosecute, claim or mount any action or proceedings in the present or in the future' against all Trafigura parties (i.e. Trafigura itself, its directors, employees and its Ivorian subsidiary).⁵²² The agreement henceforth absolved Trafigura from civil or criminal liability arising out of the facts and stressed that the payment did not imply recognition on the part of the company of any sort of responsibility for the events.⁵²³ Trafigura executives and employees were released on bail the following day.⁵²⁴ It was reported that 'despite the State agreeing to accept responsibility for any future claim relating to the dumping and to take all appropriate measures to compensate victims, no mechanism or steps were subsequently taken to enable further action by victims'.⁵²⁵ Concerns were also raised regarding the adequate allocation of the compensation from the settlement to the victims. In particular, it was reported that many victims had been left out, that the government kept the bulk of the settlement money and that, the amounts actually distributed were arbitrary, and that they did not take into consideration the severity of the harm suffered, nor did they include an assessment of long-term consequences.⁵²⁶

On 19 March 2007, the Indictment Division of the Abidjan Court of Appeal dropped all criminal charges against Trafigura's executives on the basis that there was insufficient evidence to proceed with the charges against them.⁵²⁷ In particular, the court found that 'the investigation failed to reveal any act committed personally by the defendants Dauphin, Claude and Valentini, Jean-Claude' and that they 'found themselves at the centre of these proceedings because they had travelled to Côte d'Ivoire of their own free will in order to help limit the damageable consequences of the acts committed by Ugborugbo Salomon Amejuma (the director of Tommy) and others'.⁵²⁸ The charges against the director of the Ivorian subsidiary, N'Zi Kablan, were also dropped.⁵²⁹ According to the FIDH, the decisions to dismiss the charges against them was a direct consequence of the settlement between Trafigura and the Ivorian government.⁵³⁰

⁵²⁰ *Ibid.*, p. 359

⁵²¹ *Yameogo Hado & others v Trafigura*, Court of Appeal of Abidjan, 24 Devenber 2010, available at: https://www.trafigura.com/media/3910/court_of_appeal_abidjan_yameogo_hado_and_others_24_12-2010_en.pdf (last accessed on 7 November 2018).

⁵²² Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, 2014, at 102, available at: <https://www.amnesty.org/download/Documents/8000/pol300012014en.pdf> (last accessed on 26 November 2018).

⁵²³ A. Hindman and R. Lefeber, "General Developments - International/Civil Liability and Compensation" (20) *Yearbook of International Environmental Law* 2009, 244, pp. 245-246.

⁵²⁴ Amnesty International, *Injustice Incorporated*, *op. cit.*, p. 102.

⁵²⁵ *Ibid.*, p. 103.

⁵²⁶ Amnesty International, *Injustice Incorporated*, *op. cit.*, p. 104.

⁵²⁷ *Ibid.*, p. 102.

⁵²⁸ Decision by the Indictment Division of the Abidjan Court of appeal, 19 March 2008, pp. 25-26.

⁵²⁹ FIDH, "Corporate Accountability for Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms", 2006, p. 360.

⁵³⁰ FIDH, "L'affaire du 'Probo Koala' ou la catastrophe du déversement des déchets toxiques en Côte d'Ivoire", April 2011, available at: https://www.fidh.org/IMG/pdf/FIDH-LIDHO-MIDH_Rapport_ProboKoala_avril2011.pdf (last accessed on 12 November 2018), p. 25.

The Ivorian court found that there was enough evidence to proceed with the charges against 12 other individuals (who were not employees of Trafigura), including State officials who were implicated in the dumping.⁵³¹ On 22 October 2008, Salomon Ugborugbo, the director of Tommy, which was in charge of the offloading and disposal of the waste, was convicted for poisoning by the Assize Court of Abidjan and sentenced to a term of 20 years imprisonment. In addition, Essoin Kouao, a shipping agent from WAIBS who had recommended the company Tommy to the Ivorian subsidiary of Trafigura was sentenced to 5 years imprisonment.⁵³² The former harbour master, customs officials and former director of the Affaires maritimes et portuaires were acquitted.

Proceedings in the UK

On 10 November 2006, a group of over 30,000 Ivorian citizens brought civil proceedings in the UK before the High Court of Justice in London against the English subsidiary (Trafigura Limited) that chartered the ship.⁵³³ The Dutch parent company TBBC was joined as a party in February 2007.⁵³⁴ The claimants were represented by the UK law firm Leigh Day on a 'no win no fee' basis, meaning that they would not be required to pay legal costs if their case was not successful,⁵³⁵ while Trafigura was represented by Macfarlanes.⁵³⁶

The claimants claimed over £100 million in compensation for the injuries they had allegedly suffered after being exposed to the waste.⁵³⁷ They sustained that, by exporting untreated waste to Côte d'Ivoire, Trafigura breached Article 18(1) of Council Regulation (EEC) 259/93 implementing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal which includes a ban on the export of hazardous waste for disposal outside the EU/EFA area.⁵³⁸

Trafigura contested the toxicity of the waste and the number of victims,⁵³⁹ and maintained that it had entrusted the disposal of the waste to the local contractor Tommy and had no reason to doubt the ability of Tommy to properly handle slop disposal. In particular, Trafigura continued to affirm that: 'the discharge of slops to a nominated contractor, Company Tommy, was conducted in accordance with local and international regulations, with the approval of the port authorities and in the presence of both the police and customs officials. Sadly, the contractor then dumped the slops illegally at sites around the city. Trafigura could not have foreseen these actions, which were in flagrant breach of both the operator's license and Company Tommy's contractual undertakings to Trafigura.'⁵⁴⁰

The claimants' lawyers presented evidence to the court that the defendants had attempted to influence individual claimants to alter their statements and, on 23 March 2009, the High Court of

⁵³¹ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 102.

⁵³² FIDH, "La Cour d'assises d'Abidjan rend son verdict, en l'absence des principaux responsables", available at: https://www.fidh.org/IMG/article_PDF/article_a5961.pdf (last accessed on 8 November 2018).

⁵³³ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 263.

⁵³⁴ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 105.

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*, p. 107.

⁵³⁷ N. Buck, "The Trafigura Super-Injunction", 28 Communications Law Bulletin, 2009, p. 15.

⁵³⁸ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 MArch 1989, available at: <https://www.basel.int/portals/4/basel%20convention/docs/text/baselconvention-text-e.pdf>

⁵³⁹ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 263.

⁵⁴⁰ <https://www.trafigura.com/media/3954/trafigura-and-the-probo-koala.pdf> p. 4.

Justice granted an injunction prohibiting the defendant from having 'any communications, by whatever means, with any claimant'.⁵⁴¹

On 16 September 2009, just a few weeks before going to trial, the parties reached an out-of-court settlement whereby Trafigura agreed to pay approximately £30 million.⁵⁴² In exchange of the settlement, the parties agreed a waiver of all claims against Trafigura.⁵⁴³ In addition, the parties agreed that there would be no admission of liability by Trafigura for the harm alleged by the claimants, that the information, materials and medical expert evidence gathered during the proceedings would remain confidential,⁵⁴⁴ and that a joint statement would be released acknowledging that 'the slops could at worst have caused a range of short term low-level flu like symptoms and anxiety'.⁵⁴⁵

In the meantime, Trafigura filed libel proceedings against the BBC programme Newsnight which, on 13 May 2009, broadcast a piece and published a story on its website on the events described as 'the biggest toxic dumping scandal of the 21st century'. The programme detailed the composition of the waste dumped in Abidjan and affirmed that it was revealed to be lethal by the Dutch authorities.⁵⁴⁶ It also included an interview with a toxicologist from the Royal Society of Chemistry, who stated that the waste 'would bring a major city to its knees'.⁵⁴⁷ It was also alleged, amongst other things, that the waste had caused deaths and miscarriages.⁵⁴⁸ Trafigura disputed this, relying on the opinion of 20 independent experts in shipping, chemistry, modeling, toxicology, tropical medicine, veterinary science and psychiatry who had been appointed as part of the investigation of the events that occurred in Abidjan, and 'were unable to identify a link between exposure to the chemicals released from the slops and deaths, miscarriages, still births, birth defects, loss of visual acuity or other serious and chronic injuries'.⁵⁴⁹ The BBC was ordered to pay £28,000 in damages to Trafigura and had to retract its allegations and apologize on air.⁵⁵⁰

In September 2009, various media in the UK (The *Guardian* and the BBC) and in the Netherlands and Norway obtained and published some of Trafigura's internal emails, which revealed that staff knew that the waste was hazardous and that disposing of it would prove both difficult and costly. It reported that Trafigura's Chairman, Claude Dauphin, urged his team to 'be creative' in the way they dealt with the waste.⁵⁵¹ That same month, The *Guardian* also obtained a document, the Minton Report, which had been commissioned by Trafigura to John Minton (from the scientific consultancy firm Minton, Treharne & Davies Group) in 2006 and which acknowledged that the waste was potentially harmful and 'capable of causing severe human health effects through inhalation and

⁵⁴¹ A. Brown, "UK Oil Company Accused of Trying to Buy Witnesses", *Commercial Law International* Commercial Law International, 7 April 2009, available at: <http://www.commerciallawinternational.com/?p=186> (last accessed on 13 November 2018).

⁵⁴² Trafigura, 'Trafigura holds Dutch and French Lawyers Personally Liable for Forgery in Unique Case', available at: <https://www.trafigura.com/news/trafigura-holds-dutch-and-french-lawyers-personally-liable-for-forgery-in-unique-case/22582> (last accessed on 11 January 2019).

⁵⁴³ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 263.

⁵⁴⁴ Amnesty International, "Injustice Incorporated", *op. cit.*, p. 105.

⁵⁴⁵ https://www.trafigura.com/media/3950/trafigura_and_leigh_day_co_agreed_final_joint_statement.pdf

⁵⁴⁶ J. Meirion and L. MacKean, "Dirty Tricks and Toxic Waste in Ivory Coast", available at: <http://www.informationclearinghouse.info/article23715.htm> (last accessed on 14 November 2018).

⁵⁴⁷ N. Buck, "The Trafigura Super-Injunction", *op. cit.*, p. 16.

⁵⁴⁸ J. Meirion and L. MacKean, "Dirty Tricks and Toxic Waste ...", *op. cit.*

⁵⁴⁹ Yao Esaie Motto & Ors v. Trafigura Ltd and Trafigura Beheer BV, 23 September 2009

⁵⁵⁰ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 263.

⁵⁵¹ BBC Newsnight, "Trafigura know of waste dangers", 16 September 2009, available at: <http://news.bbc.co.uk/2/hi/programmes/newsnight/8259765.stm> (last accessed on 13 November 2018).

ingestion.⁵⁵² The report also stated that the medical issues reported by the inhabitants of Abidjan in the aftermath of the dumping were consistent with the release of hydrogen sulphide gas contained in the waste; the effects of exposure could have included severe burns to the skin and lungs, eye damage, vomiting, diarrhoea, loss of consciousness and death. The report affirmed that the dumping of the waste would have been illegal in Europe and the proper method of disposal should have been through the use of a special chemical treatment called wet-air oxidation.⁵⁵³

On 11 September 2009, Trafigura sought and obtained from the UK High Court an injunction in order to prevent the newspaper *The Guardian* from publishing the Minton Report. The argument put forward by the company's lawyer in order to obtain the injunction was that the report was only preliminary, it had been proven to be inaccurate and it was confidential and privileged as it had been commissioned for use in litigation.⁵⁵⁴ The injunction was referred as a 'super-injunction' as it not only prevented the publication of the document but also prohibited disclosure of the existence of the injunction itself.⁵⁵⁵ A breach of the injunction would constitute contempt of court, punishable by imprisonment or sequestration of a company's assets.⁵⁵⁶

In October 2009, Paul Farrelly, Labour MP for Newcastle-under-Lyme brought up the events during Parliamentary Questions. The *Guardian* requested authorization of Trafigura's lawyer (Carter-Ruck) to report on the parliamentary proceedings, but this was denied.⁵⁵⁷ Trafigura's lawyer later sought to prevent the parliamentary debate from taking place.⁵⁵⁸

The super-injunction was eventually circumvented. The parliamentary question and the gagging order around it were revealed by Twitter users following the publication by the *Guardian* on 12 October 2009, that the Parliament's order papers of the day contained a question to be answered by a minister and that the newspaper had been 'prevented from identifying the MP who has asked the question, what the question is, which minister might answer it, or where the question is to be found'.⁵⁵⁹ The whole debate around the super-injunction gave rise to concerns about the mechanisms in place to protect whistle-blowers, press freedom, and freedom of speech.⁵⁶⁰

Proceedings in France

On 29 June 2007, FIDH's Legal Action Group filed criminal proceedings with the Prosecutor's office in Paris in the name of 20 Ivorian claimants against the two French executives, Claude Dauphin and Jean-Pierre Valentini of Trafigura. The pair were sued on charges of dumping harmful substances, manslaughter, bribery and violation of the special provisions concerning cross-border movements of waste.⁵⁶¹ However, the case was dismissed by the prosecutor on 16 April 2008, on the grounds that the proceedings were 'entirely of foreign origin'.⁵⁶² In particular, it was noted that Claude

⁵⁵² N. Buck, "The Trafigura Super-Injunction", *op. cit.*, p. 16.

⁵⁵³ *Ibid.*

⁵⁵⁴ N. Buck, "The Trafigura Super-Injunction", *op. cit.*, p. 16.

⁵⁵⁵ *Ibid.*, p. 15.

⁵⁵⁶ The Guardian, "How the Trafigura story came to be told", 16 October 2009, available at: <https://www.theguardian.com/world/2009/oct/16/trafigura-carter-ruck-the-guardian> (last accessed on 14 November 2018).

⁵⁵⁷ N. Buck, "The Trafigura Super-Injunction", *op. cit.*, p. 17.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ D. Leigh, "Guardian gagged from reporting parliament", *The Guardian*, 12 October 2009, available at: <https://www.theguardian.com/media/2009/oct/12/guardian-gagged-from-reporting-parliament> (last accessed on 14 November 2018).

⁵⁶⁰ *Ibid.*

⁵⁶¹ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 360.

⁵⁶² *Ibid.*

Dauphin and Jean-Pierre Valentini did not have permanent ties to the French territory, that the subsidiaries and commercial entities belonging to the Trafigura group were established outside of French territory, and there were other ongoing legal proceedings elsewhere.⁵⁶³

Proceedings in the Netherlands

In June 2008, the Dutch Public Prosecutor brought charges in the Netherlands relating to the illegal export of waste from the Netherlands to Côte d'Ivoire against the Dutch parent company TBBV, the Chairman of Trafigura, Claude Dauphin, an employee of Trafigura Limited Naeem Ahmed (who was in charge of the 'caustic washing' aboard the vessel), the Ukrainian captain of the Probo Koala, Sergiy Chertov, APS, its director, Evert Uittenbosch, and the Municipality of Amsterdam,⁵⁶⁴ concerning the events that took place in the Port of Amsterdam. The court dismissed the case against Claude Dauphin.⁵⁶⁵ On 16 September 2009, Greenpeace Netherlands challenged that decision not to prosecute Trafigura's Chairman. The Court of Appeal rejected its complaint and found that Greenpeace lacked legal standing to request prosecution for the criminal offences.⁵⁶⁶ On 6 July 2010, the Dutch Supreme Court held that the Court of Appeal should review whether Claude Dauphin could be prosecuted.⁵⁶⁷

On 23 July 2010, Naeem Ahmed was found guilty of having concealed the hazardous nature of the goods (on the basis of s174 of the Dutch Penal Code) and delivered such goods to APS, and was given a six-month suspended sentence and a fine of EUR25,000.⁵⁶⁸ TBBV was condemned by the Amsterdam District Court to pay the maximum fine of EUR 1 million for shipping hazardous waste to the Netherlands and illegally instructing the Probo Koala to export the hazardous waste for disposal in Côte d'Ivoire after having concealed the hazardous nature of the transported waste described by the company as 'routine slops from ordinary tank-cleaning', in violation of article 18(1) of the European Waste Shipment Regulation, implementing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.⁵⁶⁹

On 21 December 2011, the Amsterdam Court of Appeal upheld the decision.⁵⁷⁰ The court found that APS and its director had made an 'excusable error of law' by transferring the waste back to the Probo Koala as it had relied on the permission given by the Environmental and Buildings Departments of the Amsterdam Municipality.⁵⁷¹ On 23 December 2011, the same court considered that the municipality of Amsterdam was immune to prosecution as it was exercising its executive functions.⁵⁷²

On 16 November 2012, an out-of-court settlement was reached, following which the criminal prosecution of Claude Dauphin was withdrawn, and the outstanding cases were all then settled. The company agreed to pay the existing EUR 1 million fine, plus a further EUR 367 000 as compensation for assets acquired through the illegal export, Claude Dauphin was asked to pay a EUR 67 000 fine

⁵⁶³ Ibid.

⁵⁶⁴ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 107.

⁵⁶⁵ D. Blackburn, 'Removing Barriers to Justice...', *op. cit.*, p. 27.

⁵⁶⁶ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 109.

⁵⁶⁷ D. Blackburn, 'Removing Barriers to Justice...', *op. cit.*, p. 27.

⁵⁶⁸ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 108.

⁵⁶⁹ - Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste

⁵⁷⁰ FIDH, "Corporate Accountability for Human Rights Abuses ...", *op. cit.*, p. 362.

⁵⁷¹ Amnesty International, *Injusticed Incorporated*, *op. cit.* at 108.

⁵⁷² Associated Press, "Amsterdam court fines oil trader Trafigura €1 million for its role in hazardous waste case", 23 July 2010, available at:

<https://cdn2.hubspot.net/hubfs/2617486/Greenpeace/Desarrollador%20CMA/Responsabilidad%20Corp/20%20Cases/Trafigura.pdf?t=1516750211784> (last accessed on 14 November 2018).

(which corresponded to the maximum fine that could be imposed for illegal export of waste), and Naeem Ahmed was required to pay a fine of EUR 25 000, in exchange of which all the legal proceedings were ended.⁵⁷³

In 2015 and 2016, two associations (the Stichting *Union des Victimes de déchets Toxiques d'Abidjan* (UVDTAB) and the Stichting *Victimes des déchets toxiques Côte d'Ivoire* (VDTCI)) brought civil proceedings against Trafigura in the Netherlands.⁵⁷⁴ They were each claiming to represent over 100,000 Ivorian victims.⁵⁷⁵ As a response to these proceedings, Trafigura filed a criminal complaint against UVDTAB for forgery and fraud.⁵⁷⁶ On 30 November 2016, the district court of Amsterdam declared UVDTA inadmissible in its claim.⁵⁷⁷ The VDTCI's claim was also dismissed by the Dutch court.⁵⁷⁸

Barriers

Legal standing

Issues of legal standing impeded Greenpeace to request a prosecution for the criminal offences carried out by Trafigura as the NGO was found to have an 'insufficiently direct interest'.⁵⁷⁹

Jurisdiction

The fact that the criminal proceedings were rejected in France as being 'entirely of foreign origin' constitutes an obstacle to the access to justice for the victims. This is so especially as the French courts could have decided to assert their jurisdiction in this case on the basis of the principle of active personality, under which a State may exercise jurisdiction to regulate the conduct of its nationals including when it takes place in third countries, and enshrined in article 113-6 of the French criminal code.⁵⁸⁰

Doctrine of immunities

In the Netherlands, the municipality of Amsterdam was deemed to be immune from prosecution. The doctrine of immunity served to shield the Dutch authorities from their liability with regards to the illegal export of hazardous waste from an EU country to an ACP (African, Caribbean and Pacific) state which is prohibited under EU law.

Effectiveness of out-of-court settlements in providing effective access to justice

According to Amnesty International, if the UK settlement provided some measures of justice for the individuals who received compensation, it had a number of shortfalls. In particular, 'the claim did not represent all the victims of the toxic dumping but rather a limited group of people who were able to produce the documentary evidence needed⁵⁸¹ to substantiate their claim.'⁵⁸² In addition, Amnesty International affirmed that 'as with other settlement agreements and with civil claims more

⁵⁷³ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 109.

⁵⁷⁴ D. Blackburn, 'Removing Barriers to Justice...', *op. cit.*, p. 29.

⁵⁷⁵ *Ibid.*, p. 29.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ Trafigura, 'Trafigura holds Dutch and French Lawyers Personally Liable for Forgery', available at: <https://www.trafigura.com/news/trafigura-holds-dutch-and-french-lawyers-personally-liable-for-forgery-in-unique-case/22582> (last accessed on 11 January 2019).

⁵⁷⁹ Amnesty International, *Injusticed Incorporated*, *op. cit.*, p. 109.

⁵⁸⁰ O. De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', *Faculté de Droit de l'Université Catholique de Louvain* (2006), p. 24.

⁵⁸¹ Amnesty International, *Justice Incorporated ...*, *op. cit.*, p. 107.

⁵⁸² *Ibid.*

generally, the settlement focused on financial compensation only. Other key elements of remedy, such as health care provision and decontamination (or rather the money needed to pay for these), were not included in the agreement'.⁵⁸³ Moreover, in the aftermath of the UK settlement, recurrent issues arose in relation to the transfer of the victims' compensation. In particular, the distribution process was derailed by a group called National Coordination of Toxic Waste Victims of Côte d'Ivoire (CNDT-CI) which falsely claimed to represent the victims and tried to secure control of the compensation fund.⁵⁸⁴ CNDT-CI managed to obtain a court order in Côte d'Ivoire to freeze the money and then for it to be transferred to its bank account for distribution to the claimants. Leigh Day agreed to a joint distribution process with CNDT-CI in order to prevent all-out fraud but eventually a significant amount of the fund was reported to have disappeared and 6,000 people remained unpaid.⁵⁸⁵ Furthermore, Trafigura continued to deny that it had any responsibility in the event. The UK settlement included a final statement according to which 'it remains Trafigura's position that it did not foresee, and could not have foreseen, the reprehensible acts of Compagnie Tommy in the dumping of the slops in and around Abidjan in August and September 2006, and that Compagnie Tommy acted entirely independently of, and without any authority from Trafigura.'⁵⁸⁶

5.3.10. Vedanta

History of the case

Vedanta Resources plc (Vedanta) is a holding company for a diverse group of base metal and mining companies,⁵⁸⁷ which is headquartered in the UK.⁵⁸⁸ In 2004, Vedanta acquired a 51% interest in Konkola Copper Mines Plc (KCM), a public limited company incorporated in Zambia, which owned and operated the Nchanga mine. The remaining 49% was held by ZCCM Investment Holdings Plc ('ZCCM'), a State-owned company. In February 2008 Vedanta increased its shareholding, via call options, to 79.42%, while the remaining 20.58% of the shares remained with ZCCM.

Several reports revealed that toxic effluent from KCM's operations of the Nchanga mine were discharged into the waterways and the local environment.⁵⁸⁹ In particular, a 2014 report from the Zambian Government Auditor General found that 'effluent discharged from the Nchanga mine into surface water contained material quantities of toxic metals and other substances which significantly exceeded permitted levels'.⁵⁹⁰

In April 2017, KCM launched its Going Green campaign, designed to restore the environment around its mining sites. However, the campaign has not yet been fully implemented.⁵⁹¹ On 2 October 2018,

⁵⁸³ Ibid., p. 106

⁵⁸⁴ Ibid., p. 107.

⁵⁸⁵ Ibid.

⁵⁸⁶ "The Probo Koala Case in 12 Questions", available at: <https://www.trafigura.com/resource-centre/probo-koala/> (last accessed on 7 November 2017).

⁵⁸⁷ *Lungowe and Others v Vedanta Resources Plc and Another*, [2016] EWHC 975 (TCC), at 1.

⁵⁸⁸ <https://www.vedantaresources.com/Pages/Home.aspx>

⁵⁸⁹ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2017] EWCA Civ 1528, at para. 17-18; 2012 South African Resource Watch Report (Foil Vedanta, 'Vedanta's pollution of water in Zambia' (27 August 2015)

⁵⁹⁰ Ibid.; 2012 South African Resource Watch Report (Foil Vedanta, 'Vedanta's pollution of water in Zambia' (27 August 2015) www.foilvedanta.org/articles/vedantas-pollution-of-water-in-zambia/

⁵⁹¹ KCM, 'KCM Shares Progress on its Going Green Initiative' (3 July 2017) kcm.co.zm/news/kcm-shares-progress-on-its-going-green-initiative/.

Vedanta Resources was officially removed from the London Stock Exchange amidst loud protests at the company's last Annual General Meeting in London.⁵⁹²

Discussion of the case

Proceedings in Zambia

Between 2007 and 2008, a number of environmental lawsuits failed in respect of some or all of the claimants for various reasons.⁵⁹³ One of these cases, known as the *Benson Shamilimo* case, was rejected on the basis that the claimants were unable to obtain expert evidence to prove a connection between their illnesses and their exposure to radiation.⁵⁹⁴ In another case, known as the *Nyasalu* case,⁵⁹⁵ the claimants succeeded on liability, however 1,989 claimants failed to obtain damages in the Supreme Court as they had not submitted medical reports.⁵⁹⁶

Proceedings in the UK

On 31 July 2015, 1,826 Zambian citizens from the Chingola region brought civil proceedings against both the UK parent company Vedanta and its Zambian subsidiary KCM on the basis of alleged personal injury, damage to property and loss of income, amenity and enjoyment of land arising out of discharges from the Nchanga copper mine. In particular, they sustained that the mine operations polluted the waterways and the Kafue river into which they flow, affecting their livelihood.⁵⁹⁷ They argued that the waterways were of critical importance to their livelihood and physical, economic and social wellbeing. More specifically, they affirmed that they relied on the waterways 'as their primary source of clean water for drinking, bathing, cooking, cleaning and other domestic and recreational purposes' and that they used them to irrigate crops and sustain livestock.⁵⁹⁸ The claimants sought damages, remediation, and cessation of the ongoing pollution.⁵⁹⁹

The claimants, who were represented by Leigh Day, argued that the parent company had committed a tort of negligence in failing to ensure that KCM's mining operations did not cause harm to the environment or local communities.

The applicable law to the dispute was Zambian law as the law of the place where the damage occurred under Article 4 of the Rome II Regulation. As English common law is of significant weight in the Zambian legal system,⁶⁰⁰ the claimants relied on English case-law to affirm that Vedanta owed them a duty of care on the basis of the very high level of control and direction continuously exercised by the parent company over the mining operations of its Zambian subsidiary and over the compliance, by the latter, with applicable health, safety and environmental standards.⁶⁰¹

⁵⁹² London Mining Network, 'Why is Vedanta delisting from the London Stock Exchange?', 1 October 2018, available at <https://londonminingnetwork.org/2018/10/why-is-vedanta-delisting-from-the-london-stock-exchange/> (last accessed 4 February 2019).

⁵⁹³ *Benson Shamilimo and 41 others v. Nitrogen Chemicals of Zambia Ltd* (2007/HP/0725); and, *Nyasulu and 2,000 others v. KCM* (2007/HP/1286).

⁵⁹⁴ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2017] EWCA Civ 1528, at para. 129.

⁵⁹⁵ *Nyasulu and Others v Konkola Copper Mines Plc and Others* (2007/HP/1286) [2011] ZMHC 86 (31 December 2010).

⁵⁹⁶ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2017] EWCA Civ 1528, at para. 129.

⁵⁹⁷ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2017] EWCA Civ 1528, at para. 13.

⁵⁹⁸ *Ibid.*, at para. 15.

⁵⁹⁹ Leigh Day, 'Legal Briefing: Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines' www.leighday.co.uk/LeighDay/media/LeighDay/documents/Zambia/Zambia-brief-2.pdf.

⁶⁰⁰ *Lungowe and Others v Vedanta Resources Plc and Another*, [2016] EWHC 975 (TCC), at para 122.

⁶⁰¹ *Ibid.*, at para 20.

In addition, the causes of action against the Zambian subsidiary included negligence, nuisance, trespass and liability under Zambian statute law.⁶⁰² The claimants also sustained that KCM was strictly liable for the consequences of toxic discharges under a number of Zambian statutory provisions.⁶⁰³

The claimants relied on the Brussels I Recast Regulation to establish the jurisdiction of the UK courts over the claim against the parent company, since Vedanta was domiciled in the UK. As the Brussels I Recast Regulation is not applicable to non EU-domiciled defendants, the claimants relied on English domestic law to establish the jurisdiction of the UK courts over the Zambian subsidiary. In particular, in English law, under Practice Direction 6B, paragraph 3.1(3), English courts may have jurisdiction over a defendant if he is a 'necessary or proper' party to proceedings against another defendant against whom there is a real issue to be tried. The claimants submitted that the Zambian subsidiary could be joined in the legal proceedings against the UK-domiciled parent company as KCM was a necessary or proper party to the legal proceedings, and there was, between themselves and Vedanta, a real issue which was reasonable for the UK court to try. They also sustained that access to justice issues would make it impossible for these claims to be tried in Zambia.⁶⁰⁴

The defendants challenged the jurisdiction of the UK courts to try the claims against KCM on the basis of the doctrine of *forum non conveniens* which allows a court to decline to exercise jurisdiction over a dispute on the grounds that there is a more appropriate forum to try the claim. More specifically, KCM sustained that the appropriate place to bring the claims against KCM was Zambia since the entire focus of the case was in Zambia, as this was where the alleged torts were committed, where the damage occurred, where all the claimants lived, where KCM is domiciled and the law of Zambia was applicable to the proceedings.⁶⁰⁵

The claimants affirmed that the English courts had no discretion to decline the jurisdiction conferred on them by Article 4 of the Brussels I Regulation as the ECJ decision in *Owusu v. Jackson* excluded the possibility for EU MS courts to apply the doctrine of *forum non conveniens* when the Brussels I Recast regulation is applicable.⁶⁰⁶

Vedanta sustained that *Owusu v. Jackson* was not applicable on the grounds, firstly, that it was a case on its particular facts with no applicability to the present case; secondly, that the rule in *Owusu v. Jackson* was plainly and obviously flawed and should not be followed;⁶⁰⁷ secondly that the reasoning of the ECJ was plainly and obviously flawed and should not be followed;⁶⁰⁸ and thirdly that the proceedings against Vedanta were an abuse of EU law in that they constituted a device designed simply to ensure that the real claim, against KCM, was litigated in the UK rather than in Zambia.⁶⁰⁹

In a judgment of 27 May 2016, Coulson J sitting as a judge in the Technology and Construction Court, affirmed the jurisdiction of the English courts to hear the case.⁶¹⁰ The judge stated that, while it was obvious that Zambia was the most appropriate forum to try the claims against KCM,⁶¹¹ the existence of ongoing proceedings between the claimants and Vedanta meant that England was in fact the appropriate place to try the claims against KCM since 'two trials on opposite sides of the world on

⁶⁰² Lungowe and Others v Vedanta Resources Plc and Another, [2016], *ibid.*, at para 37.

⁶⁰³ *Ibid.*, para 38.

⁶⁰⁴ *Ibid.*, para 94.

⁶⁰⁵ *Ibid.*, at para 93.

⁶⁰⁶ Lungowe and Others v Vedanta Resources Plc and Another, [2016] *op. cit.*, at para 50.

⁶⁰⁷ *Ibid.*, at 51.

⁶⁰⁸ *Ibid.*, at 51.

⁶⁰⁹ *Ibid.*, at 51.

⁶¹⁰ *Ibid.*, at 70.

⁶¹¹ *Ibid.*, at 156.

precisely the same facts and events (...) is unthinkable'.⁶¹²The judge also expressed his views that the claimants would almost certainly not get access to justice if these claims were pursued in Zambia'.⁶¹³

In addition, the judge acknowledged that there were legitimate concerns about both the conduct of the parent company, which was seen as the real architect of the environmental pollution in Zambia,⁶¹⁴ and about the financial position of the subsidiary, which may not have the ability to pay compensation to the claimants.⁶¹⁵Coulson J stated that: 'since it is Vedanta who are making millions of pounds out of the mine, it is Vedanta who should be called to account. I acknowledge that this argument has some force, and provides a further reason why I cannot label the claim against Vedanta as a device'.⁶¹⁶

On 13 October 2017, the Court of Appeal affirmed the High Court's decision. The court found that the effect of the ECJ decision in *Owusu v. Jackson* is that the English Court is precluded from declining its mandatory jurisdiction under the Brussels I Recast Regulation where the defendant is a company domiciled in the UK.⁶¹⁷ In addition, the court affirmed that it would be inappropriate to have parallel proceedings involving 'virtually identical facts, witnesses and documents, in circumstances where the claim against Vedanta would in any event continue in England, and that this made England the most appropriate place to try the claims against KCM'.⁶¹⁸ Furthermore, the court found that it could not be said that the claimants had no interest in suing Vedanta other than for the purposes of bringing KCM within the jurisdiction since 'the claimants wish to proceed against Vedanta as a company that has sufficient funds to meet any judgment of the English court'.⁶¹⁹ Finally, the court stated that the claimants' argument as to the fact that Vedanta owed them a duty of care had a reasonable prospect of success. In particular, the court affirmed that there was 'a serious question to be tried which should not be disposed of summarily'.⁶²⁰

In January 2019, the Supreme Court heard submissions and evidence from all parties during a two-day hearing. At the time of writing, its decision is still pending.

Barriers

Costs of bringing claims and difficulties in securing legal representation

In the Zambian context, the cost of buying summons, especially in civil matters, can discourage members of the public and particular communities. The cost of hiring a lawyer can also be prohibitive.⁶²¹ As the defendants argued on appeal, there are only 545 lawyers in the whole country (1 per 20,000 people), and only 4 in Chingola itself (1 per 40,000 people), 75% of the Zambian population lives on less than \$1.25/day, and only 4% of the claimants ever had a job other than subsistence farming.⁶²² The fact that the claimants would struggle to find lawyers to represent them,

⁶¹² Ibid., at 168.

⁶¹³ Ibid., at 198.

⁶¹⁴ Ibid., para. 78.

⁶¹⁵ Ibid., at 82.

⁶¹⁶ Ibid., at 78.

⁶¹⁷ Ibid., at para 34.

⁶¹⁸ Ibid., at para 117.

⁶¹⁹ Ibid., at para 96.

⁶²⁰ Ibid., at para 90.

⁶²¹ Zambian Human Rights Commission, '2010 State of Human Rights Report in Zambia: Human Rights & the Environment', 2010 Annual State of Human Rights Report www.hrc.org.zm/phocadownload/state_of_human_rights_report_2010.pdf.

⁶²² Pleadings Appeal case, Pleading Representative Respondents, Richard Hermer QC, in Foil Vedanta, 'Report Court Hearings 5-6 July 2017' www.minesandcommunities.org/article.php?a=13632.

combined with the lack of legal aid in Zambia constituted a serious threat to the claimants' access to justice in Zambia.⁶²³

Issues of access to justice in the host State

The Court of Appeal⁶²⁴ accepted the claimants' argument that they were precluded from bringing the claims in Zambia because of issues with access to justice in the country. When dealing with this point, the Court commented that the evidence presented against the Zambian justice system was so 'overwhelming' that it was almost certain that the claimants would be unable to obtain justice in the Zambian courts.⁶²⁵

Difficulties in gathering evidence

Gathering evidence on the ground can constitute a significant hurdle to accessing justice when problems of corruption exist in the host State. In this case,⁶²⁶ Leigh Day lawyers reported to have faced obstruction in getting access to their clients by local authorities.⁶²⁷ In addition, one of the lead claimant claimed to have received threats and harassment from agents allegedly working on behalf of KCM. Leigh Day has affirmed that attempts to disrupt the claims from a local perspective have in the past been one of the most significant barriers to obtaining justice.⁶²⁸

Jurisdiction

The fact that EU private international law rules on jurisdiction set out in the Brussels I Regulation are limited to EU defendants, and that the domestic law of the forum determine residual jurisdiction over non-EU entities can give rise to legal uncertainty. The foreign subsidiary of an EU defendant might be added as a co-defendant when the domestic law of the forum allows it. In this case, the defendants had sustained that the case should be stayed in favour of the most appropriate forum (Zambia) on the basis of the *forum non conveniens*. If the English courts rejected this argument, it created unnecessary delays and added to legal costs.

Attribution of legal responsibility

As English common law is of significant weight in the Zambian legal system, the claimants relied on the English case-law to establish that the parent company owed them a duty of care. However, it may be difficult for the claimants to demonstrate, with very limited access to information, that the circumstances of the case justify the recognition of the existence of a duty of care owed to them by Vedanta. Obtaining compensation from Vedanta is, however, the only real possibility for the claimants to obtain effective access to legal remedies considering the financial difficulties faced by KCM which would most likely be unable to meet any compensation payment.⁶²⁹

⁶²³ Pleadings Appeal case, Pleading Representative Respondents, Richard Hermer QC, in Foil Vedanta, 'Report Court Hearings 5-6 July 2017' www.minesandcommunities.org/article.php?a=13632.

⁶²⁴ *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528

⁶²⁵ *Lungowe and Others v Vedanta Resources Plc and Another*, [2016], *ibid.*, at para 94.

⁶²⁶ eg Oliver Holland was targeted by local police and detained whilst attempting to hold group meetings with clients at the beginning of 2017. Holland was arrested under the Public Order Act, which states that holding a meeting of more than three people requires a police permit. The act is usually invoked during election times by political parties. Leigh Day said the response was 'excessive'. Holland was eventually charged with the misdemeanour 'conduct likely to cause a breach of peace', which resulted in him paying a ZMK50 (\$5/£4) fine.

⁶²⁷ Leigh Day stated on their website that the KCM logo had been found on one of the police cars. This suggests collusion between the Defendant and the authorities. See Facing Finance, 'Update: Employees of the law firm Leigh Day arrested after criticism of the Vedanta subsidiary KCM in Zambia' (17 January 2017) www.facing-finance.org/en/2017/01/update-mitarbeiter-der-anwaltsfirma-leigh-day-nach-kritik-am-vedanta-tochterunternehmen-kcm-in-sambia-verhaftet/.

⁶²⁸ Email Communication with Leigh Day's Contact Person, Oliver Holland, 23 October 2018.

⁶²⁹ *Ibid.*, at para 96.

5.3.11. Vinci

History of the case

Vinci is a French concessions and construction company founded in 1899 as the Société Générale d'Entreprises. It has been working in Qatar since 2007 through its Qatari subsidiary QDVC,⁶³⁰ and employs 3,500 persons there, many of whom are migrant workers from Nepal, Sri Lanka and India.⁶³¹ Vinci won various contracts to contribute to major projects to develop transport infrastructure in Qatar, notably in the run-up to the 2022 FIFA World Cup.

Over the past few years, concerns have arisen over the welfare and working conditions of migrant workers working for construction companies in Qatar. In particular, recent studies have denounced the various forms of exploitation to which migrant workers are subjected when involved in the infrastructure and development projects related to the 2022 FIFA World Cup.⁶³² These include exorbitant debt incurred as a result of recruitment agency fees in their home country (the agencies often mislead them on the type of work, the pay and/or their working conditions);⁶³³ the very harsh living and working conditions of the workers; and chronic problems with late or non-payment of wages, a source of great anxiety for the workers as they rely on their pay not only to buy food, but also to make payment towards their large recruitment-related loans or send money to their family back home.⁶³⁴ In addition, the workers' freedom of movement is restricted as a result of the employment sponsorship scheme known as the 'Kafala-system' (Arabic for sponsorship); under Qatari's labour laws, this requires workers to have a Qatari sponsor giving them permission not only to work in Qatar but also to decide when they can leave the country or change employer. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has warned that the Kafala system 'may be conducive to the exaction of forced labour'.⁶³⁵ Following international scrutiny over the working conditions of migrant workers in the build-up of to the 2022 FIFA World Cup in Qatar, a new law enacted on 4 September 2018 mostly abolished the exit permit, however, employers will retain this right under certain conditions for up to 5% of their workforce.⁶³⁶

The working conditions of migrant workers employed by Vinci in particular have come under scrutiny as criminal legal proceedings were launched against the company.

Discussion of the case

On 24 March 2015, Sherpa filed a criminal complaint with the Nanterre court in France against Vinci Construction Grands Projets and the French directors of its Qatari subsidiary QDVC. Sherpa accused the defendants of forced labour, servitude and concealment in relation to migrant workers employed by the company on its construction sites in the framework of the 2022 Fifa World Cup in Qatar.⁶³⁷ Sherpa claimed that migrant workers employed by Vinci on its construction sites were working an average of 66 hours a week, often had to commute for 2 hours daily and were usually paid around EUR 200 per month on average. Working conditions were described by the NGO as

⁶³⁰ <https://www.vinci.com/vinci.nsf/en/press-releases/pages/20150324-1130.htm>

⁶³¹ K. Willsher, "France: Vinci Construction investigated over Qatar forced labour claims" <https://www.theguardian.com/world/2015/apr/26/france-vinci-construction-qatar-forced-labour-claims-2022-world-cup>

⁶³² Ibid., at 5.

⁶³³ <https://www.amnesty.org/en/latest/campaigns/2016/03/qatar-world-cup-of-shame/>

⁶³⁴ S. Goethals and al., "Business Human Rights Responsibility for Refugees and Migrant Workers ...", op. cit. at 336-337.

⁶³⁵ S. Goethals and al., "Business Human Rights Responsibility for Refugees and Migrant Workers ...", op. cit. at 337.

⁶³⁶ R. Ratcliffe, "Qatar law change hailed as milestone for migrant workers in World Cup run-up", available at: <https://www.theguardian.com/global-development/2018/sep/06/qatar-law-change-milestone-migrant-workers-world-cup-2022-exit-permits> (last accessed on 8 November 2018).

⁶³⁷ D. Vidalon and G. Guillaume, French builder Vinci to sue over claims of forced labor in Qatar", op. cit.

'difficult even dangerous' and in 'stifling heat' while migrant workers were living in labour camps where there were as many as eight persons sharing one room.⁶³⁸ Workers were reportedly told to resign or change employer if they asked for better working conditions and housing.⁶³⁹ In addition, the company reportedly confiscated workers' passports. The CEO of Vinci, Xavier Huillard, acknowledged in an interview with Le Figaro newspaper that the company kept the workers' passports until January 2015 'to avoid risk of them being stolen or destroyed' although he added that this was not done under force and that 'they could, of course, have them back at any time'.⁶⁴⁰

Sherpa announced its intention to file criminal proceedings against Vinci on the homepage of its website,⁶⁴¹ and invited the internet users to sign a petition against slavery in Qatar in the run-up to the World Cup.⁶⁴² The director of Sherpa, William Bourdon, its president, Laetitia Liebert and the legal advisor, Marie-Maure Guislain, gave various interviews to radio stations, TV programmes and newspapers explaining the reasons behind the criminal proceedings.⁶⁴³

A preliminary investigation was opened by the Nanterre public prosecutor on 23 April 2015. On 31 January 2018, Nanterre's Public Prosecutor decided to close the preliminary investigation and take no further action (*affaire classée sans suite*) regarding the criminal complaint on the basis of the lack of identified victims.⁶⁴⁴

On 22 November 2018, Sherpa filed new criminal proceedings in France against the company for forced labour and enslavement (Articles 225-13 -225-15 of the French Criminal Code), reckless endangerment of workers' lives (Article 223-1 of the French Criminal Code), working conditions incompatible with human dignity and breach of safety obligation (Article 222 of the French Criminal Code), as well as servitude and concealment (Article 321-1 of the French Criminal Code), this time together with the *Comité contre l'esclavage moderne* (committee against modern slavery) and together with six former Indian and Nepalese employees of the company who worked on the construction sites for the 2022 Fifa World Cup.⁶⁴⁵

Vinci denied the allegations and affirmed that they 'do more than merely comply with local labour law and respect fundamental rights'.⁶⁴⁶ In response to the criminal proceedings filed against the company by Sherpa in 2015, Vinci filed a lawsuit for defamation on 13 April 2015 against William Bourdon on the basis of the allegations published on Sherpa's website. The company filed a further

⁶³⁸ D. Vidalon and G. Guillaume, "French builder Vinci to sue over claims of forced labor in Qatar" Reuters, 25 March 2015, available at: <https://www.reuters.com/article/us-vinci-qatar-labour-conditions/french-builder-vinci-to-sue-over-claims-of-forced-labor-in-qatar-idUSKBN0MK00H20150324> (last accessed on 9 November 2018).

⁶³⁹ Ibid.

⁶⁴⁰ Ibid.

⁶⁴¹ Sherpa, « Mondial 2022 au Qatar : Sherpa porte plainte contre Vinci construction et les dirigeants de sa filiale au Qatar », 23 March 2015, available at: <https://www.asso-sherpa.org/mondial-2022-au-qatar-sherpa-porte-plainte-contre-vinci-construction-et-les-dirigeants-de-sa-filiale-au-qatar-qdvc#.VRFGIOEzcn8> (last accessed on 19 November 2018).

⁶⁴² Sherpa, « Pour une enquête approfondie sur Vinci en France et au Qatar », available at: <https://www.powerfoule.org/campaigns/vinci/appel-a-taubira/pour-une-enquete-approfondie-sur-vinci-en-france-et-au-qatar> (last accessed on 19 November 2018).

⁶⁴³ Libération, "Les dirigeants de Vinci voulait un procès, ils auront un contre procès", 23 April 2015, available at: https://www.liberation.fr/planete/2015/04/23/les-dirigeants-de-vinci-voulaient-un-proces-ils-auront-un-contre-proces_1261304 (last accessed on 19 November 2018).

⁶⁴⁴ Le Monde, "Nouvelle plainte contre Vinci pour 'travail forcé' sur les chantiers liés à la Coupe du monde au Qatar", 22 November 2018: available at: https://www.lemonde.fr/sport/article/2018/11/22/mondial-2022-vinci-vise-par-une-plainte-pour-travail-force-au-qatar_5387196_3242.html?xtmc=vinci&xtcr=3 (last accessed on 23 November 2018).

⁶⁴⁵ Ibid.

⁶⁴⁶ Vinci, "Press releases: Vinci entirely refutes Sherpa's allegations and decides to file a lawsuit for defamation", 24 March 2015, available at: <https://www.vinci.com/vinci.nsf/en/press-releases/pages/20150324-1130.htm> (last accessed on 9 November 2018).

lawsuit for defamation the following day against Laetitia Liebert and Marie-Laure Guislain, on the basis of the comments made by the president of Sherpa and its legal advisor during various interviews given to the newspaper *Le Parisien* as well as BFMTV and Canal+ on 24 March 2015. Vinci sustained that such allegations constituted a serious attack on their image and asked for EUR 350,000 in damages as well as a fine of EUR 10,000.⁶⁴⁷

On 13 May 2015, Vinci filed another lawsuit against Sherpa, its director William Bourdon and its president Laetitia Liebert, this time on the basis of article 9-1 of the French Civil Code and article 6 of the European Convention of Human Rights, for undermining the presumption of innocence during an interview that the president and the director of Sherpa gave with the newspaper *Libération* which was broadcast on the newspaper's website on 23 April 2015.⁶⁴⁸ The case was dismissed by the Paris *Tribunal de Grande Instance* on 13 April 2016 on the basis that the interview was given following the defamation lawsuit and aimed at allowing Sherpa to defend itself from the allegations made against the organisation and express its version of the facts.⁶⁴⁹ The decision was affirmed by the Paris Court of Appeal on 28 June 2017, and Vinci was condemned to pay EUR 3,000 to Sherpa pursuant to article 700 of the French Code of Civil Procedure.⁶⁵⁰

Even though the criminal proceedings brought against Vinci are still ongoing, this still shows that litigation can be strategically used as part of broader campaigns to raise awareness on corporate human rights abuses, regardless of the actual outcome of the case. In this respect, Vinci has already reported improvements in its processes of recruitment of migrant workers since the situation of the migrant workers in construction in Qatar came under scrutiny.⁶⁵¹ In particular, Vinci's subsidiary QDVC entered an agreement on workers' rights in Qatar with the Building and Wood Worker's International (BWI) which was signed at the headquarters of the International Labour Organisation (ILO) concerning human rights in the workplace, workers' housing, and fairness in the recruitment of workers and workers' rights.⁶⁵² In addition, the company introduced numerous safeguards in its recruitment chain to prevent workers from paying recruitment fees.⁶⁵³

Barriers

Poor human rights standards or enforcement of such standards in the host State

In this case, one of Vinci's defenses lays in the fact that it respected the labour laws of Qatar. However, difficulties arise when the laws of the host State are much less stringent than the ones of the home State and do not offer sufficient protection of human rights and labour rights, or when there are issues with regard to the enforcement of such laws, which is common in practice. For instance, under the Kafala system in Qatari law, workers cannot change jobs or leave the country without the sponsor's permission and the risk is therefore that migrant workers become stuck in a cycle of abuse as employers can deny them the exit visa they need to leave Qatar.⁶⁵⁴ However, it would have been

⁶⁴⁷ Ibid.

⁶⁴⁸ Cour d'appel de Paris, 28 June 2017. Available at: <https://www.asso-sherpa.org/wp-content/uploads/2017/07/ARRET-CA-PARIS-28-juin-17.pdf> (last accessed on 19 November 2018).

⁶⁴⁹ Sherpa, "Poursuites-bâillons de Vinci contre Sherpa: nouvelle victoire", 4 July 2017, available at: <https://www.asso-sherpa.org/poursuites-baillons-de-vinci-contre-sherpa-nouvelle-victoire> (last accessed on 9 November 2018).

⁶⁵⁰ Cour d'appel de Paris, 28 June 2017. Available at: <https://www.asso-sherpa.org/wp-content/uploads/2017/07/ARRET-CA-PARIS-28-juin-17.pdf> (last accessed on 19 November 2018).

⁶⁵¹ Sherpa, "Legal action against Vinci in Qatar ...", *op. cit.*

⁶⁵² Vinci, "No further action in the Sherpa case", 6 February 2018, available at: <https://globenewswire.com/news-release/2018/02/06/1333488/0/en/VINCI-No-further-action-in-the-SHERPA-case.html> (last accessed on 19 November 2018).

⁶⁵³ Ibid.

⁶⁵⁴ Amnesty International, "The Ugly Side of the Beautiful Game ...", *op. cit.*, p. 5.

possible for companies operating in Qatar to respect human rights standards while still being in conformity with Qatar's labour law, for instance by not confiscating their workers' passports or not denying them the exit visa that they require to leave Qatar.

Potential use of Strategic Lawsuit against Public Participation or SLAPP allegedly used to "intimidate" NGOs

Sherpa has denounced the fact that Vinci's action in defamation is a litigation strategy often used by multinational companies to discourage or even intimidate claimants as they become involved in proceedings.⁶⁵⁵ According to them, this 'commonly-used retaliatory device is designed to impede by the threat of proceedings an individual's or an organisation's denunciation of misdoings; the success of such a manoeuvre resides not so much in winning a court action as from the process itself, which seeks to intimidate the defendant or exhaust its resources and so reduce it to silence'.⁶⁵⁶ In response to these accusations, Vinci has, since 11 October 2018, changed its demands to a symbolic EUR 1 in compensation (as opposed to the EUR 350,000 it was originally seeking in reparation) in the lawsuit in defamation.⁶⁵⁷

5.3.12. Xstrata

History of the case

Xstrata Limited (Xstrata) is a UK-based company which became part of Glencore, a Swiss multinational commodity trading and mining company, following a merger in 2013.⁶⁵⁸ Xstrata Tintaya S.A. (now Compañía Minera Antapaccay S.A), a Peruvian subsidiary of Xstrata, owned the Antapaccay copper mine.

Local communities have long raised concerns about health issues allegedly caused by water pollution around the copper mine,⁶⁵⁹ which include cancer, kidney failure and mental disorders, while local livestock has become less productive.⁶⁶⁰ Two studies carried out by a group of NGOs on the basis of blood samples taken from local communities reportedly found high level of arsenic and lead, among 16 metals.⁶⁶¹

The affected communities have repeatedly called on the Peruvian state and Glencore to take action against the pollution and related-health risks, and organised protests.

⁶⁵⁵ Sherpa, "Legal action against Vinci in Qatar: Vinci institutes defamation proceedings, claiming exorbitant damages from Sherpa Organisation and its employees", 16 April 2015, available at: <https://www.asso-sherpa.org/legal-action-vinci-qatar-vinci-institutes-defamation-proceedings-claiming-exorbitant-damages-sherpa-organisation-employees> (last accessed on 9 November 2018).

⁶⁵⁶ Ibid.

⁶⁵⁷ "Accusations de travail forcé au Qatar: Vinci demande désormais un euro à Sherpa pour diffamation", available at: <https://www.boursorama.com/patrimoine/actualites/accusations-de-travail-force-au-qatar-vinci-demande-desormais-un-euro-a-sherpa-pour-diffamation-1b5d8ba724cfff423151ee0e521a36f7> (last accessed on 9 November 2018).

⁶⁵⁸ Singapore Management University, 'Commodities: Commodity trading firms' researchguides.smu.edu.sg/c.php?g=422042&p=2881476.

⁶⁵⁹ ECCHR, 'Mining in the Andes: Complaint and Lawsuit Filed Against Swiss Firm Glencore, Switzerland and Peru', available at: <https://www.ecchr.eu/en/case/mining-in-the-andes-complaint-and-lawsuit-filed-against-swiss-firm-glencore-switzerland-and-peru/> (last accessed on 11 January 2019).

⁶⁶⁰ 'Peru NGOs seeking mine health risk probes' (BN Americas, 24 November 2015) www.bnamericas.com/en/news/mining/peru-ngos-seeking-mine-health-risk-probes. See also CooperAcción, 'Diagnóstico de Salud Ambiental Humana en La Provincia de Espinar-Cusco (2016) www.business-humanrights.org/sites/default/files/documents/Diagn%C3%B3stico%20de%20salud%20ambiental%20humana%20en%20la%20Provincia%20de%20Espinar-Cusco.pdf .

⁶⁶¹ Ibid.

In May 2012, the Peruvian National Police (PNP) brutally quelled a protest at the Tintaya mine as a result of which a number of people were severely injured and two persons died.⁶⁶²

Discussion of the case

Proceedings in the UK

On 30 April 2013, 22 Peruvian citizens filed civil proceedings in the High Court of London against Xstrata (both the parent company and its Peruvian subsidiary). Twenty of the claimants were seeking compensation for the alleged injuries that they suffered at the hands of the members of the PNP during the protest, while the other two were claiming compensation for the damage that they suffered as a result of the death of their relatives. The claimants were represented by Leigh Day, while the defendant was represented by Linklaters. The claimants sustained that 'the PNP, whose attendance at the protest was requested by the mine, used excessive force including the use of live ammunition, beat and kicked protesters, subjected them to racial abuse and made them stand for prolonged periods in stress positions in the freezing cold'.⁶⁶³ In addition, the claimants argued that Xstrata was liable because it provided significant assistance to the PNP and failed to take reasonable steps to prevent the use of excessive force by the PNP.⁶⁶⁴

The claim against the parent company was filed in the UK under the Brussels I Recast Regulation, since Xstrata was domiciled in the UK. However, as the Brussels I Recast Regulation is only applicable to EU domiciled defendants, EU private international law rules on jurisdiction were only applicable to the claims over the Xstrata's Peruvian subsidiary. After initially challenging the jurisdiction of the English courts to hear the case against it, Xstrata's Peruvian subsidiary subsequently accepted to join the case voluntarily.⁶⁶⁵ Throughout 2015 and 2016, a series of disputes focused on the scope of the defendants' disclosure obligations.⁶⁶⁶ In particular, emails from an Xstrata director to the South American manager proposing that a 'direct, proactive and strong approach' be taken to confront community representatives were disclosed.⁶⁶⁷

The claimants alleged that the defendants were jointly liable for the excessive force used by PNP against the protestors as they knew, or ought to have known, from past history that the PNP had a propensity to use excessive force.⁶⁶⁸ In particular, the claimants sustained that Xstrata paid the PNP, provided the PNP with logistical assistance, including equipment and vehicles, and encouraged the PNP to mistreat the protesters.⁶⁶⁹

The defendants denied these allegations and affirmed that they were constrained to have recourse to the PNP to protect the mine as thousands of protesters, many of which were armed with traditional slingshots, were marching towards it.⁶⁷⁰ They further maintained that PNP operated independently and that they had no control over PNP's behaviour.⁶⁷¹

⁶⁶² ECCHR, Mining in the Andes: Complaint and Lawsuit Filed Against Swiss Firm Glencore www.ecchr.eu/en/case/mining-in-the-andes-complaint-and-lawsuit-filed-against-swiss-firm-glencore-switzerland-and-peru/.

⁶⁶³ Leigh Day, 'Glencore subsidiary in UK High Court battle over human rights abuse claims in Peru', 27 October 2017, available at: <https://www.leighday.co.uk/News/News-2017/October-2017/Glencore-subsiidiary-in-UK-High-Court-battle-over-h> (last accessed on 11 January 2019).

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

Under the Rome II Regulation, the applicable law to the dispute was Peruvian law as the law of the place where the damage occurred. In particular, the defendants sustained that the claims were barred by limitation under Peruvian law.⁶⁷² In order to clarify the relevant Peruvian law provisions, the Court heard evidence from Peruvian legal experts.⁶⁷³

On 19 January 2018, the High Court dismissed the case on the basis that, under Peruvian law, the claims were time-barred.⁶⁷⁴

Other complaints and proceedings

In May 2015, the ECCHR – together with affected persons and the organisations Multiwatch from Switzerland and *Derechos Humanos sin Fronteras* and CooperAcción from Peru – submitted a complaint to the UN Special Rapporteur for the human right to safe drinking water and sanitation and the UN Working Group on human rights and transnational corporations.⁶⁷⁵ On 1 October 2018, the Inter-American Commission on Human Rights (IACHR) held hearings on the police force used against civilians in socio-environmental conflict zones, including – but not exclusively – Peru, the practice of concluding agreements between the Peruvian national police and mining companies, and the health problems experienced by Peruvian miners.⁶⁷⁶

In addition, a group of Peruvian farmers claiming to be affected by the pollution has brought proceedings in Peru.⁶⁷⁷ At the time of writing, these proceedings are ongoing.

Barriers

Costs of bringing claims

Leigh Day stated that the cost of bringing this case in the London courts exceeded £8 million which is not recoverable for the law firm.⁶⁷⁸ The prohibitive costs of bringing claims is intrinsically linked to the difficulties that victims of corporate human rights abuses might face in securing legal representations. Lawyers fees are generally not covered by the claimants who generally lack the necessary resources and often face difficulties in securing legal funding in this type of cases. Lawyers acting for the claimants might act on a pro bono or no win no fees basis or get funded by litigation funders. However, this creates a disincentive to deal with cases that are difficult and encourages lawyers to only take on the most valuable cases as costs are high, the duration of cases is often uncertain and the prospect of success are often unknown in this type of complex trans-border cases.

Access to information

Access to information constituted a major hurdle for the claimants in this case. The defendants repeatedly argued that documents held by certain key individuals and companies within the defendants' corporate structure were not within their control for the purpose of Civil Procedure Rule, Part 31 and therefore should not be disclosed. It took a year and a half and a number of disclosure

⁶⁷² *Vilca and others v Xstrata Limited and others* [2018] EWHC 27 (QB), para 2.

⁶⁷³ *Ibid*, para 4.

⁶⁷⁴ [2018] EWHC 27 (QB).

⁶⁷⁵ ECCHR, Mining in the Andes: Complaint and Lawsuit Filed Against Swiss Firm Glencore www.ecchr.eu/en/case/mining-in-the-andes-complaint-and-lawsuit-filed-against-swiss-firm-glencore-switzerland-and-peru/.

⁶⁷⁶ OAS, IACtHR, Schedule of Public Hearings, September 30 to October 5, 2018

www.oas.org/en/iachr/sessions/docs/Calendario-169-audiencias-en.pdf. See also 'Comisión Interamericana cuestiona convenios entre la policía y empresas mineras en el Perú' (*Derechos in Fronteras*, 1 October 2018) <http://derechosinfronteras.pe/comision-interamericana-cuestiona-convenios-entre-la-policia-y-empresas-mineras-en-el-peru/>.

⁶⁷⁷ ECCHR, 'Mining in the Andes: Complaint and Lawsuit Filed Against Swiss Firm Glencore, Switzerland and Peru', op. cit.

⁶⁷⁸ Email Communication with Leigh Day's Contact Person, Benjamin Croft, 16 October 2018.

applications and hearings for the claimants to get access to some of the documents that they needed to substantiate their claims.⁶⁷⁹

Gathering of evidence

A key issue in the case was the extent, if any, to which company officers had incited the PNP to take a tough line with the protestors, thereby encouraging the human-rights abuses. This required the gathering of evidence for the claimants to build their case. However, it was reported that potential witnesses were extremely reluctant⁶⁸⁰ to come forward to assist with Leigh Day's investigations due to personal security and economic concerns, linked to the company's socio-economic power in the region. This hampered the factual investigations on the ground.⁶⁸¹

Applicable law

Under the Rome II Regulation, the applicable law in this case was Peruvian law, as the country where the damaged occurred. The fact that Peruvian law was the applicable law created major hurdles for the claimants. First of all, because Peruvian law gave rise to very different interpretations by the legal experts. In addition, because under Peruvian law, the limitation period was two years from the date in which the claimants alleged that they were injured, which meant that the claimants' claims were barred by limitation.

Time Limitations

Despite the fact that the defendants only raised time limitations at a very late stage of the proceedings,⁶⁸² it constituted a major obstacle for the claimants who were unable to access legal remedies in the UK as the court concluded that their claims were time-barred. The short limitation period of two years did not take into account the complexity inherent to transnational tort claims for alleged corporate human rights abuses.

5.4. Comparative summary table of the cases

Table 3 summarizes the main characteristics of the cases. For most columns we used a fixed number of categories based on the literature review which are applied to the cases.

Column Criminal/Civil: criminal versus civil law case

Column Legal barriers:

- Attribution of legal responsibility. This refers to the way in which legal responsibility is attributed among members of a corporate group or down a supply chain and which might hinder holding companies to account (i.e. complexity of corporate structures and the doctrine of separate corporate personality; difficulties in attributing negligence and intent to a corporate entity)
- Difficulty of proving causality
- Jurisdiction

⁶⁷⁹ Email Communication with Leigh Day's Contact Person, Benjamin Croft, 16 October 2018.

⁶⁸⁰ See 'Violence, power and mining in Peru: how has Las Bambas worsened repression?' (*OpenDemocracy*, 7 December 2017) www.opendemocracy.net/protest/las-bambas-mine-peru for testimonies regarding reluctance of witnesses to attend hearings in a similar Peruvian case.

⁶⁸¹ Email Communication with Leigh Day's Contact Person, Benjamin Croft, 16 October 2018.

⁶⁸² See [2018] EWHC 27 (QB). See also Appellants' Skeleton Argument for Permission to Appeal, 6 March 2018, Claim Nos. HQ13X02561, HQ14X02107, paras 5-10.

- Interpretation of foreign law
- Inadequate alternative options. This refers to either options for appeal, access to remedies in the host State, or collective actions.

Column Practical and procedural barriers:

- Access to evidence
- Costs of bringing claims
- Safety of witnesses
- Time barriers
- Culture and/or language barriers.

Column Opportunities: No fixed categories.

Column Status: Ongoing, dismissed or settled

Column Remedies: No fixed categories. Either obtained or sought

Table 3 shows that there are several legal and practical barriers of which the corporate structure (addressing human rights issues throughout the supply chain), information asymmetries, the question of jurisdiction and applicable law are the most important ones. The cases also reveal that mostly financial compensation is sought as remedy. Finally, the table also identifies some opportunities to hold business to account.

Table 3: Comparative Overview of Cases

Case	Country Case	Year start proceeding	Country Abuse	Criminal / Civil	Remedy sought	Legal Barriers	Practical and procedural Barriers	Opportunities	Outcome
Amesys	France	2011	Libya/ Syria	Criminal	Criminal sanctions		Access to evidence Participation and safety of witnesses Time barriers Language barriers		Ongoing
Boliden	Sweden	2013	Chile	Civil	Financial compensation and environmental remediation	Difficulty in proving causality Applicable law and interpretation of foreign law	Costs of bringing claims		Dismissed
Danzer	Germany	2013	DRC	Criminal	Criminal sanctions		Lack of funding Access to evidence Safety of witnesses Cultural barriers Language barriers		Dismissed
ENI	Italy	2018	Nigeria	Civil	Financial compensation (€2 million) and environmental remediation	Attribution of legal responsibility Jurisdiction Applicable law Establishing a duty of care			Ongoing
KiK	Germany	2015	Pakistan	Civil	Financial compensation (€30.000 for each claimant), an apology from the company and a pledge to ensure	Attribution of legal responsibility Jurisdiction Applicable law	Access to evidence Time limitations Inadequate options for aggregating claims	Legal aid	Dismissed

					safety at its outsourced clothing production facilities.				
Lafarge	France	2018	Syria	Criminal	Criminal sanctions	Attribution of legal responsibility		Public international law principles on jurisdiction Recognition of the concept of corporate complicity	Ongoing
RWE	Germany	2015	Peru	Civil	Financial compensation (€17.000)	Difficulty of proving causality	Lack of adequate options for climate change related claims Access to evidence Time Limitations	Applicable law (Rome II)	Ongoing
Shell	The Netherlands/UK	2015	Nigeria	Civil	Financial compensation and Environmental remediation	Attribution of legal responsibility Jurisdiction Applicable law		Giving teeth to the codes of conduct via judicial activism	Ongoing
Trafigura	UK, France, the Netherlands	2006	Côte d'Ivoire	Civil and Criminal	Financial compensation (UK - £100 million), Criminal sanctions (France and Netherlands)	Jurisdiction Doctrine of immunities	Legal standing Effectiveness of out-of-court settlements		UK: Out-of court settlement, France: Claim rejected, Netherlands: claims partially successful and partially settled
Vedanta	UK	2015	Zambia	Civil	Financial compensation	Jurisdiction Attribution of legal responsibility	Issues relating to access to justice in the host State		Ongoing

							Costs of bringing claims and difficulties in securing legal representation Difficulties in gathering evidence		
Vinci	France	2015	Qatar	Criminal	Criminal sanctions	Poor human rights standards or enforcement of such standards in the host State	Potential use of Strategic Lawsuit against Public Participation or SLAPP allegedly used to "intimidate" NGOs	Importance of public scrutiny	Ongoing
Xstrata	UK	2016	Peru	Civil	Financial compensation	Applicable law	Costs of bringing claims Access to information Gathering of evidence Time limitations		Dismissed

6. Recommendations

6.1. Introduction

Several academic papers, policy reports and opinions have produced a long list of recommendations on how to improve access to justice at EU level. In the literature review we refer to many of those. Some of those recommendations propose broad legal reforms. Van Dam and Gregor propose for example three types of legal reform which would strengthen the responsibility and liability of EU-based companies over their supply chains and what happens in those supply chains concerning human rights abuses. These reforms would create a disclosure obligation for a company concerning the control it has over its subsidiaries in their supply chains, introduce a presumption that it has such control and finally also introduce a statutory due diligence duty for companies to identify, prevent, and take action to cease human rights abuses by its business partners such as is the case in France.⁶⁸³ Other recommendations are more specific and focus for example on strengthening the potential for class action suits.

In this chapter, we focus on some key recommendations on the barriers to accessing legal remedies which emerge from our case studies. We focus on recommendations for both internal and external EU policies. Regarding internal policies, the focus is on strengthening human rights due diligence requirements, strengthening the jurisdiction of EU MS over extraterritorial cases, strengthening access to the law of an EU MS as applicable law and the development of an information platform to exchange best practices. Regarding EU external policies, we focus on strengthening the business and human rights dimension in EU policies on human rights defenders, the importance of contributing to capacity-building in host states, considering sanctioning companies directly in the reform of EU trade policy and engaging further with existing international instruments.

6.2. Recommendations for the internal policy of the EU

6.2.1 Strengthen due diligence requirements and promote the use of due diligence instruments

Central to the UNGPs, the concept of human rights due diligence is also recognized in various instruments such as the OECD Guidelines or ISO 26000 at international level. It refers to the positive steps that businesses need to take, through policies and processes, to identify, prevent, mitigate, and account for the adverse impact on human rights they may cause through their own activities or which are linked to their business relationships.⁶⁸⁴ Human Rights due diligence is 'a comprehensive, context-specific, dynamic and ongoing process which should enable to the company to address its actual and potential human rights impacts'.⁶⁸⁵ The cases in this study highlight that the actual and effective implementation by EU-based companies of their human rights due diligence requirements is very poor. This is part of a wider issue which is linked to the non-binding character of current international instruments relating to human rights due diligence. In 2018, the Corporate Human Rights Benchmark assessed 101 of the largest publicly traded companies in the world across three industries (agricultural products, apparel and extractives).⁶⁸⁶ The findings of the assessment depict a 'deeply concerning' picture, with the majority of companies scoring

⁶⁸³ Van, Cees and Gregor Filip, 'Corporate responsibility to respect human rights vis-à-vis legal duty of care', pp. 119-138, in Rubio, Juan J. A. and Katerina Yiannibas (eds.) *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*. London/New York: Routledge, 2017. On the role of the EU, see also J. Wouters and N. Hachez, *Business and Human Rights in EU External Relations. Making the EU a Leader at Home and Internationally*, Study for the European Parliament, Directorate-General for External Policies of the Union, Directorate B – Policy Department, EXPO/B/DROI/2009/2, April 2009, PE407.014; J. Wouters and L. Chanet, 'Corporate Human Rights Responsibility: A European Perspective', 6(2) *Northwestern University Journal of International Human Rights* 2008, pp. 262-303.

⁶⁸⁴ UNGPs, Principle 17.

⁶⁸⁵ BIICL and Norton Rose Fulbright, 'Making sense of managing human rights issues in supply chains', 2018 available at: <http://nortonrosefulbright.com/hrdd> (last accessed on 11 January 2019).

⁶⁸⁶ The Corporate Human Rights Benchmark (CHRB) is a collaboration led by investors and civil society organisations dedicated to creating the first open and public benchmark of corporate human rights performance.

poorly on the Benchmark,⁶⁸⁷ and an alarming 40% of companies scoring no points at all across the human rights due diligence section of the assessment.⁶⁸⁸ As a result, the voluntary character of current approaches to human rights due diligence in business operations and supply chains appears to be widely insufficient. The KiK case exemplifies the shortcomings of voluntary initiatives in ensuring respect for human rights throughout the value chain. Despite KiK having established its own Supplier Code of Conduct requiring its worldwide suppliers to comply with certain standards, actual compliance with such standards was problematic in practice, as illustrated by the fact that inadequate fire safety measures reportedly contributed to the death and injury of many factory workers in the fire in the textile factory of KiK's supplier in Pakistan. More rigorous regulations on human rights due diligence at the EU level could help prevent many corporate-related human rights abuses in their early stages.⁶⁸⁹ For instance, the Danzer case demonstrates the importance of clarifying the extent to which the parent company is required to carry out due diligence with respect to the activities of its subsidiaries. In particular, the alleged human rights abuses could have been avoided if the parent company had given specific instructions to the Congolese subsidiary on how to cooperate (or even possibly not to cooperate) with local security forces that are notorious for their record of gross human rights abuses and sexual violence, in resolving conflicts with forest communities. The need for the parent company to carry out due diligence is not limited to its own activities and those of its subsidiaries but extends throughout the supply chain, as exemplified by the Boliden case in which the damage allegedly suffered by the claimants could have been prevented through continuous monitoring of the actual disposal of the industrial waste by the subcontractor, and potentially the discontinuation of the contractual relationship upon realizing that the smelter sludge was not appropriately processed by the subcontractor.

Against this backdrop, the adoption of regulation on mandatory human rights due diligence at EU level⁶⁹⁰ would foster greater corporate accountability by addressing the practice of *law shopping* by EU businesses operating in third countries, and help bridge the regulatory gap by creating a much needed level playing field in Business and Human Rights at European level. In so doing, it would both contribute to preventing human rights abuses and ensure better access to legal remedies for victims when abuses do occur. This would be in line with the position of the European Parliament, which has already called on the Commission to propose binding legislation on due diligence obligations for supply chains in the garment sector,⁶⁹¹ and more recently called on the Commission to present a proposal for 'an overarching mandatory due diligence framework including a duty of care to be fully phased-in within a transitional period and taking into account the proportionality principle'.⁶⁹²

A number of EU MS and the EU have already sought to provide mandatory frameworks for human rights due diligence. Examples include laws integrating elements of human rights due diligence requirements through mandatory reporting, such as the UK Modern Slavery Act 2015 or the Non-Financial Reporting Directive at European level. However, one of the fundamental weaknesses of this type of legislation stems from the lack of enforcement mechanisms in the event of non-compliance. In practice, the risk is that they

⁶⁸⁷ CHRB, '2018 Key Finding - Apparel, Agricultural Products and Extractive Companies', available at: <https://www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf> (last accessed on 9 January 2019), p. 5.

⁶⁸⁸ Ibid., p. 13.

⁶⁸⁹ CorA Network for Corporate Accountability, 'Toward global regulation of Human Rights and Business - Position paper of the Treaty Alliance Germany on the UN treaty process on transnational corporations and other business enterprises', at 14, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/TreatyAllianceGermany-WrittenSubmission.pdf> (last accessed on 11 January 2019).

⁶⁹⁰ In this respect, the 'Green Card Initiative', launched in May 2016 by the Parliaments of eight Member States (Estonia, France, Italy, Lithuania, the Netherlands, Portugal, Slovakia and the UK), has called on the EU Commission to adopt legislation establishing a duty of care for EU-based companies towards individuals and communities affected by their activities.

⁶⁹¹ European Parliament resolution of 27 April 2017 on the EU flagship initiative on the garment sector (2016/2140(INI)).

⁶⁹² European Parliament Resolution of 29 May 2018 on sustainable finance (2018/2007(INI)).

become no more than box ticking exercises for companies.⁶⁹³ Against this backdrop, other laws and legislative initiatives have emerged from EU MS, going beyond mere mandatory reporting. The Dutch Child Labour Due Diligence Bill is one such initiative, which is still pending approval from the Senate, and the French law on the Duty of Vigilance, adopted on 21 February 2017 (see annex 2 for an overview and discussion of several initiatives), is another.

However, the various laws and legislative initiatives taken by the EU MS remain fragmented, resulting in legal uncertainty and a need for harmonization at European level. To that end, the French law could serve as a model for EU regulation on mandatory human rights due diligence.⁶⁹⁴ One of the strongest features of the French legislation is the fact that, by imposing a duty akin to the duty of care on the parent company for loss arising from the activities of its foreign subsidiaries or the ones of suppliers or subcontractors with whom they have an established relationship, the obstacle of the corporate veil is circumvented. The principle of separate corporate personality and the difficulties in circumventing the corporate veil has been identified in the case study as one of the major hurdles faced by claimants in business-related human rights claims. It relates to another issue which is the lack of transparency and lack of access to relevant information, which makes it difficult for the claimants to substantiate their claims. For instance, the UK Court of Appeal rejected the Shell case on the basis that claimants could not demonstrate a properly arguable case that the parent company owed them a duty of care. Giving clear guidelines on what is expected of the parent company in terms of putting in place, effectively implementing and disclosing human rights due diligence measures to identify and prevent human rights issues resulting in the activities of the company or in its supply chains would help to simplify and shorten civil legal proceedings. However, in the French legislation, the burden of proof lies with the claimants to prove the breach of the duty of vigilance, harm and causation, which can prove a challenging and lengthy endeavour. Indeed, the issue of the burden of proof was cited by the ECCHR as a reason not to undertake civil proceedings in Germany in the Danzer case. EU regulation on mandatory due diligence could address that weakness by providing for the reversal of the burden of proof, which would entail that, in case of damage linked to alleged business-related human rights abuses, the parent company would need to demonstrate that it had taken all the necessary steps in order to meet its human rights due diligence obligations with regard to its own operations, those of its subsidiaries or subcontractors. This in turn, would require companies to disclose their internal information which would address one of the main barriers to accessing legal remedies identified in the case studies, namely access to information, reduce the length of legal proceedings and reduce costs substantially. Another weakness of the French Law concerns its scope,⁶⁹⁵ which is very limited and only concerns around 150 companies in practice. It is submitted that choosing a scope in terms of turnover, like the UK Modern Slavery Act or a scope similar to that in the Dutch Child Labour Due Diligence Bill, which applies to companies providing goods and services to Dutch end-users twice or more a year, would be preferable for EU regulation on mandatory human rights due diligence.

Recommendations:

- The Commission should propose legislation on mandatory due diligence at the EU level modelled on the French law, but with a wider scope of application and a reversed burden of proof. This proposal is in line with the resolution of the EP on mandatory due diligence in the garment sector

⁶⁹³ See for instance The Alliance for Corporate Transparency project analysis of companies' reporting, 'The State of corporate sustainability disclosure under the EU Non-Financial Reporting Directive', 2018 at 7: over 90% of the companies assessed in the project expressed a commitment to respect human rights in their reports, however, a majority of companies did not provide any information that would allow stakeholders to understand how this commitment is put into practice. Available at: http://www.allianceforcorporatetransparency.org/assets/2018_Research_Report_Alliance_Corporate_Transparency-66d0af6a05f153119e7cffe6df2f11b094affe9aaf4b13ae14db04e395c54a84.pdf (last accessed on 21 February 2019),

⁶⁹⁴ 'Improving access to remedy in the area of business and human rights at the EU level', Opinion of the European Union Agency for Fundamental Rights, 1/2017, Vienna, 10 April 2017.

⁶⁹⁵ The law applies to companies incorporated or registered in France for two consecutive fiscal years and that employ 5,000 people or more either directly or through their French subsidiaries, or employ 10,000 people or more worldwide through their subsidiaries located in France and abroad.

and its recent call for the Commission to present a proposal for 'an overarching mandatory due diligence framework including a duty of care to be fully phased-in within a transitional period' and is further supported by the cases analysed in the study.

- If mandatory due diligence, either in specific sectors or more broadly, is not achievable or is only limited to a small number of companies, the European Commission might consider making the adoption of stringent company-based human rights due diligence instruments a requirement for companies in the context of public procurement or investment funds. In this option is chosen, the relevant legislation would need to be changed to include this conditionality. Such a conditional approach might be extended to other organisations, including the European Investment Bank (EIB), which manages significant investment funds and engages with firms. The EIB has social and environmental safeguard policies but these might be strengthened with reference to human rights due diligence requirements. By focusing on human rights due diligence conditionality, the legislation would also apply to small and medium-sized EU companies, which often operate globally. The analysis of our cases shows that current action on human rights abuses focuses mostly on large companies. However, small and medium-sized companies also need to address human rights issues in third countries.

6.2.2 Strengthen jurisdiction over extraterritorial cases

As the scope of application of the Brussels I Recast Regulation is limited to EU-domiciled defendants, the question of the civil jurisdiction of the courts of EU MS over corporate entities domiciled outside the EU is governed by the domestic private international law rules on jurisdiction of the forum State. This is so, even for companies that have a clear link with the EU, such as foreign subsidiaries of EU companies, which might be added as a co-defendant when the domestic law of the forum allows it, but this gives rise to a number of difficulties and creates a risk of contradictory decisions between EU MS as illustrated in the Shell case. In that case, the Court of Appeal of the Hague accepted jurisdiction over the claims against both the parent company and the Nigerian subsidiary on the basis of Dutch law (Article 7(1) of the Dutch Code of Civil Procedure) and affirmed that it could not be ruled out that the parent company could be liable for damages resulting from the conduct of its subsidiary, and that the claims against the parent company and its foreign subsidiary were so closely connected that it was essential to hear and rule on them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. Conversely, in the UK proceedings, the Court of Appeal in London ruled that the claims against the UK parent company and the subsidiary could not proceed, on the basis that the claimants could not demonstrate a properly arguable case that the parent company owed them a duty of care. As a result, the court found that there was no real issue that was reasonable for the court to try in the claim against the parent company, with the result that the Nigerian subsidiary could not join the English proceedings on the basis of English Law (Paragraph 3(1) of Practice Direction 6B).

Relying on the domestic law of EU MS to determine residual jurisdiction over non-EU entities means that access to European courts for claimants will depend on the domestic private international law rules of the forum.⁶⁹⁶ However, access to European courts is often the only effective means of access to justice and remedies for third State claimants in business-related human rights abuses claims, as illustrated in the Eni case, in which the claimants affirmed that the lack of effective access to justice combined with poor enforcement of judicial decisions in Nigeria deterred them from bringing their claim in Nigeria. The domestic rules on residual jurisdiction vary from one EU MS to the next, which creates a great deal of legal uncertainty for all parties involved. In addition, it often creates a very high burden on the claimants to establish an arguable case on the duty of care at the jurisdictional stage of proceedings, when they only

⁶⁹⁶ C. Bright, *L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales*, [Online], (Cadmus. Florence: European University Institute), 2013. Available at: <http://hdl.handle.net/1814/29602> (last accessed on 27 November 2018).

have a very limited access to information.⁶⁹⁷ Hence the need for harmonisation at EU level of the jurisdictional criteria on these aspects through a modification of the Brussels I Recast Regulation. In particular, it is suggested that a new jurisdictional rule specific to business-related human rights claims should be added to the Brussels I Recast Regulation. This rule would extend the jurisdiction of the courts of the EU MS where the EU parent company is domiciled to claims over its foreign subsidiaries or business partners,⁶⁹⁸ when the claims are so closely connected that it is expedient to hear and rule on them together. This proposal would ensure a greater access to justice and remedies for victims of corporate human rights abuses in third countries, while taking into consideration the economic reality of the unity of the various entities that form a multinational company. It is in line with the position of the European Parliament, which in its resolution on corporate liability for serious human rights abuses in third countries encouraged 'reflection on the extension of jurisdictional rules under the Brussels I Regulation to third-country defendants in actions against companies that have a clear link with one EU MS among others – because they are domiciled or have substantive business there or their main place of business is in the EU – or companies for which the EU is an essential outlet'.⁶⁹⁹

In addition, it is suggested that another new jurisdictional rule establishing a *forum necessitatis* be added to the Brussels I Recast Regulation. This new jurisdictional rule would provide a basis for exceptional jurisdiction allowing the EU MS' courts to exercise jurisdiction over civil claims when there is a risk of denial of justice in a third country - in accordance with Article 6 of the European Convention of Human Rights⁷⁰⁰ - and when there is a sufficiently close connection to the EU MS concerned.⁷⁰¹ Although not specific to business-related human rights claims, such a provision would be relevant in this field for claims involving third State claimants suing foreign subsidiaries or business partners of EU companies (which could constitute the connection to the EU MS) when they are unable to obtain justice in their host country. This was, for instance, the case in *Vedanta*, in which the English court found that the claimants would almost certainly not get access to justice if the claims were pursued in Zambia.

The doctrine of *forum necessitatis* is well known in a number of EU MS,⁷⁰² and already exists in other EU private international law instruments.⁷⁰³ The EU Agency for Fundamental Rights,⁷⁰⁴ the Council of Europe,⁷⁰⁵ and a number of academics⁷⁰⁶ have suggested that its use be promoted amongst EU MS in business-related cases. However, harmonisation at European level of the jurisdictional criteria in this respect through a modification of the Brussels I Regulation would foster greater legal certainty and predictability.

⁶⁹⁷ E. Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: the Challenge of Jurisdiction'.

⁶⁹⁸ The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts, p. 18; Augenstein, Daniel and Nicolas Jägers, 'Judicial remedies: The issue of jurisdiction', pp. 7- 37, in Rubio, Juan J. A. and Katerina Yiannibas (eds.) *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*. London/New York: Routledge, 2017, p. 36.

⁶⁹⁹ European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)).

⁷⁰⁰ Skinner, McCorquodale and De Schutter, 'The Third Pillar', *op. cit.*, p. 46.

⁷⁰¹ Council of Europe, Recommendation CM/rec(2016)3 of the Committee of Ministers to Member States; Recommendation 36.

⁷⁰² J. Kirschner, "A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses", *op. cit.*, p. 25.

⁷⁰³ Council Regulation (EC) No 5/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Article 7: 'Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.'

⁷⁰⁴ 'Improving access to remedy in the area of business and human rights at the EU level', Opinion of the European Union Agency for Fundamental Rights, 1/2017, Vienna, 10 April 2017, Opinion 4.

⁷⁰⁵ Council of Europe, Recommendation CM/rec(2016)3 of the Committee of Ministers to Member States; Recommendation 36.

⁷⁰⁶ H. Muir-Watt, 'The Proposal for a Regulation ...', *op. cit.*; C. Bright, *L'accès à la justice civile*, *op. cit.*, p. 89; Ch. Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor', 30(78) *Utrecht Journal of International and European Law*, 2014, p. 24; Augenstein, and Jägers, 'Judicial remedies', *op. cit.*, p. 37.

In the context of discussions on revision of the former Brussels I Regulation (Regulation 44/2001) in 2001, the Commission had proposed to extend the jurisdictional rules of the Brussels I regulation to third State defendants,⁷⁰⁷ and to create a *forum necessitatis*,⁷⁰⁸ but these propositions failed.⁷⁰⁹ However, there have since been a number of developments in the field of business and human rights at domestic (see Annex 2), European,⁷¹⁰ and international level. It is therefore suggested that the Commission should try for revision of the Brussels I Recast Regulation again.

Some of the cases discussed in Chapter 5 have shown that jurisdictional rules in criminal proceedings can also constitute an obstacle to accessing legal remedies for claimants. For instance, in the *Trafigura* case, the criminal proceedings filed in France against two executives were dismissed on the basis of the lack of territorial connection of the case with France. In this respect, it is suggested that the Council should encourage EU MS to assume jurisdiction over criminal cases involving their nationals (companies or their staff or executives) for human rights abuses in third countries. Indeed, the exercise of extraterritorial jurisdiction by a home State over the activities of their corporations in third countries is fully legitimate based on the international law principle of active personality under which a State may exercise jurisdiction to regulate the conduct of its nationals, including in third countries.⁷¹¹ In addition, the principle of universal jurisdiction, under which extraterritorial jurisdiction can be exercised in order to prosecute certain universally condemned crimes, was referred to as a basis for the jurisdiction of the French courts in the *Amesys* case, and should be encouraged in order to provide greater access to justice and remedies for claimants.

Recommendations:

- The European Commission should adopt a proposal to revise the Brussels I Recast Regulation and include in particular:
 - a provision extending the jurisdiction of the courts of the EU MS where the EU parent company is domiciled to the claims over its foreign subsidiary or business partners when the claims are so closely connected that it is expedient to hear and determine them together.
 - a provision establishing a *forum necessitatis* on the basis of which a courts of an EU MS may, on an exceptional basis, hear a case brought before it when the right to a fair trial or access to justice so requires, and the dispute has sufficient connection with the EU MS of the court seized.
- The Council should encourage EU MS to assume jurisdiction over criminal cases involving their nationals (companies or their staff or executives) for human rights abuses in third countries and to exercise universal jurisdiction under the conditions laid down by international law.

6.2.3 Strengthen access to Member States law as applicable law

Several case studies have shown that the issue of the applicable law can constitute a significant barrier to accessing legal remedies for victims of human rights abuses allegedly carried out by EU companies in third countries. For instance, in the *Shell* case reported in Chapter 5, the District Court of The Hague had originally dismissed the claims against the parent company on the grounds that under the applicable law,

⁷⁰⁷ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Recast)', COM(2010) 748 final.

⁷⁰⁸ *Ibid.*, Article 25.

⁷⁰⁹ Commission Staff Working Document, 'Implementing the UN Guiding Principles on Business and Human Rights - State of Play', 14 July 2014, SDW(2015) 144 final, p. 25.

⁷¹⁰ An example of such developments at the EU level can be found in the Eu flagship initiative on the garment sector: <http://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-eu-garment-initiative> (last accessed on 10 January 2019).

⁷¹¹ O. De Schutter, 'Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations', *Faculté de Droit de l'Université Catholique de Louvain* (2006), p. 24.

Nigerian law, there was no general duty of care of parent companies to prevent their subsidiaries from inflicting damage on others through their business operations.⁷¹² Under the Rome II Regulation, the law applicable to tort claims is the law of the place where the damage occurred (*lex loci delicti*) which points to the law of the host State. However, the effect of applying the law of the host state (as the law of the country in which the damage occurs) is often to deprive the victims of access to substantive justice and legal remedies. This difficulty was circumvented in that particular case by the Court of Appeal of The Hague and by the UK courts by finding that Nigerian law as a *common law* system, is based on English law, and that common law and in particular English case law are therefore relevant sources of Nigerian law.

The advantages of applying the law of the home State derive from the fact that, 'generally speaking, parent companies are located in economically developed states that have had the opportunity to develop more sophisticated and generous rules for compensation.... In most cases the tort principles in developing countries will not have been as fully elaborated through judicial decisions as the tort law in industrialized countries.'⁷¹³ By contrast, the law of the host State, generally a developing country, is more likely to have lower standards. In practice, the *lex loci damni* often results in victims not being able to access legal remedies. This, in turn, prevents tort law from performing the traditional function attributed to it of corrective or distributive justice, or to play a deterring role.⁷¹⁴

The possibility for the forum to apply its own law is confined to two mechanisms under the Rome I Regulation: the overriding mandatory provisions and the public policy exception. It has been argued that overriding mandatory provisions could be used to substitute the law of the forum (or part of it) for the law normally applicable when the latter is not sufficiently protective of the human rights of the victims.⁷¹⁵ In addition, legislative provisions on mandatory due diligence such as the French Law on the Duty of Vigilance,⁷¹⁶ could form the basis for overriding mandatory rules to ensure their applicability in civil liability cases relating to corporate human rights abuses in third countries.⁷¹⁷ Moreover, the public policy exception could 'provide an important minimum guarantee (or "emergency brake") in foreign direct liability cases that brought before EU Member State courts but governed by host country law, especially since fundamental human rights principles, whether ensuing from international or domestic law, are considered to be part of the public policy of the forum'.⁷¹⁸ These two exceptions provide, theoretically at least, the possibility for the forum state to apply its own law (at least in part) when the law of the host state does not offer enough protection for the human rights of the victims, or when damages in host countries are too low to deter businesses from further abuse.⁷¹⁹ The Committee of Ministers of the Council of Europe has encouraged EU MS to make use of them.⁷²⁰ However, this possibility has not been confirmed in practice,⁷²¹ and, in any case, their application is supposed to remain exceptional. In its Opinion on improving access to remedies in the area of business and human rights at EU level, the EU Agency for Fundamental Rights has called on 'the EU to provide guidance on when and how to make full use of the flexibility available under the *ordre public* clause of the Rome regime, in particular in extraterritorial settings'.⁷²²

⁷¹² District Court of The Hague, *Akpan v. Royal Dutch Shell Plc et al.*, C/09/337050 / HA ZA 09-1580, January 30, 2013, para. 4.26.

⁷¹³ M. Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer', 41 *Washburn Law Journal* 2002, 400, p. 418.

⁷¹⁴ C. Bright and B. Wray, 'Corporations and Social Environmental Justice: the Role of Private International Law', In A. Duval and M.-A. Moreau (eds.), *Towards Social Environmental Justice?* (Florence: Cadmus, *EUI Working Papers* 2012), p. 75.

⁷¹⁵ G. Skinner et al., 'Third Pillar...', *op. cit.*, p. 61.

⁷¹⁶ See French legal background *supra*.

⁷¹⁷ L. Enneking, 'Judicial remedies: The issue of applicable law', *op. cit.*, p. 58.

⁷¹⁸ *Ibid.*, p. 60.

⁷¹⁹ FRA, *op. cit.*, Opinion 8, p. 10.

⁷²⁰ Council of Europe Committee of Ministers, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights an business, n° 40.

⁷²¹ G. Skinner et al., 'Third Pillar...', *op. cit.*, p. 17.

⁷²² FRA, *op. cit.*, Opinion 8, p. 10.

In environmental damage cases, the choice between the law of the place where the damage occurred (*lex loci damni*) and the law of the place where the event giving rise to the damage occurred (*lex loci delicti commissi*), granted to the claimant under Article 7 of the Rome I Regulation, may allow for the law of the home State to apply. Thus, for instance, in the RWE case, this rule allowed the claimant to argue that German law applied as, although the damage itself (the risk of flooding due to the melting of the glaciers) occurred in Peru, the event allegedly giving rise to the damage occurred in Germany, the country where the greenhouse gases were emitted. This was beneficial to the case as the environmental protection standards are higher in German law than in Peruvian law (*the lex loci damni*). It has been suggested that this choice of law option be expanded to encompass human rights abuses.⁷²³ In support of this proposal, it has been noted that 'extending the scope of the special rule on environmental damage in this way would be crucial to enabling EU (MS) policies aimed at contributing to raising the general level of protection not only with respect to environmental matters but also with respect to human rights and health and safety related matters'.⁷²⁴ However, one obvious difficulty comes from the fact that the event giving rise to the damage may not always be clearly identifiable,⁷²⁵ and there may well be a series of actions, inactions or decisions which, together, gave rise to the damage.⁷²⁶ For instance, in the Trafigura case reported in Chapter 5, there seems to have been a series of actions and decisions contributing to the damage, which ran from carrying out the oil refining process of 'caustic washing' aboard the Probo Koala, thus generating the hazardous waste, to the actual disposal of the waste in Côte d'Ivoire, and including the decision of Trafigura not to process the waste in the Netherlands, followed by the decision of the Amsterdam Municipality and of the Port of Amsterdam services to allow the Probo Koala to reload the hazardous waste and leave the port of Amsterdam, and the decision of the Ivorian subsidiary to contract the newly licensed Ivorian Company Tommy (which had no expertise in handling hazardous waste) to dispose of the waste. Another related difficulty of the *lex loci delicti commissi* is that evidentiary issues may arise.⁷²⁷

It is therefore suggested that a further choice of law provision be added to the Rome I Regulation. This provision would be specific to business-related human rights claims and allow the claimant to choose between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled in order to ensure more effective access to justice. This proposition would take into consideration the specific nature of the business-related human rights claims and redress the power imbalance between the parties, the victims usually being in a situation of particular vulnerability in relation to the multinational companies. It would also promote the interests of the respective countries and of the EU as a whole in upholding higher human rights standards. In this respect, it has been noted that 'the possibility of pursuing foreign direct liability cases in EU Member States on the basis of home country tort law is of fundamental importance. It determines whether EU MS can deploy their national rules in the field of civil liability as a much needed regulatory instrument to promote international corporate social responsibility and, more specifically, respect for human rights by EU-based enterprises operating in developing countries'. At the same time, it also determines the possibilities for host country based individuals and communities who have suffered harm as a result of the activities of EU-based businesses with international operations to ensure, through this type of litigation, that the level or protection of their environmental and human rights interests is adequate and not fundamentally different from that afforded to those living in the EU home countries of the business enterprises involved'.⁷²⁸

⁷²³ The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts.

⁷²⁴ J. Enneking, *op. cit.*, p. 65.

⁷²⁵ G. Betlem, 'Transnational Litigation against Multinational Corporations before Dutch Civil Courts', 2000, p. 283.

⁷²⁶ C. Bright and B. Wray, 'Corporations and Social Environmental Justice: the Role of Private International Law', in A. Duval and M.-A. Moreau (eds.), *Towards Social Environmental Justice?* (Florence: Cadmus, *EUI Working Papers* 2012), p. 75.

⁷²⁷ S. Joseph, *Corporations and Transnational Human Rights Litigation*, (Hart, 2004), p. 8.

⁷²⁸ L. Enneking, "Judicial remedies: The issue of applicable law", *op. cit.*, p. 60.

Recommendations:

- The Council should encourage EU MS to make use of the overriding mandatory provisions and the public policy exception in the context of business-related human rights claims, in particular when the law of the host state is not protective enough of the human rights of the victims.
- The European Commission should adopt a proposal to revise the Rome II Regulation and include in particular a choice-of law provision specific to business-related human rights claims against EU companies that would allow the claimant a choice between the *lex loci damni*, the *lex loci delicti commissi* and the law of the place where the defendant company is domiciled, as the applicable law.

6.2.4 Recommendation Information Platform

The analysis of the cases shows that several jurisdictions are confronted with similar barriers and issues, which are not only legal in nature but also practical and financial. Therefore, information sharing would be beneficial. From this perspective, initiatives can be developed to foster exchange of knowledge and mutual learning. Zerk (2015) proposed the development of a platform which identifies best practice in relation to the functioning of domestic judicial mechanisms and facilitates mutual learning and exchange on a wide variety of topics. Hence, an initiative or series of initiatives could be considered, such as the establishment of an information platform or training sessions to promote knowledge exchange between different stakeholders involved in the use of domestic remedial mechanisms so that practices might be emulated. These information exchange and knowledge creation initiatives could focus on issues such as:⁷²⁹

- What type of funding and/or support is available to take legal action
- Information on establishing group and collective actions (class-actions or other similar mechanisms)
- Simplifying the process of prosecuting a claim
- Identification of challenges faced by prosecution bodies in investigating cross border allegations and possible solutions to these challenges
- Processes to ensure involvement of victims in decision-making by prosecution bodies, including access to information and rights to consultation at different stages of the legal proceedings
- Information on how to organise access to legal representation
- Awareness raising of legal rights on the use of judicial mechanisms
- Sharing knowledge on establishing appropriate and effective sanctions including the calculation of damages

Recommendation:

- It is recommended to establish an information platform to share best practices and case studies. The EU Agency on Fundamental Rights could be designated to develop such initiatives since it already is a key information provider on human/fundamental rights. An alternative is to assign this task to the Commission.

⁷²⁹ See Zerk p. 11 for a more elaborate list of issues.

6.3. Recommendations in relation to external policies of the EU

6.3.1 Building institutional judicial capacity in host states and strengthening the business and human rights dimension in EU support for Human Rights Defenders

Although we did not analyse court cases against companies for human rights abuses in third countries, it is safe to assume that few such cases exist. Various institutional factors, in terms of available laws and legal mechanisms, might inhibit access to justice and remedy. Limited access to justice is not confined to cases of human rights abuses by companies, it is a broader issue. The EU acknowledges this and is already supporting capacity building in relation to the rule of law, the judiciary and good governance in many host countries. This includes projects and programmes focusing on access to justice. The institutional shortcomings in host countries are also illustrated in some of the cases analysed in this study. Institutional shortcomings include insufficient human rights legislation in third countries (Vinci case) or insufficient implementation of existing legislation (KiK case). Most cases are also initiated by European civil society organisations, indicating that civil society organisations have little capacity to take action in host countries. Finally, our cases display significant information asymmetries which hinder the possibilities of holding companies to account. Generation of relevant information in the countries in which the human rights abuses occur is particularly problematic. These shortcomings might be partially addressed by actions taken in the context of EU external action. Such actions could take several forms such as awareness raising, capacity-building, training and financial support. It is behind the scope of this study to provide a comprehensive overview of recommendations on possible actions, but some seem especially relevant in view of our case studies.

Recommendations

- It is recommended to strengthen the capacity of local actors, especially the capacity of CSOs and human rights defenders (HRDs)⁷³⁰ in host countries, to address human rights abuses by companies and enable them to provide relevant information. This could have spill-over effects internally in host countries pushing for institutional and legal reform in the context of business and human rights and externally in terms of providing the necessary information for cases pursued in EU MS. Supporting HRDs around the world is a long-established priority of EU external action. In order to promote and protect the work of HRDs in third countries, the Union has long since identified support to HRDs, specifically in situations where they are most at risk, as one of the key objectives of one its main financing instruments for development and human rights promotion, the European Instrument for Democracy and Human Rights (EIDHR). Notably, under the current EIDHR Regulation for the period 2014-2020, 20 to 25% of the total financial package of EUR 1 332.75 million has been reserved for various ways of supporting HRDs. The HRD-support measures managed under the EIDHR provide a range of assistance measures with a direct impact on individuals and organisations operating in often difficult circumstances.⁷³¹ The current policy and funding framework for HRDs is universal in nature, in that it seeks to promote and protect the work of those who contribute to furthering any civil, political, economic, social and cultural rights. It therefore does not provide specific guidance or entry points for special protection or financing mechanisms for HRDs operating on a specific subset of human rights and fundamental freedoms.

⁷³⁰ EU defines HRDs as ‘those individuals, groups and organs of society that promote and protect universally recognized (...) civil and political rights as well as (...) economic, social and cultural rights’ See ‘Ensuring Protection – European Union Guidelines on Human Rights Defenders’, updated 2008, available online: https://cdn3-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/G0SkM0XAvuiDps_EYT19c8-mQA_sEgMmhYKxvHxmMJg/mtime:1466504337/sites/eeas/files/eu_guidelines_hrd_en.pdf

⁷³¹ DG DEVCO ‘human rights defenders’, available online (26/11/2018): https://ec.europa.eu/europeaid/sectors/human-rights-and-governance/democracy-and-human-rights/human-rights-defenders_en.

While this is an understandable choice, there is some scope for adjustments to strengthen the business and human rights dimension of the EU's support and financing mechanisms for HRDs.

- The European External Action Service should consider providing dedicated training on business and human rights to staff in EU Delegations (EUD). Staff in EUD in host countries, and human rights focal points in particular, could be trained on the complexities of business and human rights issues and the relevant national, EU and international policy and legal frameworks in place to address them. This will allow them, first and foremost, to raise awareness about relevant labour and human rights that may be violated by companies. Using the UNGPs as a framework of reference and the different available reports and recommendations by relevant (EU) bodies (see Annex 1), substantive information and awareness-raising campaigns should be developed and run, tailored to the needs of specific industries and/or geographic areas. Well-trained staff could also engage with national authorities on business and human rights in order to raise awareness and foster a better understanding of the importance of access to remedies for victims of human rights abuses by companies.
- Given their presence in host countries, EUD might play a role in providing information and fact-finding on alleged human rights abuses in host countries. This idea has a number of legal implications. It is recommended that a study, commissioned by the European Parliament or European Commission, looks into the possibilities and limitations of enhancing the role of EUD in business and human rights cases. Special attention might be given to the role of due diligence legislation in this context, since it might provide a legal basis for a formal fact-finding role for EUD, possibly in collaboration with established mechanisms governed by international organisations.
- Given the crucial importance of access to justice to seek remedies, the Commission might consider increasing the budget for capacity-building in relation to the rule of law, good governance and access to justice in host countries through the different financial instruments available. It is recommended to carry out an assessment on which instruments could be best used for this purpose and what the scope is for further increasing funds for this type of capacity-building.

6.3.2 Reforming trade policy to address human rights abuses of business

The mapping and in-depth discussion of the cases shows that there are very few cases overall and even few in which resulted in access to a remedy or some form of sanction of the company involved in human rights abuses. As highlighted in this study, there are many barriers to the use of judicial mechanisms. Also, the analysis we presented on the use of OECD NCPs (see chapter 4) shows that even this non-judicial mechanism is rarely used. Ruggie and Nelson (2015) note that the near absence of specific instances in some countries signals limited use of the OECD NCPs in some countries, as it is implausible that there were no breaches of the Guidelines in those countries.⁷³²

If the aim is to hold more companies to account for human rights abuses, one could consider additional reforms or measures. An additional mechanism which could be considered is to target the companies more directly. In this context one can consider reforming EU trade policy instruments to address human rights abuses by business in third countries with a specific focus on the Generalised Scheme of Preferences

⁷³² Ruggie and Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises', *op. cit.* See also Ochoa, 'The Roles and Powers of the OECD National Contact Points', *op. cit.*; Ochoa, 'An Empirical examination of the function of the OECD national contact', *op. cit.*

(GSP)⁷³³ and Free Trade Agreements (FTAs).⁷³⁴ Such a trade based approach is substantially different since it is mainly an alternative way to sanction abuses or prevent abuses and is less about access to legal remedies, obtaining financial compensation or claiming restoration.

Both GSP and FTAs already contain clear commitments to human rights protection. FTAs include human rights protection as an essential element in the first chapter of FTAs⁷³⁵ and include commitments to core labour rights in the trade and sustainable development chapters. In recent free trade agreements, trade and sustainable development chapters also contain provisions on corporate social responsibility and the role of business in protecting human and labour rights.⁷³⁶ The effectiveness of both instruments to protect human rights is currently under hot debate. The GSP scheme will also be reformed and proposals have been made for the reform of GSP in order to better foster the protection of human and labour rights.⁷³⁷ Regarding FTAs and TSD, the European Commission launched a consultation process in 2017 in order to receive proposals on how to strengthen the TSD-chapters in FTAs. This generated discussions and several proposals on that issue. A significant proportion of the debate focused on how to strengthen labour rights protection through trade agreements⁷³⁸ and the role of sanctions therein.⁷³⁹

In recent debates on the reform of GSP, several reports have suggested considering the integration of targeted sanctions in GSP beyond the current withdrawal approach, which provides only for withdrawal of

⁷³³ The European Union's GSP is a preferential trade arrangement by which the EU grants unilateral and non-reciprocal preferential market access to goods originating in developing countries. The preferences are given in the form of the partial or entire suspension of import tariffs. The scheme consists of three arrangements that distinguish between developing countries on the basis of their development status and needs. The three arrangements are: (1) the general arrangement; (2) the special incentive arrangement for sustainable development and good governance, known as the "GSP+"; and (3) the special arrangement for the least-developed countries, known as "Everything But Arms" (EBA). Standard GSP provides tariff preferences for a number of products. GSP+ expands this to almost 90% of export products, while EBA provides zero-tariff access for all products, except for products related to arms. A country might become a GSP beneficiary if it complies with certain conditions, including the ratification and implementation of 27 international conventions concerning human and labour rights, environmental protection, and good governance. GSP+ aims at spreading and promoting the values and principles of human rights protection, sustainable development, and good governance. The additional preferences are intended as a form of compensation, or reward, for having signed up to, and for implementing the relevant international law. In other words, the GSP+ "fosters the achievement of its goals by offering the 'carrot' of preferences" (see European Commission, *Report from the Commission to the European Parliament and the Council on the Generalised Scheme of Preferences covering the period 2014 -2015*, COM (2016) 29 final, 28 January 2016, p. 3.)

⁷³⁴ Beke, Laura, D'Hollander, David, Hachez, Nicolas and Beatriz Pérez de las Heras (2014) 'The integration of human rights in EU development and trade policies', Frame report. Available at:

<https://globalcampus.euic.org/bitstream/handle/20.500.11825/72/07-Deliverable-9.1.pdf?sequence=1&isAllowed=y>

⁷³⁵ Hachez, N. (2015) "'Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way That Helps Human Rights?", in *Cuadernos Europeos de Deusto*, p. 81

⁷³⁶ Marx, A., Ebert, F., Hachez, N. & J. Wouters (2017) *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements*. Report for the Dutch Ministry of Foreign Affairs. Leuven: Leuven Centre for Global Governance Studies.

⁷³⁷ See for example the proposals by the GSP Reform Platform https://actalliance.eu/wp-content/uploads/2017/12/20171124_GSP-Platform-Statement_FINAL.pdf and Marx et al. (2018) *What Role can Voluntary Sustainability Standards play in the European Union's GSP Scheme*. Report for the German Ministry of Development Cooperation. Leuven: Leuven Centre for Global Governance Studies.

⁷³⁸ For a summary and discussion of this debate see Harrison, J., Barbu, M, Campling, L., Ebert, F., Martens, D., Marx, A., Orbie, J., Richardson, B. and A. Smith (2018) 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda', in *World Trade Review*.

⁷³⁹ The proposals for reform differ between both instruments, but there are some commonalities which are relevant for this study. One is to more explicitly engage with business and the second is to use sanctions in order to foster compliance. Both are interrelated. In case of FTAs a sanction might be a suspension of the trade agreement when the essential elements clause on human rights is violated (never used). For violation of TSD-chapters no sanction is currently applicable (see Marx, A., Ebert, F. & N. Hachez (2017) 'Dispute Settlement for Labour Provisions in Trade Agreements. Rethinking Current Arrangements', in *Politics and Governance*, 5, 4, pp. 49-59). For GSP there is a common withdrawal mechanism of the trade preferences for the three schemes in case of violations of the first 15 conventions of the regulation (i.e. human rights and labour rights conventions) and a more specific sanctioning system for GSP+. Since both trade instruments are in essence state to state instruments the use of these sanctions is very rare (only three cases under GSP) or non-existing in the case of the FTAs since it would hit a whole country and hence is a rather blunt sanctioning mechanism.

tariff preferences for a whole country. Richardson et al (2017)⁷⁴⁰ suggest considering the integration of targeted sanctions on the basis of economic sector or even create a negative list of individual exporters/companies. This idea is further developed by Portela (2018), who proposes integrating targeted sanctions in GSP and FTAs.⁷⁴¹ According to her proposal, targeted sanctions could be applied at four levels. First at the country level as is currently the case. However, she also proposes to apply targeted sanctions for economic sectors, specific companies and even individuals. For this study, company-specific sanctions are especially relevant. This could imply that targeted sanctions suspend preferences for certain companies. Such an approach would sanction companies involved in human rights abuses. This approach could be implemented via the EU registered exporter system (a database of companies registered to export under GSP). Companies who commit human rights abuses could be 'blacklisted' in the registration system. Such a system could also be applied to FTAs.⁷⁴² In that case, the mechanism would be reciprocal. This proposal is supported in a draft report on the implementation of the GSP regulation by the EP Committee on International Trade.⁷⁴³

Such a trade-based approach would have an additional advantage in terms of addressing human rights abuses by companies. Current debates on holding companies to account for human rights abuses focus on large EU based MNEs who dominate their supply chain. The analysis of our cases also shows that it currently mainly concerns leading EU firms targeted by judicial mechanisms. However, there are also many large non-EU companies in third countries which might be involved in human rights abuses and supply to European SMEs or dominate the supply chain and hence towards which EU-based firms have little leverage to demand compliance with human rights commitments. A trade-based approach might also target such companies and might be able to address far more human rights abuses by companies than is currently achieved. However, it should be noted that such an approach might contribute to the most-sought remedy, namely financial compensation (see table 3).

Recommendation:

- It is recommended that the European Commission assess this proposal and consider it in the context of current debates on the reform of EU trade policy. The further development of this recommendation creates several operational questions such as who can file a complaint on a possible abuse of human rights by a company, how human rights abuses will be established, what is an appropriate measure, etc. Regarding these operational questions, some proposals are currently developed. The GSP Reform Platform foresees a role for the EP in such a complaint system. It proposes that different EP Committees including the committee on trade and the sub-committee on human rights run the complaint body.⁷⁴⁴ This proposal is also suggested by Richardson et al. An alternative proposal put forward by them is to establish an investigative body led by a special rapporteur.⁷⁴⁵

⁷⁴⁰ Richardson, B., Harrison, J. & L. Campling (2017) *Labour Rights in Export Processing Zones with a focus on GSP+ Beneficiary Countries*. Brussels: European Parliament.

⁷⁴¹ Portela, Clara (2018) *Enforcing Respect for Labour Standards with Targeted Sanctions*. Singapore: Friedrich-Ebert-Stiftung.

⁷⁴² A legal assessment on compatibility with WTO law of such an approach is required since it might violate the non-discrimination principle. According to Clara Portela such an approach could be made compatible with WTO law if the sanctions are justified under the trade-restricting exceptions covering public morals (Articles XX GATT) or security (Article XXI GATT) (Portela, 2018, p. 20).

⁷⁴³ European Parliament (2018) DRAFT REPORT on the implementation of the GSP Regulation (EU) No 978/2012 (2018/2107(INI)) Committee on International Trade. Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-630.395&format=PDF&language=EN&secondRef=01>

⁷⁴⁴ See https://actalliance.eu/wp-content/uploads/2017/12/20171124_GSP-Platform-Statement_FINAL.pdf.

⁷⁴⁵ Richardson, B., Harrison, J. & L. Campling (2017) *Labour Rights in Export Processing Zones with a focus on GSP+ Beneficiary Countries*. Brussels: European Parliament.

6.3.3 Promotion of international mechanisms and cooperation agreements

Many international mechanisms already exist to address allegations of human rights abuses. The UN human rights treaty bodies, in particular, offer a range of monitoring and remediation bodies for EU MS and individuals.⁷⁴⁶ Paré & Chong consider that ‘the communications procedures available under the UN human rights treaty regime should be considered as an avenue for remedy’,⁷⁴⁷ although they are not judicial, and thus not binding, and may not lead to reparations. However, ‘the jurisdiction of the treaty bodies extends only to states that have recognised their competence to receive individual complaints’,⁷⁴⁸ and this is not the case for many States. For example, so far, 78 countries did not ratify the first Optional Protocol to the International Covenant on Civil and Political Rights recognising the competence of the Committee to receive individual communications, 149 countries did not ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights recognising the competence of the Committee to receive communications, and 138 did not ratify the third Optional Protocol to the Convention on the Rights of the Child on a communications procedure.⁷⁴⁹ The EU should therefore promote international ratification of these instruments, in order to offer more access to individual remedies to victims of human rights abuses.

Moreover, as we saw in the KiK case, international organisations, such as the ILO, can play a role in helping victims to access remedies. Several ILO mechanisms exist to address allegations of a breach of specific ILO Conventions.⁷⁵⁰ For example, ILO Member States can file a complaint against another Member State for non-compliance with a ratified Convention.⁷⁵¹ A Commission of Inquiry could then be set up to address persistent and serious abuses. However, this procedure is not often used: to date, only 12 Commissions of Inquiry have been established.⁷⁵² Although this procedure is not directly available to individual victims, and has to be triggered by a Member Country, it is an international mechanism that should be promoted, in order to increase the number of complaints and compliance with ILO standards. Another ILO mechanism called ‘representation’ allows industrial associations of employers or of workers to communicate a representation against a government.⁷⁵³ A committee can then be set up and can formulate recommendations to the government. So far, 70 Member Countries have been targeted by this mechanism, and ‘77 cases led to a recommendation which needs to be followed up by the Member State’.⁷⁵⁴ The Committee on Freedom of Association is another ILO supervisory mechanism, which reviews complaints submitted by employers’ and workers’ organisations, and may issue recommendations and request governments to keep it informed. The EU could therefore raise awareness regarding these mechanisms and support their use by relevant stakeholders. In essence, these are actions which do not target companies directly, but governments. However, they can provide incentives for these governments to improve corporate accountability.

Next, the EU could promote the creation of new international agreements, especially regarding judicial cooperation between countries. As we saw in the Danzer case, for example, the prosecution sometimes lacks resources to access evidence in the host country. Establishing a judicial cooperation mechanism could thus enhance access to remedies for victims. Judicial cooperation could entail mutual recognition of judgments, sharing documents and evidence and mutual legal assistance. Such judicial cooperation and assistance could for example follow the model of the agreement between the EU and the United States on

⁷⁴⁶ <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (last accessed 30 November 2018).

⁷⁴⁷ Mona Paré & Tate Chong, ‘Human rights violations and Canadian mining companies: exploring access to justice in relation to children’s rights’, *The International Journal of Human Rights*, 21:7, 2017, p. 922.

⁷⁴⁸ *Ibid.*, pp. 922-923.

⁷⁴⁹ See status of ratification of the different instruments and of their protocols at: <http://indicators.ohchr.org> (last accessed 30 November 2018).

⁷⁵⁰ <https://undg.org/human-rights/strengthening-engagement-with-the-international-human-rights-mechanism/ilo-supervisory-machinery-and-bodies/> (last accessed 30 November 2018).

⁷⁵¹ ILO Convention, Art. 26.

⁷⁵² <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang-en/index.htm> (last accessed 30 November 2018).

⁷⁵³ ILO Convention, Art. 24.

⁷⁵⁴ Marx, Ebert, Hachez & Wouters, *op. cit.*, p. 53.

mutual legal assistance.⁷⁵⁵ Another interesting model in this matter is the Joint Investigation Teams (JITS) put in place through a Council Resolution,⁷⁵⁶ which are a cooperation tool to tackle cross-border crime. Such a tool could be created on an international basis, enhancing cooperation with third countries. This would allow 'enforcement agencies and judicial bodies [to] readily and rapidly seek legal assistance and respond to requests from their counterparts in other States with respect to the detection, investigation, prosecution and enforcement of... cases concerning business involvement in severe human rights abuses'.⁷⁵⁷

In this context, the EU should also keep on supporting the UN Treaty on Business and Human Rights. Moreover, the European Parliament should continue to call 'on the EU to show its full commitment'.⁷⁵⁸ This Treaty could indeed contribute to better human rights legislation worldwide, as well as to harmonisation of the existing rules. This could, among other things, avoid putting EU companies at a disadvantage when victims seek a remedy, as shown by the RWE case. Regarding judicial cooperation, Article 12 of the Draft tackles international cooperation in general.⁷⁵⁹ The EU could therefore insist on judicial cooperation during negotiations, so that it is better reflected in this international instrument.

Finally, a non-judicial mechanism similar to the OECD National Contact Points is not available in all countries, nor does it exist at the international level. As the RWE case showed, this sometimes prevents victims from seeking remedy in the host country, because they have no other choice but to sue their own government. The EU could further promote the adoption of the OECD Guidelines on MNEs (see Chapter 3) since the OECD-NCP mechanism is also open to non-OECD members (including EU MS). The EU could therefore further support and promote the adoption of the OECD Guidelines as it has recently done in the TSD chapters of some FTAs.

Recommendations:

- Promote the ratification of optional protocols to UN human rights treaties, recognising the competence of Committees to receive communications, including from individuals. Promotion could be transformed into a requirement for some EU instruments. Given that the ratification of 15 human rights conventions are a requirement for the GSP+ scheme, and relevant for the common temporary withdrawal mechanism for the entire GSP (GSP, GSP+ and EBA), the EU could make ratification of the optional protocols to these conventions an eligibility requirement for GSP+ and part of the conventions relevant for the common withdrawal mechanism for the entire GSP. The European Commission might consider this proposal in the upcoming debates on GSP reform.
- The Commission and European External Action Service should promote existing international mechanisms, in particular the ILO representation and complaints mechanisms, various EU external policy instruments including FTAs.
- Support international judicial cooperation. The Council should reach mutual legal assistance agreements with third countries. The EU MS should further explore the potential of JITS on the international level. The EU should insist on judicial cooperation during UN Treaty negotiations.
- EU MS should further support the adoption of the OECD Guidelines and the linked institutional mechanism of NCPs which allow for the submission of 'specific instances' (i.e. complaints against MNEs) across the world.

⁷⁵⁵ Council Decision on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America, 2009/820/CFSP, 23 October 2009.

⁷⁵⁶ Council Resolution on a Model Agreement for Setting Up a Joint Investigation Team (JIT), 2017/C 18/01.

⁷⁵⁷ Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse', A/HRC/32/19, 10 May 2016.

⁷⁵⁸ European Parliament, 'Towards a binding international treaty on business and human rights', EPRS Briefing, April 2018, p. 11.

⁷⁵⁹ Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, 16 July 2018, Article 12.

7. References

[Note – this list of references only contains reference to the main papers and reports by official institutions, civil society organisations and academics used in parts 1, 2, 3, 4 and 6. The references for part 5 (detailed cases) which also includes many primary sources are included in the footnotes in that part]

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Annex 1: Positions taken by EU and other bodies on Access to Remedy

In this annex we identify the main documents and positions taken by the EU institutions (Council, Commission and Parliament), Fundamental Rights Agency, Council of Europe and Office of the High Commissioner for Human Rights.

a. Council

For the position of the Council two documents provide guidance. The first document is the second action plan on human rights and democracy of 2015 while the second document is the Council conclusions on Business and Human Rights of 2016. In the action plan, advancing on business and human rights is included as a separate objective (objective 18).⁷⁶⁰ There are three actions related to this objective. The first is to develop capacity and knowledge on the implementation of the UNGPs framework. The second focuses on the development of business and human rights policies in the EU strategy on corporate social responsibility. The third one is to share best practices between EU MS on the development and implementation of the National Action Plans. The action plan also refers to business and human rights under objective 25 (trade and investment policy) and proposes to systematically integrate internationally recognized principles and guidelines on corporate social responsibility in trade and investment agreements. The action plan does not refer to judicial mechanisms in the case of business and human rights or the third pillar of the UNGP. The Council also highlighted some priorities in their conclusions on Business and Human Rights following the Foreign Affairs Council of 20th June 2016.⁷⁶¹ In these conclusions they refer to access to remedy and the need to strengthen current mechanisms to facilitate access to effective remedies. The conclusions do not explicitly refer to judicial mechanisms. The Council requests the Fundamental Rights Agency to issue an expert opinion on possible avenues to lower barriers for access to remedy at the EU level (discussed below). In addition, the conclusions support the recommendations and work done by Council of Europe's Committee of Ministers' Recommendation on Human Rights and Business (see below) and the accountability and access to remedy project of the UN Office of the High Commissioner for Human Rights (OHCHR) (see below). Finally, the conclusions focus on the importance of non-judicial mechanisms. On the one hand, the conclusions support the implementation of the OECD Guidelines for MNEs and enhancing the effectiveness of the system of National Contact points. On the other hand, the Council encourages EU companies to establish operational-level grievance mechanisms and/or create joint grievance mechanisms initiatives between companies.

b. European Commission

In its 2011 Communication on the Renewal of the EU strategy 2011-14 for Corporate Social Responsibility, the European Commission explicitly endorsed the UNGPs and made a number of commitments with regard to their implementation.⁷⁶² On the basis of one of these commitments, the Commission published, on 28 November 2012, a guide to human rights for small and medium-sized enterprises (SMEs) seeking to explain how SMEs can address human rights risks in practice in key business sectors.⁷⁶³ On 3-4 February

⁷⁶⁰ Second Action Plan on Human Rights and Democracy of 2015 (Council of the EU 2015). Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf

⁷⁶¹ Council of the EU Conclusions on Business and Human Rights -> Council of the EU, General Secretariat of the Council, 10254/16 of 20/06/2016. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/council_conclusions_on_business_and_human_rights_foreign_affairs_council.pdf

⁷⁶² Com(2011) 681 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0681> (last accessed on 25 November 2018).

⁷⁶³ "My Business and Human Rights: A Guide to Human Rights for Small and Medium-sized Enterprises", 28 November 2018, available at: http://ec.europa.eu/growth/content/guide-human-rights-smes-0_en (last accessed on 25 November 2018).

2015, the European Commission held a European multi-stakeholder forum on CSR in order to provide stakeholders with an array of information, best practices and questions to help facilitate policy development. A number of key subsectors of CSR were identified, such as business and human rights and access to remedies, for which two critical issues were highlighted as being the availabilities of collective actions and pre-trial disclosures.⁷⁶⁴ Although the EU recognised the relevance of non-judicial remedies, it was highlighted that judicial remedies are the axis of human rights protection. On 14 July 2015, the Commission released the Staff Working Document on *Implementing the UN Guiding Principles on Business and Human Rights - State of Play* which is a technical staff working document describing the steps that have been taken at the EU level to implement the UNGPs.⁷⁶⁵ The Commission commissioned a comprehensive research project on Improving Access to Remedy in the Area of Business and Human Rights at the European Union Level which was published on 20 January 2017 and makes a number of recommendations on how to address barriers to access to justice and include an in depth analysis of issues relating to applicable law.⁷⁶⁶ It also includes a practical guide for civil society and human rights defenders which contains an overview of the main procedural and substantive hurdles that can arise when filing a claim in European courts for human rights abuses by European-based companies in third countries.⁷⁶⁷ The Commission also proposed a change to the Brussels regime which is discussed in chapter 6.

c. European Parliament

The European Parliament has put forward its position in its 2016 resolution on corporate liability for human rights abuses. In this resolution, the Parliament made several recommendations towards the Council and Commission.⁷⁶⁸ These recommendations are addressed to several actors. First, in relation to the Commission the resolution recommends to identify measures to remove barriers for legal action and to build consistent rules governing access to justice and reflect on a possible extension of the jurisdictional rules under the Brussels I regulation. Second, in relation to EU MS the EP recommends to take steps to ensure effective remedy by eliminating legal, practical and other barriers to access to justice in civil and criminal courts. Third, in relation to the Council and the Commission the EP urges the use of Article 83 TFEU to establish minimum rules concerning definition of criminal offences in the areas of particularly serious crimes with a cross-border dimension pertaining to serious human rights violations in third countries committed by companies. Finally in relation to the EU MS and EU the EP recommends to tackle financial and procedural burdens in civil litigation and consider the establishment of collective redress mechanisms.

Also in other documents the EP proposes to strengthen the responsibility and liability of business. In its resolution on corruption in the public and private sectors and the impact on human rights in third countries, the EP requests all EU enterprises to fulfil their corporate responsibility to respect human rights.⁷⁶⁹ A similar position is taken in the resolution on corporate social responsibility with a strong focus

⁷⁶⁴ https://europa.eu/newsroom/events/european-multistakeholder-forum-corporate-social-responsibility_en (last accessed on 25 November 2018).

⁷⁶⁵ SDW(2015) 144 final, available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/swd_2015_144_f1_staff_working_paper_en_v2_p1_818385.pdf (last accessed on 25 November 2018).

⁷⁶⁶ J.J. Álvarez Rubio and K. Yiannibas, "Human Rights in Business: Removal of Barriers to Access to Justice in the European Union" (Routledge, 2017), available at: <https://www.taylorfrancis.com/books/10.4324/9781315269467> (last accessed on 25 November 2018).

⁷⁶⁷ 'Human Rights in European Business: Practical Handbook for Civil Society Organisations and Human Rights Defenders', available at http://humanrightsinbusiness.eu/wp-content/uploads/2016/09/HUMAN_RIGHTS_IN_EUROPEAN_BUSINESS_EN.pdf (last accessed on 25 November 2018).

⁷⁶⁸ European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)): <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0405+0+DOC+PDF+V0//EN>

⁷⁶⁹ European Parliament resolution of 8 October 2013 on corruption in the public and private sectors: the impact on human rights in third countries (2013/2074(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0394+0+DOC+PDF+V0//EN>

on accountable, transparent and responsible business conduct.⁷⁷⁰ Also in recent debates on responsible supply chains, such as in the report on the EU flagship initiative in the garment sector, the EP stresses the importance of corporate responsibility in the supply chains and makes recommendations on how to strengthen this.⁷⁷¹ In the context of the debates on the garment sector the EP called on the Commission to go beyond the promotion of voluntary corporate social responsibility initiatives and propose binding legislation on due diligence obligations for supply chains in the garment sector following the guidelines developed by the OECD. The EP also proposed that such a legislative proposal also includes measures to address remedies for victims.⁷⁷² Finally, as noted in the introduction, the EP also strongly supports the UN Treaty on Business and Human Rights.⁷⁷³

d. Fundamental Rights Agency of the European Union

The EU Agency for Fundamental Rights (FRA) has developed recommendations to improve access to remedy in the area of business and human rights at the EU level, in an opinion requested by the Council in its conclusions on business and human rights.⁷⁷⁴ This opinion focuses on the third pillar of the UNGPs, and 'covers the areas of judicial and non-judicial remedies, as well as issues related to their effective implementation'. 21 specific opinions are given, clustered under six general headings: (1) lowering barriers to make judicial remedies more accessible; (2) enhancing the effectiveness of judicial remedies, especially in extraterritorial situations; (3) ensuring effective remedies through criminal justice; (4) ensuring effective non-judicial remedies – state based and non-state based; (5) implementing access to remedy through transparency and data collection; and (6) implementing access to remedy through action plans, coordination and due diligence. The FRA recommends, amongst other things, to facilitate the burden of proof (Opinion 3), encourage improved investigations of corporate crimes (Opinion 11), facilitate victims' civil claims in criminal procedures (Opinion 12), strengthen the role of non-judicial mechanisms (Opinion 13), and to collect and display data and information on companies with EU obligations (Opinion 17). The FRA has also launched a project, jointly with the European Law Institute, which aims to analyse different cases in relation to access to remedies for victims of business-related human rights abuses in selected EU MS in order to identify best practices in addressing obstacles to access to remedy, both for human rights abuses by companies in the EU MS as well as third countries.⁷⁷⁵

e. Council of Europe and Office of the High Commissioner for Human Rights

Besides the position of EU bodies there are two other bodies which are relevant in the context of the current study. These are the Council of Europe and the Office of the High Commissioner for Human Rights. Both bodies have developed recommendations concerning access to remedy and strengthening judicial mechanisms to address human rights abuses by business.

The Council of Europe (CoE) released recommendations (CM/REC (2016)3) on human rights and business with the purpose of assisting and guiding CoE Member States in the implementation of the UNGPs. The general recommendations focus on (1) the necessity of reviewing national legislation in order to be in conformity with the UNGPs and the recommendations by CoE, (2) dissemination of the recommendations, (3) the establishment of an information system to share good examples and (4) the sharing of National Action Plans. The specific recommendations follow the three pillar structure of the UNGPs. Concerning

⁷⁷⁰European Parliament resolution of 6 February 2013 on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth (2012/2098(INI))

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0049+0+DOC+PDF+V0//EN>

⁷⁷¹ EP REPORT on the EU flagship initiative on the garment sector (2016/2140(INI)). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0080+0+DOC+PDF+V0//EN>

⁷⁷² See <http://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-eu-garment-initiative>

⁷⁷³ Ibid., p. 11.

⁷⁷⁴ 'Improving access to remedy in the area of business and human rights at the EU level', Opinion of the European Union Agency for Fundamental Rights, 1/2017, Vienna, 10 April 2017.

⁷⁷⁵ More information on the project is available at: <https://fra.europa.eu/en/project/2018/business-and-human-rights-access-remedy-improvements>

access to remedy, the CoE develops recommendations in relation to civil liability for business-related human rights abuses and criminal or equivalent liability for business-related human rights abuses. With regard to civil liability the recommendations distinguish between recommendations in relation to human rights abuses by businesses in the MS and recommendations in relation to human rights abuses by businesses in a third country, the focus of this study. Here, the CoE recommends (recommendation 35) that Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business related human rights abuses against subsidiaries. The CoE also recommends (recommendation 36) that Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims if no other effective forum guaranteeing a fair trial is available (*forum necessitates*) and there is a sufficiently close connection to the Member State involved. Finally, the CoE recommends that Member States should consider adopting measures that allow third parties (unions, associations, etc.) to bring claims on behalf of alleged victims. Other recommendations focus on the importance of provision of legal aid, allowance of collective claims (class-action) and the requirement of transparency and provision of information by businesses. Concerning criminal or equivalent liability CoE recommends (recommendation 44) the consideration of developing and applying legislation or measures which ensure that businesses can be held liable under their criminal law when they are involved in (1) crimes under international law (genocide, crimes against humanity and war crimes), (2) offences established in accordance with a series of treaties and (3) other offences constituting serious human rights abuses (such as forced evictions or murder). The recommendations also stress that Member States should consider applying legislative and other measures to ensure that representatives of businesses can be held criminally liable for the commission of crimes under international law, offences identified in other international agreements or other serious human rights abuses.

The Office of the High Commissioner for Human Rights launched in 2014 the Accountability and Remedy Project to address challenges related to access to remedy. The project aims to contribute to a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses. The project consists of three components: (1) judicial mechanisms, (2) state-based non-judicial mechanisms and (3) non-state based grievance mechanisms. Concerning the judicial mechanisms the project foremost aims to identify and analyse the main challenges related to access to remedy and also offers some recommendations. A first main challenge relates to the structural and managerial complexity of business enterprises which takes many legal forms. By the doctrine of 'separate corporate personality', recognized by most jurisdictions, action against business is often complicated. Under this doctrine each part in a complex business constellation is a separate legal entity which makes it difficult to hold a parent company liable for actions of a subsidiary where the human rights violation has occurred. This implies that legal liability for human rights abuses of a subsidiary's may not extend beyond the subsidiary unless the liability of the parent company can be established in one way or another. Legislative proposals in some countries have been adopted or are discussed to address this issue. However, these developments are in an early stage creating an uncertain basis for legal action against parent companies. As a result the Accountability and Remedy project makes several suggestions related to the development of legal regimes that respond to this structural challenges and which takes into account the challenges arising from complex supply chains.⁷⁷⁶ A second challenge focuses on cross-border cases and the importance of international cooperation. The current confusion across jurisdictions about the roles and responsibilities of different relevant states in cross-border cases create a significant risk that no action is taken, leaving victims with no access to remedy. As a result, home states are recommended by several human rights treaties to take steps to prevent human rights abuses by business enterprises domiciled in their territory. Recommendations also focus on cross-border exchange of information between domestic law enforcement and judicial bodies.⁷⁷⁷ A third challenge focuses on the need for policy coherence and awareness of the issues related to coherence. OHCHR recommend that states should strive for vertical and

⁷⁷⁶ Office of the High Commissioner for Human Rights (2016) p. 10.

⁷⁷⁷ Office of the High Commissioner for Human Rights (2016) p. 11.

horizontal policy coherence in the development of laws and policies in relation to business and human rights.⁷⁷⁸ To facilitate this process OHCHR has developed a model terms of reference for a formal legal review of the domestic legal regime in order to (1) develop policies and reforms that respond to the complexity of global supply chains and (2) improve the effectiveness of judicial mechanisms as a means of delivering corporate accountability and remedy in cases of business-related human rights abuses.

Annex 2: Legislation on Human Rights Due Diligence in Europe

At the European level, the Non-Financial Reporting Directive, which entered into force in 2014 (with a transposition deadline of 6 December 2016), requires large, public-interest companies with more than 500 employees to include non-financial statements in their annual reports disclosing the risks of adverse effects related to human rights, labour and environmental protection that may stem from their own activities, their products, services and business relationships, including their supply and subcontracting chain. The European Commission published some Guidelines on Non-financial Reporting in 2017, which businesses can follow.

The Conflict Mineral Regulation, which will take full effect on 1 January 2021 importers of four minerals (tin, tantalum, tungsten, and gold) into the EU will be obliged to check the likelihood that the raw materials could be financing conflict or could have been extracted using forced labour.

In the UK, the transparency in supply chains clause (section 54) of the Modern Slavery Act 2015 requires large companies carrying out business in the UK, with a turnover of at least £36 million, to prepare and publish a slavery and human trafficking statement for each financial year. Such a statement must disclose the steps the company has taken to ensure that slavery and human trafficking are not taking place in any of its supply chains, or in any part of their own business. Businesses can fulfil their obligation under the legislation simply by stating that they have taken no such step.

In the Netherlands, the Child Labour Due Diligence Bill was adopted by the lower chamber of the Dutch Parliament on 7 February 2017, though it is still pending approval from the Senate. If adopted, it would require companies providing goods and services to the Dutch market, two or more times a year, to submit a statement to the Dutch regulatory authorities describing the steps taken to investigate whether there is a 'reasonable suspicion' that child labour occurs in their operations or in their supply chain; should there be reasonable suspicion, they are to put in place an action plan to address their findings in line with international guidelines (UNGPs or OECD Guidelines). Companies failing to submit a statement could be fined up to EUR 4,100. In addition, if concrete evidence can be found that goods or services have been produced with child labour, a third party complaint could be filed with the Dutch regulatory authorities that will assess whether the company has conducted sufficient due diligence.

In Germany, a motion on mandatory human rights due diligence was introduced to Parliament by the Green Party in 2016, with the aim to: (1) introduce a Human Rights Due Diligence Law that would require certain companies to undertake an ongoing human rights risk analysis, to take appropriate prevention means to avoid human rights abuses, to ensure remedial actions in case of abuses, to put in place suitable whistle-blower mechanisms, and to document and report the measures taken; (2) to improve the civil litigation options for victims of business-related human rights abuses; and (3) to establish effective sanctions for companies in case of non-compliance with their human rights due diligence duty. In Finland, a campaign bringing together civil society organisations and trade unions, together with over 70 companies, are calling for Finnish legislation on mandatory human rights due diligence.

In France, the law on the Duty of Vigilance was adopted on 21 February 2017 and imposes due diligence responsibilities on large companies in order to ensure that responsible business standards are adhered to

⁷⁷⁸ Office of the High Commissioner for Human Rights (2016) p. 11.

in their own activities but also in the activities of their subsidiaries, suppliers and subcontractors wherever they operate. The law applies to any company that employs, by the end of two consecutive financial years, at least 5000 employees itself or through its direct or indirect subsidiaries which registered office is located in France, or at least 10 000 employees itself or through its direct or indirect subsidiaries which registered office is located either in France or abroad. The law imposes a 'duty of vigilance' on large companies through a threefold obligation to put in place, disclose and implement a vigilance plan (*plan de vigilance*) detailing the 'reasonable vigilance measures to identify risks and prevent serious abuses of human rights and fundamental freedoms, health and safety and the environment resulting from their own activities or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship'.

The vigilance plan, which can be drafted in consultation with the relevant stakeholders or within multi-party initiatives, must include five elements: 1) a mapping of the risks involved, containing in particular the identification, analysis and prioritization of risks; 2) procedures to regularly assess risks associated with the activities of subsidiaries, subcontractors or suppliers with whom the company has an established business relationship; 3) actions to mitigate risks and prevent serious harm; 4) a whistleblowing mechanism collecting reports of potential and actual risks and effects, drawn up in consultation with the company's representative trade unions; 5) a mechanism to monitor measures that have been implemented and evaluate their effectiveness. A recent study analysing the first published plans showed that the majority of the plans were the fruit of a collaborative approach within companies, usually coordinated by CSR or sustainable development departments. However, external stakeholder engagement remains very low⁷⁷⁹. Ongoing external stakeholder engagement should be encouraged, as it can play a key role in the effective application of the law on the corporate duty of vigilance, with regards for instance to the identification of potential risks or actual practice of corporate-related human rights or environmental abuses on the ground.

In the case of non-compliance, the legislation provides for two implementation mechanisms. The first entails that anyone with *locus standi* can give formal notice of a violation to a company, which has three months to address it, failing this a complaint can be filed with the French courts to have the company ordered to establish, effectively implement and publish a vigilance plan under *astreinte* (i.e. with a periodic penalty payment, which can be imposed on the company as long as it remains in violation of the law). The civil fine of up to EUR 10 million that was originally envisaged by the legislation was struck down by the French Constitutional Council. The second implementation mechanism results from the civil liability regime envisaged in Article 2 of the legislation. Article 2 provides that interested parties can file civil proceedings, under the general principles of French tort law (Articles 1240 and 1241 of the French Civil Code), whenever a company's failure to comply with the obligations set forth in the legislation gives rise to damage.

In Switzerland, the popular Responsible Business Initiative launched in April 2015 and currently debated in the Swiss Parliament also aims at introducing mandatory due diligence provisions for multinational companies, together with a specific liability provision and a provision ensuring the applicability of the law as an overriding mandatory provision, regardless of the law applicable under the private international law rules.

⁷⁷⁹ Entreprises pour les Droits de l'Homme (EDH) and B&L Evolution, 'Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans', 25 April 2018, at 4, available at: https://www.edh.org/userfiles/Edh_2018_Etude_EN_V4.pdf (last accessed 29 November 2018).

PE 603.475
EP/EXPO/B/DROI/FWC/2013-08/LOT4/07

Print ISBN 978-92-846-4643-2 | doi:10.2861/59434| QA-04-19-224-EN-C
PDF ISBN 978-92-846-4642-5 | doi:10.2861/566720| QA-04-19-224-EN-N