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Piercing the Corporate Veil?

The Future of Transnational Civil Claims for Business-Related Human
Rights Abuses under the Upcoming European Union Due Diligence
Directive

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ABSTRACT

Victims of human rights violations inflicted by European transnational corporations (TNCs) face near-insurmountable obstacles to seek justice. Often confronted with a lack of legal recourse in their home country where the harm has occurred, the only remaining chance to obtain a remedy is to sue the TNC where it is headquartered in the European Union. However, a multitude of obstacles arise when filing a transnational suit in the EU – from high legal costs and procedural hurdles to barriers in international private law. The result is a ‘David v Goliath’ match-up between vulnerable plaintiffs and enormous corporate entities whose yearly revenues often rival the gross domestic product of the very countries in which they operate. Yet this imbalance could be about to change. In April 2020, the European Commission announced plans to develop a legislative proposal by 2021 requiring European Union businesses to carry out due diligence in relation to the potential human rights impacts of their operations. A Resolution of a Draft Directive on corporate due diligence and corporate accountability (‘the Directive’) adopted by the European Parliament in March 2021 included provisions on the civil liability of TNCs. If passed, the Directive would ensure that European TNCs could be held liable for ‘any harm arising out of potential or actual adverse impacts on human rights that they have caused or contributed to by acts or omissions’. For the first time, the onus would be on the TNC to prove that they took all due care in line with the Directive to avoid such harm. However, these promising provisions were slightly diminished by the rejection of two proposed amendments to key EU Regulations that would have given victims a greater ability to establish jurisdiction in EU courts as well as an opportunity to choose the applicable law upon which their claim would be adjudicated. The future of civil liability claims against TNCs in the EU, and whether the corporate veil could ultimately be pierced, is therefore unclear. In light of these developments, this thesis shall aim to determine the outlook for future civil liability claims brought to EU Member State courts by victims of human rights abuses committed by EU-based TNCs in third countries with the objective of setting recommendations for a future legislative proposal by the European Commission.

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RESEARCH METHODOLOGY

In determining the outlook for future civil liability claims brought to EU Member State courts by victims of human rights abuses committed by EU-based TNCs in third countries, this thesis operates primarily via literature research. Chapter I identifies the barriers faced by victims in pursuing civil remedies, beginning with a focus on practical and procedural barriers. The focus then shifts to barriers presented by international private law. A particular focus is directed towards the issue of jurisdiction (governed by the Brussels I Regulation) and the issue of applicable law (governed by the Rome II Regulation). Chapter II analyses the European Parliament's Draft Due Diligence Directive, from its key features to its provisions on civil liability. It is in Chapter III that the Draft Directive is compared with other legislative initiatives of its kind, from the United Nations Second Revised Draft Treaty on Business and Human Rights to domestic initiatives such as the French Duty of Vigilance Law and the Swiss Popular Business Initiative. The end objective shall be to determine whether the Directive will strengthen access to judicial remedies for victims of human rights violations committed abroad by European TNCs.

The main research method deployed here is literature review. As this thesis revolves around a legislative initiative, it is the Draft Directive that shall be the primary focus. The United Nations Guiding Principles are the cornerstone of any writing on business and human rights and are also referred to heavily throughout this work. This thesis also aims to build upon the wide range of research conducted on access to civil remedy for business and human rights abuses that has been published in recent years. The primary research output has been from the European Union itself. Particular attention is paid to the European Commission's Study on Due Diligence in Supply Chains (2020), which was conducted with the eventual aim of assisting the development of a future EU Due Diligence Law. Also relevant is the Fundamental Rights Agency's Report on Access to Remedy (2020), in which a range of barriers to access to justice have been highlighted. The European Parliament's report on access to legal remedies for victims of corporate human rights violations in third countries (2019) has also been extremely helpful, particularly with its individual country case studies. One of the most prominent pieces of work that has highlighted the range of barriers faced by

victims of corporate human rights abuses has been ‘Human Rights in Business: Removal of Barriers to Access to Justice in the European Union’ (2016), a research consortium coordinated by the Globernance Institute for Democratic Governance and edited by Juan José Álvarez Rubio and Katerina Yiannibas.

A natural consequence of this subject matter is that it revolves around a legislative proposal that at the time of writing is still in fluid development. This means that while the actual law that comes into force will undoubtedly bear many similarities to the present Draft Directive, it is almost certainly subject to change. That said, mandatory due diligence obligations and an EU-directed civil liability regime *will* be in place in the next year or two, and this thesis will be among the first to analyse its likely components and ascertain the likelihood of its subsequent effectiveness and success.

Many activists have called for attribution of criminal liability to corporations that violate human rights and environmental laws. While criminal liability as a mechanism for holding corporations to account is the subject of a very relevant debate, the scope of this thesis is to discuss corporate liability in the context of civil liability claims. Criminal liability does not form a part of the EU Due Diligence Legislative Initiative. For a case list and commentary on the assignment of criminal liability to TNCs, see the Business & Human Rights Resource Centre (available at <<https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/corporate-criminal-liability/>> accessed 14 June 2021).

Access to justice is of course a broad concept, and there are many available routes in which victims may pursue justice. While civil litigation is a principal route, there are of course others, from company-based grievance mechanisms and National Contact Points. As the focus of this thesis is on *judicial* remedies, non-judicial remedies fall beyond the scope of this work.

Of course, access to justice initiatives are occurring outside of the business and human rights frameworks. United Nations Sustainable Development Goal 16 calls for access to justice in the promotion of peaceful and inclusive societies more generally. Business and human rights advocates should therefore realise that access to justice stretches far beyond the realm of business and human rights.

INTRODUCTION

On 10 November 1995, nine members of the Movement for the Survival of the Ogoni People were executed by the Abacha military regime in Port Harcourt, Nigeria.¹ Their crime, while officially accused of murder, was their involvement in protests against oil extraction on their lands by Anglo-Dutch oil giant Royal Dutch Shell (RDS).² Evidence alleging that RDS was complicit in the men's executions was compelling.³ From its close collaboration with the Nigerian military to its bribing of key witnesses to make incriminating statements against the accused, RDS is alleged to have directly supported the violent actions of the regime.⁴ Yet it has taken a quarter of a century for the widows of the victims to hold RDS liable. Left without opportunity for legal recourse in their home country and having been rejected by the courts of the United States, the only option remaining was to pursue RDS where it is headquartered in the Netherlands. After 24 years, the Hague's District Court ruled that it had jurisdiction to hear witnesses to the case, but it ultimately found that the evidence alleging Shell's liability was insufficient and held against the claimants on the merits.⁵

The case of the Ogoni Nine is a reminder of how challenging it can be for victims of corporate-related human rights abuses to obtain justice. It is estimated that since the early 1990s, only around 40 cases have reached European courts challenging corporate liability for human rights violations.⁶ Of these cases, only four have resulted in a final judicial decision

¹ Amnesty International, 'Amnesty International Report 1995 – Nigeria' (1 January 1995) available at <<https://www.refworld.org/docid/3ae6aa0134.html>> accessed 8 May 2021.

² Ibid.

³ Amnesty International, 'A Criminal Enterprise? Shell's Involvement in Human Rights Violations in Nigeria in the 1990s' (2017) available at <https://www.amnesty.org/en/documents/AFR44/7393/2017/en/> [accessed 8 May 2021].

⁴ Ibid.

⁵ Business and Human Rights Resource Centre, 'Dutch court rules lawsuit brought by Nigerian activists' widows against Shell to be heard in Netherlands' (1 May 2019) available at <<https://www.business-humanrights.org/en/latest-news/dutch-court-rules-lawsuit-brought-by-nigerian-activists-widows-against-shell-to-be-heard-in-netherlands/>> accessed 8 May 2021.

⁶ Liesbeth F H Enneking et al, 'Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen, Report of a study commissioned by the Dutch Ministries of Security & Justice and Foreign Affairs, The Hague, Boom Juridische uitgevers [2016] report (in Dutch) and

on the merits in which the defendant companies were held liable. The remainder have either been dismissed at the procedural stage or settled out of court.⁷

The increasing social and economic power that transnational corporations (TNCs) have obtained over the past decades have allowed them to operate effortlessly over borders and jurisdictions. According to the Organisation for Economic Co-Operation and Development (OECD), TNCs nowadays account for half of all global exports, almost one-third of GDP and about one-fourth of global employment.⁸ Yet the regulations that should be holding these entities to account for their cross-border activities have remained largely stagnant. The onus has fallen upon non-governmental organisations, civil society and activist lawyers to report such instances of wrongdoing and bring legal actions against TNC parent companies. To date, leading TNCs such as Chevron, Xstrata, BHP Billiton, Newmount Mining, Vedanta Resources, Unilever, Nestlé, and Chiquita have all had to confront legal proceedings in their home states for violations committed by subsidiaries abroad.⁹

When seeking justice against a large corporation, the first option for victims is normally to seek remedy in the country in which the harm occurred. However, obtaining any meaningful remedial action in the host country is often near impossible for several reasons. Victims are sometimes confronted with corrupt governments, ineffective legal systems and a lack of awareness as to which legal routes are open for them.¹⁰ Often the country in which the victims are attempting to obtain a remedy is reliant on the defendant corporation for foreign direct investment and receives a sizeable contribution to its economy on the basis of its presence there. As a result, the enterprise will likely have been granted a wide-ranging set of

executive summary (in English) available at <<https://www.wodc.nl/onderzoeksdatabase/2531-maatschappelijk-verantwoord-ondernemen-in-het-buitenland.aspx>>.

⁷ Juan José Álvarez Rubio and Katerina Yiannibas, 'Human Rights in Business: Removal of Barriers to Access to Justice in the European Union' (Routeledge 2017).

⁸ OECD, 'Multinational Enterprises in the global economy. Heavily debated but hardly measured.' (2018) available at <<https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf>> accessed 28 May 2021).

⁹ Angela Lindt, 'Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?' [2020] *Journal of Legal Anthropology* 4(2) pp 57-77.

¹⁰ Daniel Blackburn, 'Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims' [2017] *International Centre for Trade Union Rights*.

immunities from liability.¹¹ Therefore, victims will have a better chance of obtaining a remedy if they commence transnational civil litigation against the TNC where it is domiciled. The United States initially offered a promising forum thanks to the US Alien Tort Claims Act (ATS), which allows foreign claimants to claim jurisdiction of American courts provided that the tort committed is also in violation of US law.¹² However, recent case law in the US has largely restricted the use of the ATS to ground the jurisdiction of US courts in relation to corporate human rights abuses.¹³ This leaves the European Union as the sole forum in which third country victims may be able to establish jurisdiction. Yet filing claims in the courts of EU Member States is not easy. A myriad of obstacles, from practical and procedural barriers to hurdles in international private law, make finding justice for corporate-related human rights abuses in the EU extraordinarily difficult. These obstacles are numerous and wide-ranging in nature and include financial barriers as well as jurisdictional barriers and barriers concerning the applicable law of a cross-border claim. Despite this, recent decisions in the *Vedanta* and *Shell* cases in the UK and the Netherlands has suggested that European courts are opening a new path that could represent a very important advance for the future of transnational litigation in business and human rights.¹⁴

Difficulties in accessing justice for victims of corporate-related human rights violations exist in spite of the emerging legal framework on promoting access to justice in this area both at international and European level. The leading framework in this area is the United Nations Guiding Principles on Business and Human Rights (UNGPs).¹⁵ Unanimously endorsed by the UN Human Rights Council, the UNGPs work in tandem with the UN's Three-Pillar 'Protect, Respect and Remedy' framework.¹⁶ The first 'Protect' pillar places a

¹¹ Colombia Centre on Sustainable Development and United Nations Human Rights Special Procedures, 'Impacts of the International Investment Regime on Access to Justice – Roundtable Outcome Document' [2018] available at

<https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf> accessed 21 May 2021.

¹² Alien Tort Claims Act [1789] 28 U.S.C. 1350.

¹³ Nestle USA, INC v DOE et al, 593US [2021]

¹⁴ *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents)* [2019] UKSC 20; *Four Nigerian Farmers and Stichting Milieudefensie v Shell* [2021] The Hague Court of Appeal ECLI:NL:GHDHA:2021:132 (*Oruma*), ECLI:NL:GHDHA:2021:133 (*Goi*) and ECLI:NL:GHDHA:2021:134 (*Ikot Ada Udo*).

¹⁵ OHCHR, 'The United Nations Guiding Principles on Business and Human Rights' (2010).

¹⁶ OHCHR, 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights (2010).

duty upon states to protect against human rights abuses by third parties, including businesses, while the second ‘Respect’ pillar introduces a corporate responsibility to respect human rights. The third ‘Remedy’ pillar advocates a greater access by victims to effective remedy, both judicial and non-judicial.¹⁷

The UNGPs remain the leading global ‘soft-law’ instrument in the area of business and human rights, placing a duty upon States to use these Guiding Principles to create laws in order to fulfil their duty to protect human rights from violations by third parties, including business enterprises. States are the primary duty bearers in the operationalisation of the UNGPs. Under the UN Guiding Principles, States are ‘expected to adopt a mix of measures – voluntary and mandatory, national and international – to foster business respect for human rights in practice’.¹⁸ Yet over a decade following the introduction of the three-pillar framework, relatively little has been done to adequately implement this right to a remedy. From constriction of judicial avenues by governments to limitations around enforcement and implementation, victims of human rights abuses by business activity rarely obtain a remedy.¹⁹

The right to an effective remedy is of course not unique to the world of business and human rights. States are obligated by international human rights law to uphold the right to an effective remedy, as contained in Article 2(3) of the International Covenant on Civil and Political Rights. EU Member States are also bound by Article 47 of the Charter of Fundamental Rights of the European Union. This is elaborated upon in a business and human rights context by General Principle 26 of the UNGPs, which encourages states to remove ‘legal, practical and other relevant barriers’ to both judicial and non-judicial remedies. It befalls the State to identify what these barriers are, such as jurisdictional hurdles and

¹⁷ Ibid.

¹⁸ UN Guiding Principles, Principle 3 and Commentary; J Ruggie, Letter of response to a public letter by Swiss business associations regarding their position on the Swiss Responsible Business Initiative, 19 September 2019, <https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf> accessed 8 July 2021.

¹⁹ Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, ‘Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct’ (OECD Watch June 2015).

disproportionate legal costs, and lower them.²⁰ The business and human rights field should therefore acknowledge that access to remedy is part of a much larger initiative, as demonstrated by the inclusion of access to remedy in UN Sustainable Development Goal 16.²¹ Despite this, the UN Guiding Principles have never fully elaborated on the issue of legal liability for failure to meet such responsibility, which has caused considerable legal uncertainty among intergovernmental organisations such as the European Union and its individual Member States.

At European Union level, there are currently no general, overarching and binding obligations on Member States to provide lower barriers to justice in their civil liability regimes.²² Only very limited regimes targeting specific sectors require States to ensure that their companies comply with human rights due diligence obligations. As a result, there is currently no harmonised approach to lowering barriers to access to civil remedy in the European Union. Yet this could be about to change. On 10 March 2021, the European Parliament considered and adopted an outline proposal for the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence ('the Draft Directive'),²³ which for the first time would place obligations upon businesses to 'respect human rights, the environment and good governance and [to] not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business relationship or in their value chains, and that they prevent and mitigate those impacts'.²⁴ Crucially, the Directive 'further aims to ensure that undertakings can be held accountable and liable in accordance with national law for the adverse impacts on human rights, the

²⁰ European Agency for Fundamental Rights 'Business and Human Rights – Access to Remedy' Report (2020) available at <<https://fra.europa.eu/en/project/2018/business-and-human-rights-access-remedy-improvements>> accessed 30 May 2021.

²¹ UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at <https://www.refworld.org/docid/57b6e3e44.html> [accessed 3 July 2021]

²² European Trade Union Confederation, 'Position for a European directive on mandatory Human Rights due diligence and responsible business conduct', December 2019 available at <<https://www.etuc.org/en/document/etuc-position-european-directive-mandatory-human-rights-due-diligence-and-responsible>> accessed 20 May 2021.

²³ European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL)) available at <www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

²⁴ Ibid, Article 1.

environment and good governance that they cause or to which they contribute in their value chain, and aims to ensure that victims have access to legal remedies’.²⁵ The adopted resolution containing the Directive which outlines these provisions is still in draft form and is not legally binding upon the European Commission. It does, however, put pressure on the Commission to accelerate efforts to make a formal proposal by the end of 2021, which is already confirmed to include a civil liability regime.²⁶ The Draft Directive seeks to place a duty upon Member States to ‘ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable’ for such violations. This is potentially a watershed moment for victims of human rights violations who have been seeking civil remedies against European TNCs.

The objective of this thesis is to evaluate the future of cross-border civil liability claims against transnational corporations based in the EU for harms caused in third countries under the future EU Directive on Due Diligence and Corporate Accountability. Chapter I identifies the barriers faced by victims in pursuing civil remedies, from practical and financial barriers to issues of private international law. A particular focus is directed towards the issue of jurisdiction (governed by the Brussels I Regulation) and the issue of applicable law (governed by the Rome II Regulation). Chapter II discusses the Directive, from its key features to its provisions on civil liability. It is in Chapter III that the Draft Directive is compared with other legislative initiatives of its kind, from the United Nations Second Revised Draft Treaty on Business and Human Rights to domestic initiatives such as the French Duty of Vigilance Law and the Swiss Popular Business Initiative. The end objective shall be to determine whether the Directive will strengthen access to judicial remedies for victims of human rights violations committed abroad by European TNCs.

²⁵ European Parliament Resolution 10 March 2021 (n 23), Article 1(3).

²⁶ Ibid, Paragraph 26.

I. BARRIERS FACED BY VICTIMS FROM THIRD COUNTRIES SEEKING JUDICIAL REMEDY AGAINST TRANSNATIONAL CORPORATIONS IN THE EUROPEAN UNION

This Chapter shall address the barriers that third-country victims of human rights abuses committed by EU-based transnational corporations (TNCs) face in seeking redress in EU Member State courts. This Chapter shall be divided into two sections. The first section shall discuss the practical and procedural barriers that can greatly hamper access to judicial remedy for victims, while the second section shall analyse the barriers inherent in international private law. While formal judicial structures exist for such claims, there are very few specific judicial procedures for victims of corporate-related human rights abuses.²⁷ Furthermore, assembling a court case and gathering evidence against a large multinational corporation is not easy, while high court fees, insufficient legal aid, and an overwhelmed system make for often excessively lengthy legal campaigns.²⁸ For individuals who are often already situated in a precarious financial position, financial risks involved in paying retention fees of legal and technical experts, the fees in obtaining evidence, the length of the litigation process, as well as the “loser pays” principle can act as a deterrent to filing civil claims.²⁹

Yet power imbalances between would-be plaintiffs and corporate respondents are not limited to their respective financial means. Equality in access to information becomes entirely lop-sided when the corporate respondent has the resources and litigators to access information from a wide-variety of sources, coupled with the fact that it is rarely required by law to disclose its confidential documents that may provide valuable information to the victim.³⁰ The judicial system is also presented in a way that places the corporate respondent

²⁷ Dr. Jennifer 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 (2014).

²⁸ Juan José Álvarez Rubio and Katerina Yiannibas, ‘Human Rights in Business: Removal of Barriers to Access to Justice in the European Union (Routledge 2007).

²⁹ Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations’ ICAR CORE ECCJ (2013).

³⁰ Ibid.

on higher ground – in most Member States, the burden of proof in civil claims is on the plaintiff to prove that harm, loss or damage occurred and that there was a causal link between such damage and the act or omission of the respondent.³¹ This is opposed to the automatic placement of the burden of proof on the respondent to demonstrate that there was not a duty of care and that this duty was not contravened. Yet one of the most difficult challenges that victims must overcome is identifying the precise undertaking that caused the harm with a view to holding that undertaking liable in a court of law. This is a task greatly complicated by the division of TNCs into parent companies and subsidiaries by a network of formal and informal contractual relations. While TNCs may appear on end-of-year revenue sheets as a single unified global entity, in law they often appear as a network of subsidiaries with different legal personalities which can be exceptionally difficult to link. As John Ruggie, the former UN Secretary-General's Special Representative for Business and Human Rights noted, an inherent difficulty of holding TNCs liable is their 'fundamental disjuncture between [their] economic reality and legal form'.³² A consequence of this disparity is that victims must navigate their way through this complex web of legal entities and quite literally 'pierce the corporate veil' if they are to stand any chance of having a claim successfully filed in court.

The workings of international private law do little to level the playing field. Two key procedural issues that must be resolved before the merits of a claim can be discussed by a court involve the establishment of jurisdiction of the claim and the corresponding applicable law upon which the case will be based. Jurisdiction poses a great challenge in that courts will generally only grant jurisdiction if the case has a sufficient connection to the forum state. In the EU, the Brussels I Regulation requires that the defendant of a civil action must be domiciled in one of the EU Member States – creating difficulties in cases of private litigation for human rights abuses committed by TNCs where parts of these companies are domiciled

³¹ European Union Agency for Fundamental Rights, 'Business and Human Rights – Access to Remedy' Report (2020) available at <<https://fra.europa.eu/en/project/2018/business-and-human-rights-access-remedy-improvements>> accessed 30 May 2021.

³² John Ruggie, 'Multinationals as global institution: Power, authority and Relative autonomy' [2018] 12(3) Regulation and Governance 317-333.

outside the EU.³³ The issue of applicable law, meanwhile, is determined by the Rome II Regulation and states that the applicable law will be the law of the State in which the damage occurred.³⁴ This causes problems in instances where the host State provides heightened corporate immunity, requires a high burden of proof or generally does not offer the same protections to the victim as the law of the home country would.³⁵ Claimants generally benefit from the higher standards and enhanced protection of the EU Member State courts.

1.1. Practical and Procedural Barriers

Practical and procedural barriers in transnational civil claims do not derive from EU law but rather from national law of Member States as well as legal procedures and customs.³⁶ As there is no harmonisation of law at this level, a myriad of different rules and standards exist which can greatly complicate efforts for claimants attempting to navigate the European legal systems.³⁷ These barriers, which shall be discussed in turn, range from the challenges of establishing liability against a parent company for the actions of its subsidiary (also called piercing the corporate veil), overcoming the burden of proof, evidentiary burdens, financial risks, the absence of collective redress and restrictively short limitation periods.

1.1.1. *The Challenge of Establishing Parent Company Liability*

The key task in seeking justice for corporate-related human rights abuses, and often the most difficult, is establishing the liability of the TNC that caused or contributed to the harm. This is greatly complicated by the practice of legal separation, which allows TNCs to source goods and carry out operations from suppliers and subsidiaries entrenched in complex and

³³ Regulation 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 (Brussels I) [2012] OJ 2 351/01

³⁴ Regulation of the European Parliament and of the Council of 11 July 2009 on the law applicable to non-contractual obligations (Rome II) [2007] OJ 199/01

³⁵ Skinner et al, 'The Third Pillar' (n29).

³⁶ Juan José Álvarez Rubio and Katerina Yiannibas (2007) (n25).

³⁷ FRA 'Access to Remedy' Report (2020) (n28).

often untraceable supply chains.³⁸ These commercial entities, which are usually based overseas and outside of the European Union, are all connected to the parent company (which in turn is usually headquartered in the Global North) through links of stock ownership, contract or loose or informal ties.³⁹ These entities range in nature from subsidiaries, associate firms, affiliates, contractors, subcontractors and joint ventures.⁴⁰ Each enterprise, in accordance with the corporate law principle of separate corporate personality, is legally distinct, meaning that, for the most part, the law does not treat the corporate group as a single entity. But in practice, to varying degrees, parent or lead companies exercise influence and control over the activities of the affiliate companies in the group, allowing them to pursue group-wide strategies and function essentially as a whole.⁴¹ Therefore, while TNCs operate economically as one globally-integrated entity, in law they appear as a vast myriad of subsidiaries, suppliers and parent companies (see Fig 1.). This allows the TNC as a whole to maximise its profit while at the same time minimising its liability.⁴²

As the vast majority of a TNC's overseas operations are conducted by a range of different commercial enterprises, the complex corporate structure of TNCs make it difficult or even impossible to assign liability to a specific legal entity. This deliberate shielding of the TNC has become colloquially known as the corporate veil. Holding a parent company liable for the activity of its subsidiaries requires proof that a specific relationship exists between the two.⁴³ In order to establish this link one must 'pierce the corporate veil'. In the context of civil claims against TNCs, this is usually attempted by asserting that the parent company was

³⁸ Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' *Human Rights Review* 22, 109-127 available at <<https://doi.org/10.1007/s12142-020-00607-9>> accessed 20 May 2021.

³⁹ Dr. Rachel Chambers, 'Corporate Law as a Barrier to Human Rights Claims and the Promise of MHREDD Laws' *Nova Centre on Business, Human Rights and the Environment* (2021) available at <<https://novabhre.novalaw.unl.pt/corporate-law-human-rights-claims-mhredd/>> accessed 31 May 2021.

⁴⁰ *Ibid.*

⁴¹ LeBaron G, Lister J, Dauvergne P 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime. *Globalizations* 14(6) 958-975.

⁴² *Ibid.*

⁴³ Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?' *International & Comparative Law Quarterly* 67(2) [2018] pp389-423.

negligent in failing to ensure that the subsidiary was not causing harm – this is extraordinarily difficult to ascertain in practice.⁴⁴

European case law demonstrates how these difficulties have arisen in practice. In one case brought against Italian oil and gas company ENI by Francis Ododo and Friends of the Earth on behalf of the Nigerian Ikebiri community, the claimants sought to hold both the subsidiary Nigerian Agip Oil Company (NAOC) and the Italian parent company ENI jointly liable for oil spills in the Niger Delta.⁴⁵ The claimants argued that the corporate veil should be lifted so as to find the Italian parent company liable for the action of its Nigerian subsidiary.⁴⁶ They further argued that that the parent company should be directly liable for breach of duty of care that it owed the Nigerian people living in the area of its operations. The Italian court was therefore called to establish whether Eni owed the Ikebiri community a duty of care and whether, as a result, it could be held liable for the damages resulting from the operations of its subsidiary NAOC.⁴⁷ The claim was eventually settled out of court, meaning that it was never considered whether ENI could be held liable for harm caused by an overseas subsidiary.⁴⁸ This case demonstrates that piercing the corporate veil is complex and often poses a major hurdle to the imposition of liability on the parent company for the actions of their legally autonomous and separately liable subsidiaries.

Fig 1. *A graphic representation of the corporate structures of biopharmaceutical TNC Pfizer and automatic manufacturing TNC Daimler are shown below. Each dot in the graphic*

⁴⁴ Ibid.

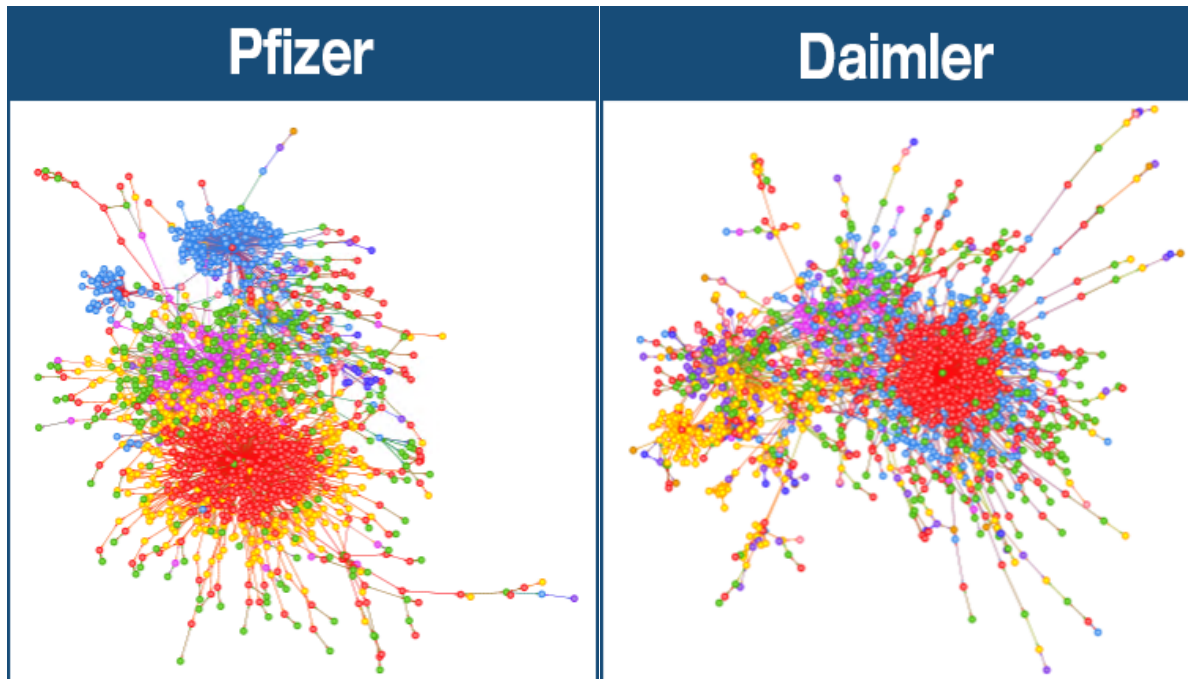
⁴⁵ Ododo Francis Timi v ENI and Nigerian Agip Oil Company (NAOC)", 7 February 2018, p. 4.

⁴⁶ Friends of the Earth Europe, 'ENI and the Nigerian Ikebiri Case' Press Briefing 4th May 2017 available at <https://www.foeeurope.org/sites/default/files/extractive_industries/2017/foee-eni-ikebiri-case-briefing-040517.pdf> accessed 30 May 2021.

⁴⁷ Friends of the Earth Europe, 'ENI and the Nigerian Ikebiri case' Press Briefing 17th January 2018 available at <https://www.foeeurope.org/sites/default/files/extractive_industries/2018/foee-eni-ikebiri-case-briefing-update.pdf> accessed 30 May 2021.

⁴⁸ European Union Agency for Fundamental Rights, 'Business and human rights – access to remedy' Italy – case study (2019).

represents an identifier for the TNC and its affiliates, with different colours representing different sources. Relationships are represented by connecting lines.⁴⁹



Proving a causal link between the activities of the parent company and the harm that occurred has also proven difficult in European case law. In one claim lodged in Germany by Peruvian farmer Saúl Lliuya against German electricity supply company RWE, it was submitted that the claimant's property was at imminent risk of being flooded or destroyed as a glacier melted into a nearby lake and that this was the result of global warming which RWE's activity was said to have contributed to.⁵⁰ However, the court found that there was an 'absence of adequate and equivalent causation of the impairment' and ruled it impossible to identify a linear chain of causation from any particular source of emission to any particular damage.⁵¹ However, the Higher Regional Court reversed the decision, stating

⁴⁹ OECD Home, 'Measuring Multinational Enterprises' [2020] https://www.foeeurope.org/sites/default/files/extractive_industries/2018/foee-eni-ikebiri-case-briefing-update.pdf accessed 18 May 2021.

⁵⁰ Germanwatch, 'Saúl versus RWE – The Huaraz Case' (2020) case summary available at <<https://germanwatch.org/en/huaraz>> accessed 30 May 2021.

⁵¹ Patrick Bundard et al., 'Climate Change Litigation in the Corporate Context – A New Risk for Due Diligence' M3TRIX (2020).

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'.⁵² The court has since requested further evidence before a final decision can be made, but this case demonstrates that proving causation can be difficult, as shown by the different conclusions reached by the regional court of Essen and the Higher Regional Court on the matter.⁵³ Proving the causal link between the actions of a single company and global phenomena such as climate change has proven especially challenging.

Difficulties in proving causality also extended to a case brought before the Swedish courts against Swedish mining company Boliden Mineral AB by Chilean citizens who suffered severe health effects due to the company's dumping of toxic waste in the town of Arica.⁵⁴ Proving causality between Boliden's actions and the harm suffered by the claimants was especially complex given that the injuries appeared gradually over time. One reason for this was that arsenic exposure tests are only accurate within a two-week period, whereas the claimants had been first exposed over a decade before proceedings began.⁵⁵ Therefore, there was a lack of clear proof that the injuries were caused by this.⁵⁶

1.1.2. Overcoming the Burden of Proof

In order to establish the liability of a TNC, claimants are required by the law of almost every EU Member State to prove that the EU-domiciled corporation was in fact liable. According to the Fundamental Rights Agency of the EU (FRA)'s Report on Access to Remedy in Business and Human Rights, domestic rules on the burden of proof constitute one

⁵² United Nations Environment Programme 'The Status of Climate Change Litigation – A Global Review' (2017) [21].

⁵³ European Parliament, 'Access to legal remedies for victims of corporate human rights abuses in third countries' Policy Department for External Relations (PE 603.475 February 2019).

⁵⁴ Arica Victims KB v Boliden Mineral AB, District Court's judgment (T-1012-13) p10.

⁵⁵ European Parliament 'Access to Justice' (n47).

⁵⁶ European Union Agency for Fundamental Rights 'Business and human rights – access to remedy' Sweden – Case study (2019).

of the biggest obstacles to access to justice for claimants filing suit against TNCs.⁵⁷ The exact dimensions of causality that claimants must prove vary by Member State, but often include proving the existence of a duty of care that the defendant TNC owes to the claimants; that this duty of care was breached; that this duty of care violated the rights of the claimants; that there was a causal link between this violation of rights and the harm suffered; and the extent of the harm.⁵⁸

The lack of harmonisation of Member State laws regarding the placement of the burden of proof on the claimant has led to a series of rulings in which the burden of proof has represented too high a threshold for victims of corporate human rights abuses.⁵⁹ Much 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.⁶⁰ This creates some major hurdles for the claimants, who must demonstrate from a very early stage of the proceedings that the circumstances of the case justify the recognition of the existence of a duty of care on the parent company.

Certain EU Member State laws allow for the lifting of the burden of proof – and the subsequent piercing of the corporate veil – in a very specific and often exceptional set of circumstances.⁶¹ For example, in Finland, the burden of proving causation is relaxed for the benefit of the victims where they have been affected by environmental damage,⁶² which requires a probable causal link between the activities and the damage alleged. Other Member States allow for no such reversal – in France, for example, in some cases it is sufficient to provide ‘serious, precise and concordant’ presumptions, which alleviates the burden of proof for the victims – this results in a presumption of causality rather than an actual reversal of the burden of proof.⁶³ Currently, the burden of proof is only ever lifted in the most exceptional of

⁵⁷ FRA ‘Access to Remedy’ Report (2020) (n28).

⁵⁸ Ibid.

⁵⁹ FRA ‘Access to Remedy’ Report (2020) (n28).

⁶⁰ European Parliament ‘Access to Justice’ (n47).

⁶¹ FRA ‘Access to Remedy’ Report (2020) (n28).

⁶² Act on Compensation for Environmental Damage [*Ymäristövahinkolaki*], No. 737 Section 1. Finlex (1994)

⁶³ FRA ‘Access to Remedy’ Report (2020) (n28) pp 61.

circumstances and there is often no allowance for cases involving alleged business human rights violations.

Difficulties for corporate-related human rights victims in discharging the burden of proof are widely seen in European case law. In one case brought against German-domiciled discount textile retailer KiK for its role in the 2012 garment factory fire in Pakistan by one survivor and three relatives of victims,⁶⁴ the claimants attempted to prove that KiK owed the victims a direct duty of care to ensure a healthy and safe working environment.⁶⁵ They supporting this claim by asserting that KiK ‘regularly intervened in the factory’s operations, including by directing and monitoring safety management’ and that KiK had assumed responsibility for the health and safety of the employees of Ali Enterprises.⁶⁶ As a result they argued that KiK was responsible for ensuring compliance with these standards, but 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.⁶⁷ KiK sustained that they could not be held liable for the events because it did not have a close enough business relationship with the supplier.⁶⁸ The claimants’ case eventually succumbed to a distinct barrier – the Court declined to investigate the case as it had exceeded the time limitations that were applied under Pakistani Law.⁶⁹

1.1.2.1. Evidentiary Burdens

Difficulties in proving liability is made worse by the fact that key evidence – normally hard copy or electronic documents in the form of letters, reports and emails – is generally

⁶⁴ Business & Human Rights Resource Centre, ‘KiK lawsuit (re Pakistan)’, available at: <<https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan>> accessed 17 May 2021.

⁶⁵ Almut Schilling-Vacaflor, ‘Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?’ Human Rights Review 22, 109-127 available at <<https://doi.org/10.1007/s12142-020-00607-9>> accessed 20 May 2021.

⁶⁶ Nicolas Bueno, Claire Bright, ‘Implementing Human Rights Due Diligence through Corporate Civil Liability’ International Comparative Law Quarterly 69(4) 1-27 available at <https://www.researchgate.net/publication/344167719_Implementing_Human_Rights_Due_Diligence_through_Corporate_Civil_Liability> accessed 1 June 2021.

⁶⁷ Ibid.

⁶⁸ European Parliament ‘Access to Justice’ (n47).

⁶⁹ Ibid.

very limited and often in the hands of the corporate defendant.⁷⁰ As a lack of access to such documents often means it is impossible to prove wrongdoing and causality, claimants therefore immediately find themselves at a disadvantaged position, rendering the obtaining of evidence a seemingly insurmountable challenge.

The concept of disclosure, in other words the obligation to make certain documents available, is not commonly available in the Member State legal systems of the EU.⁷¹ In many Member States, the only way in which courts can order the disclosure of documents is where the party specifically requests the exact documents. This is frustrated by the fact that the claimant will often not know of the precise documents that the defendant has in its possession.⁷² As the FRA noted in its report, claimants would therefore have to know not only of the existence and name of a particular document, but also of its specific content.⁷³ Requirements by the German court in the KiK case that the claimants prove under Pakistani law the exact degree of control that the parent company exercised over the operations of its suppliers meant that the claimants needed to be extremely familiar with the inner workings of the company, something that simply would not be possible unless they themselves were employed in the corporate department of the German parent company.⁷⁴ There is normally no conceivable way in which a victim of a corporate-related human rights violation would know what exact types of documents the corporate defendant would have.

Another example of this imbalance can be found in the Dutch Code of Civil Procedure, which restricts requests for evidence by requiring that the requesting party has a legitimate interest - they also need to specify the documents required.⁷⁵ While these requirements are meant to prevent “fishing for evidence”, they have proven to be a major obstacle in accessing evidence.⁷⁶ The application of this requirement proved chaotic in a high-profile civil claim against Shell in the Netherlands for a series of oil spills in the Niger

⁷⁰ G. Skinner (n3) pp 79.

⁷¹ European Parliament ‘Access to Justice’ (n47) pp17.

⁷² G. Skinner (n3)

⁷³ EU FRA (n9) pp 6.

⁷⁴ Ibid.

⁷⁵ Dutch Code of Civil Procedure (DCPC) *Article 843a*; European Parliament ‘Access to Justice’ (n47) pp 76.

⁷⁶ G. Skinner (n3) pp 46.

Delta.⁷⁷ The plaintiffs in the case requested the disclosure of key evidentiary documents from the defendant but the court rejected the request, stating that the plaintiffs lacked a legitimate interest and had not substantiated that the parent company could be held liable for damage caused by its subsidiary.⁷⁸ The plaintiffs were therefore required to outline in detail the specific information that they were seeking in the requested documents and what documents they specifically sought – all before knowing what was in those documents. However, on appeal in December 2015 this decision was reversed and the appeals court obliged Shell to grant the claimants access to certain internal company documents essential to the case. This was not based on Dutch or EU law, but rather Nigerian law which was used by the Court to decide the claims. As Shell claimed that the oil spills were caused by sabotage, which under Nigerian law brings a heavy burden of proof, the court ruled that they were unable to demonstrate that sabotage had occurred beyond any reasonable doubt, and thus in 2021 granted a decision in favour of the victims – one of Europe’s first.⁷⁹

The Dutch court in *Milieudefensie v Shell* unfortunately remains an outlier in its approach to granting evidence to the claimants. In one claim brought against German-owned logging business Danzer for its links to alleged human rights abuses and illegal logging in the Democratic Republic of the Congo, establishing the liability of a certain individual within the company was made difficult by the limited access to internal information, even more so given that Danzer is a non-listed, family-owned company and is protected from public document disclosure by German law.⁸⁰ Some corporate defendants refuse to disclose evidence entirely. In the KiK case, Italian auditing company RiNA refused to disclose relevant information in the name of confidentiality obligations, rendering futile the claimant’s attempts to construct a case.⁸¹ Access to evidence also posed major difficulties in the RWE case, in which the claimants were required to provide evidence that a glacier had melted despite the fact that

⁷⁷ *Vereniging Milieudefensie et al v Royal Dutch Shell C/09/571932* (2021); See also *Oruma Subpoena*, MILIEUDEFENSIE accessible at <<https://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/subpoena-oruma/viewm>> [last accessed 10 May 2021].

⁷⁸ EU FRA (n9) pp46.

⁷⁹ Business and Human Rights Resource Centre, ‘Shell lawsuit (re oil pollution in Nigeria) available at <<https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/>> accessed 18 May 2021.

⁸⁰ Skinner et al. (n3) pp 90.

⁸¹ European Parliament ‘Access to Justice’ (n47).

there was no Peruvian records on glaciers in the country. This, coupled with the fact that RWE was not required under German law to disclose relevant data on its CO² emissions, meant that access to evidence constituted a significant barrier to accessing legal remedies in civil proceedings brought in Germany and more generally in continental Europe.⁸²

1.1.3. Financial Risks

Initiating transnational civil litigation in the European Union is a very costly process for victims of corporate-related human rights abuses.⁸³ Given that many victims of such harms are already in a financially precarious position, the sheer cost and high financial stakes can deter many claimants from choosing the judicial route entirely. This is a concern recognised in the Guiding Principles:

‘The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means.’⁸⁴

Costs specific to transnational civil claims involve expenses of legal and technical expert retention, which can be exacerbated by the usually lengthy process of civil litigation (sometimes spanning over a decade). Once the claim reaches court, a whole range of fees come into play, from filing fees, charges for document service by professional officers of justice, witnesses’ expenses, and the costs of taking evidence and deposits for costs.⁸⁵ Transnational litigation incurs extra expenses, from the costs of document translations and interpretation services to the certification of foreign legislation and cross-border enforcement.⁸⁶ Yet it is only once the case has concluded that the total amount to be paid is confirmed. This, coupled with the fact that it is the loser who pays the fees for the winning

⁸² Ibid.

⁸³ EU FRA (n9).

⁸⁴ United Nations Guiding Principles on Business and Human Rights, Guiding Principle 26.

⁸⁵ EU FRA (n9).

⁸⁶ Ibid.

party, is one of the many features that makes transnational civil litigation a daunting prospect for potential plaintiffs.

1.1.3.1. Difficulties in securing legal representation

Securing legal representation, particularly for poorer victims based in third countries, can greatly impede access to justice. For example, in a case brought against mining company Vedanta by Zambian claimants in the United Kingdom (then an EU Member State),⁸⁷ the claimants argued that the cost of hiring a lawyer in Zambia greatly discourages members of the public from initiating a claim.⁸⁸ According to a Report by the European Parliament, the defendants in that case argued that accessing justice in the host state was complicated by the fact that Zambia only possesses one lawyer per 20,000 people.⁸⁹ This, coupled with the fact that 96% of the claimants had only ever been subsistence farmers, meant that the lack of legal support constituted a serious threat to the ability of the claimants to have their case heard in court.⁹⁰ The Report also revealed that one law firm spent £8 million making a claim against coal producer Xstrata – a non-recoverable fee.⁹¹

Interviews conducted by the European Parliament's Policy Department for External Relations revealed the prohibitive costs of bringing claims.⁹² Lawyers' fees are generally not accessible for claimants who generally lack the necessary resources and often face difficulties in securing legal funding in this type of cases. Law firm Leigh Day, which represented the claimants in *Xstrata*, had a non-recoverable fee of £8 million.⁹³ Lawyers acting for the

⁸⁷ *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents)* [2019] UKSC 20.

⁸⁸ European Parliament Report, 'Access to legal remedies' (n34) pp 92.

⁸⁹ Ibid; Pleadings Appeal Case, Pleading Representative Respondents, Richard Hermer QC, in *Foil Vedanta*, 'Report Court Hearings 5-6 July 2017' available at <www.minesandcommunities.org/article.php?a=13632.

⁹⁰ Ibid.

⁹¹ European Parliament Report, 'Access to legal remedies' (n34).

⁹² Ibid.

⁹³ European Parliament Report, 'Access to legal remedies' (n34) pp 101.

claimants might act on a pro bono basis and are often funded by NGOs. However, this may discourage lawyers from taking on such uncertain and complex transnational cases.⁹⁴

1.1.3.2. The “loser pays” principle

Perhaps the biggest deterrent for lodging a transnational civil claim is the ‘loser pays’ principle. In many EU Member States, it is the party that loses that is legally obliged to pay the costs of the other party. This can be particularly discouraging for claimants who do not find themselves in a position to pay these fees. However, in certain circumstances courts can waive the rule and order the parties to cover their own costs. In a case brought against mining company *Boliden* in Sweden, the claimants were required to pay for the winning party’s expenses, including legal retention fees, evidence-related costs and even travel expenses, as well as the travel expenses.⁹⁵ Normally Swedish courts may limit these options in an attempt to lighten the burden on the claimant and not ‘punish the tortfeasor’, but surprisingly, the costs were deemed reasonable by the Court. The claimants, ordinary Chilean citizens, were required to pay a total sum of £3.2 million to the corporation. This sets a dangerous precedent for future claimants who will be aware that a claim will result in high costs and may therefore be deterred from filing a suit in the first place.⁹⁶

1.1.3.3. Scarcity of Legal Aid in the EU

The financial risk of filing a transnational claim is compounded by the fact that legal aid is generally not available in Europe for claimants filing from third countries. In Sweden, for example, public legal aid can only be granted to foreign claimants if the suit in question concerns matters in Sweden and there are “special circumstances” such as strong

⁹⁴ Ibid.

⁹⁵ European Union Agency for Fundamental Rights ‘Business and human rights – access to remedy’ Sweden – Case study (2019).

⁹⁶ 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.

humanitarian reasons.⁹⁷ It remains unclear whether Swedish courts consider business and human rights cases to fall under this category. A 2003 EU Directive on improving access to justice sought to promote legal aid in cross-border disputes for persons who lack sufficient resources to secure effective access to justice.⁹⁸ However, as the Directive is limited to cross-border disputes within the European Union, it will not be applicable where the claim is against a parent company domiciled within the European Union and the harm was caused outside the European Union, as it is designed to aid those already residing in the EU.

Nevertheless, it could be argued that the 2003 Directive should be relevant for claimants in transnational litigation against businesses domiciled in the European Union. Whether the court can treat claimants differently in its prescription of legal aid on the basis of residency may be open to scrutiny. Furthermore, lack of legal aid provisions amount to a denial of justice of claimants, whether they reside in the EU or not. Absence of legal aid still remains a problem however, and in the *Danzer* case, the claimants were discouraged to appeal due to a lack of funding and the non-provision of legal aid.⁹⁹

1.1.4. Absence of Collective Redress in the EU

Collective redress, or class action lawsuits as they are commonly referred to in the United States, allow multiple similarly-affected plaintiffs to group together and pursue a single claim against a defendant. This is a valuable legal tool which not only reduces costs and saves court time but also allows a greater number of victims to have their case heard. This is particularly relevant to a business and human rights context, in which cases often see whole communities affected by human rights violations or environmental damage. Yet while collective redress is a widely accepted legal procedure in the United States and the United Kingdom,¹⁰⁰ the legal

⁹⁷ European Parliament, 'Access to legal remedies' (n34) pp 51.

⁹⁸ Council Directive of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ 2 26/41.

⁹⁹ European Parliament, 'Access to legal remedies' (n34) pp 52.

¹⁰⁰ Class Action Fairness Act, 28 USC 1332(d) (CAFA); United Kingdom Civil Procedure Rule (CPR) 19.11.

foundation that provides for collective redress in the European Union is considerably weaker. The lack of collective redress mechanisms in certain parts of the world is an issue recognised as a barrier to justice by the UNGPs:

‘there are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants.’¹⁰¹

The Council of Europe has also called on its Member States to address this issue:

‘Member States should consider adopting measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims; Member States should consider possible solutions for the collective determination of similar cases in respect of business-related human rights abuses; Member States should consider revising their civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims’ claims of business-related human rights abuses, with due regard for confidentiality considerations.’¹⁰²

The absence of collective redress as a barrier to justice was particularly evident in the KiK case in Germany. German law collective redress provisions only allow a ‘joinder’ of claims that are based on the same factual and legal cause.¹⁰³ However, since under German law each claimant is considered an individual party, lawyers cannot submit one petition on behalf of all claimants.¹⁰⁴ Instead, the lawyers must treat each claim as a separate lawsuit and file each motion individually – an impossible task when it comes to harms perpetrated against

¹⁰¹ UN Guiding Principle No. 26.

¹⁰² Council of Europe Committee of Ministers, Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States on human rights and business, no. 41.

¹⁰³ European Parliament, ‘Access to legal remedies’ (n34) pp 64.

¹⁰⁴ Ibid.

entire communities.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ Likewise, it was particularly surprising to see only four Nigerian claimants in *Shell* when in reality a large portion of the Niger Delta communities were harmed.¹⁰⁸

Though most European States have not adopted class action mechanisms, the use of certain similar collective redress mechanisms has been improving. In November 2020, the European Parliament approved the final text of the EU Representative Actions Directive which would allow class action mechanisms on either an opt out or opt in basis.¹⁰⁹ However, businesses are still heavily protected via the imposition of the ‘loser pays’ principle, and the availability of collective actions with this Directive may be largely restricted to particular subject matter areas that are often not relevant in foreign direct liability cases such as consumer and competition law.

1.1.5. *Time limitations on bringing claims*

Time limitations on civil claims have been recognised by the European Parliament as a major obstacle for claimants seeking justice against TNCs.¹¹⁰ Compiling evidence and constructing a case against a major TNC can take many years, and given that time limitations

¹⁰⁵ 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*’, *Human Rights Law Review* 2016 p.382.

¹⁰⁶ *ibid.*

¹⁰⁷ 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/>> accessed 1 June 2021.

¹⁰⁸ *Milieudefensie et al v RDS* (2021) (n71).

¹⁰⁹ Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final.

¹¹⁰ European Parliament, ‘Access to legal remedies’ (n34)

on filing a claim are on average only three years from when the harm occurred,¹¹¹ these periods are often unaccommodating for victims.

Limitation period rules in Europe are governed by the Rome II Regulation, which means that the period depends on which national law is applied, and it is likely to be that of the State where the harm occurred. This can create barriers in terms of determining what those time limitations may be and when they apply. Furthermore, those time limitations might be unduly restrictive. The shortness of limitation periods 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'.¹¹²

Strict time limitations have on several occasions disrupted attempts by claimants to have their cases heard. In the KiK case, the claimants were barred from having their arguments heard based on the fact that the court had applied Pakistani law which had strict time limitations. Incredibly, this was in spite of the fact that KiK had agreed to a limitation waiver.¹¹³

In a claim against French surveillance equipment company Amesys for its involvement in human rights abuses in Libya, the slow pace of proceedings was a significant legal barrier. Victims had to wait for six years just to see the investigation through. Also, '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'.¹¹⁴

¹¹¹ Ibid pp 65.

¹¹² European Parliament, 'Access to legal remedies' (n34)

¹¹³ Ibid pp 62.

¹¹⁴ European Parliament, 'Access to legal remedies' (n34) pp 65. See also Oberlandesgericht Hamm, Hinweis und Beweisbeschluss, Az. 5 U 15/17 OLG Hamm, 30 November 2018. Translation provided by Germanwatch Ev, available at <www.germanwatch.org/en/14841 (last accessed 3 October 2018). See also Agence France Press 'German court to hear Peruvian farmer's climate case against RWE' (*The Guardian* 2017).

In the *Xstrata* case, time limitations 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.¹¹⁵ The court selected the law of the host country, in this case Peru, as the applicable law. Under Peruvian law limitation periods are a mere two years from the date on which the harm occurred – this simply did not take into account the complexity inherent to transnational tort claims for alleged corporate human rights abuses.¹¹⁶

1.2. Barriers in International Private Law

Having discussed the practical and procedural hurdles faced by claimants pursuing civil remedy against TNCs in Europe, the second Part of this Chapter shall analyse the barriers faced by claimants that arise from the rules of private international law. Any transnational civil claim naturally involves the law of two jurisdictions, leading to what is known as a ‘conflict of laws’ dilemma. Two questions that must be tackled by the court are firstly whether the court seised by the claimant has the jurisdiction to hear the claim. The second question that the court must decide is what law should be used to decide the claim – the law of the host country in which the harm occurred, or the law of the forum state where the case is being heard?¹¹⁷ Both of these questions are governed by the strict parameters of private international law, which in the EU is governed by two key regulations. The first is Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), also known as the Brussels I Regime.¹¹⁸ Brussels I determines jurisdiction in transnational cases with connections to more than one country (within or outside of the European Union). The second key regulation is Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, also known as the Rome II

¹¹⁵ European Parliament, ‘Access to legal remedies’ (n34) pp 100.

¹¹⁶ Ibid.

¹¹⁷ Álvarez Rubio and Yiannibis (n20).

¹¹⁸ Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/1.

Regime.¹¹⁹ This Regulation governs the choice of law in non-contractual obligations arising between parties in most civil and commercial matters – this includes civil liability claims.

As private international law is heavily regulated by the European Union, Member States have little competence over issues of jurisdiction and the choice of law. As a consequence of this, courts of the Member States have often taken a cautious approach to the Brussels I and Rome II statutes, interpreting the law in this area restrictively. Therefore, as opposed to the last section which saw a focus on procedural laws and rules of individual EU Member States, this section will focus on such barriers presented by EU law itself. This section shall outline the material and scope of the Brussels I and Rome II Regulations and discuss how the application of their provisions by EU Member State courts can act as barriers to transnational civil human rights litigation against European TNCs.

1.2.1. Barriers related to establishing jurisdiction in EU Member State Courts

An inherent challenge of filing a civil claim against EU-based TNCs by third-country victims of corporate human rights abuses is establishing jurisdiction in EU Member State courts. In order for a claim to be processed in another state, private international law generally requires that the case bears a connection to the state in which it is being filed. In Europe, EU law on the matter is clear – the defendant of a civil claim must be domiciled in the European Union.¹²⁰ Therefore, while there is generally no difficulty in having jurisdiction granted against a corporation which is domiciled in the EU, problems will arise when a claimant wants to sue a corporate defendant which is not actually domiciled in the EU. This can occur when the respondent is a subsidiary of an EU-domiciled company.¹²¹ As a result, the chances of establishing liability against third country subsidiaries of EU TNCs are slim. Challenges in establishing jurisdiction in the EU are compounded by the fact that victims may not be able to make a successful claim in their home country either – ultimately resulting in a denial of justice.

¹¹⁹ Regulation on the law applicable to non-contractual obligations [2007] OJ 199/1.

¹²⁰ Brussels I (n109) Article 4(1).

¹²¹ Álvarez Rubio and Yiannibis (n20).

1.2.1.1. EU Jurisdiction: The Brussels I Regulation

Rules on jurisdiction in the European Union are governed by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Recast), also known as the Brussels I Regulation.¹²² This Regulation is a key part of the Brussels Regime on jurisdiction, recognition and enforcement of judgments in the EU, and is a private international law instrument that contains some of the most important rules for establishing jurisdiction in tort cases for corporate human rights abuses.¹²³

The scope of the Regulation is clearly defined and applies to almost all civil and commercial disputes taking place in the European Union.¹²⁴ The key provision as regards scope is Article 4(1) which states that ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’ Therefore, the Regulation applies to all procedures against persons domiciled in one of the EU Member States. Conversely, Article 4(2) states that ‘persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.’ Therefore, the Brussels I Regulation only partially harmonises the rules on jurisdiction in the European Union. For persons domiciled outside of the EU, the rules are left up to the domestic provisions on private international law of the Member States. Whether a legal entity such as a company is considered to be domiciled in the EU depends on whether they have their statutory seat, central administration or principle place of business there.¹²⁵ This is a particularly important provision for the human rights context: where a corporation is not domiciled in the EU, it will be up to the law of the Member State to decide whether jurisdiction should be granted.¹²⁶

¹²² OJ 2012 L 351/1.

¹²³ Álvarez Rubio and Yiannibis (n20).

¹²⁴ Article 1(1) Brussels I (n109).

¹²⁵ Article 63 Brussels I (n109).

¹²⁶ Skinner et al. (n3) pp 22.

The application of the Brussels I Regulation by EU Member State courts is strict. As the Brussels I Regulation is a closed system, EU Member State courts must rule on jurisdiction based on Brussels I only and are not allowed to deviate from the Regulation in their reasoning. Courts are equally prevented from dismissing cases on grounds other than those contained in the Regulation.¹²⁷ This has certain advantages – for example, before Brussels I jurisdiction could be denied on the basis of the concept of *forum non conveniens* (meaning that the court could reject jurisdiction if it considered the forum state not to be the ideal place for the claim to proceed). When arguments for the applicability of *forum non conveniens* were put forward in *Owusu v Jackson*, they were rejected by the European Court of Justice (ECJ) as the concept was not contained within Brussels I.¹²⁸

What about instances in which the defendant corporation is not actually domiciled in the European Union? Research conducted by Juan José Álvarez Rubio and Katerina Yiannibas found that the Regulation generally does not apply to transnational civil claims against subsidiaries, save for two exceptions.¹²⁹ The first exception has arisen in instances where the ECJ has held that when both the parent company and the subsidiary *foresaw* the possibility that they would both be sued in a Member State where at least one of them is domiciled. This was held to be the case in the *Akpan v Shell* case in the Netherlands,¹³⁰ which built upon the ECJ's *Painer* ruling in finding that the joining of parent company and subsidiaries as defendant is possible under Article 6(1) of the (old) Regulation.¹³¹ As a result, Member States have applied the same tests when determining residual jurisdiction (discussed below) in their own domestic law. The second exception may occur when it can be proven that the subsidiary in question's central administration lies with its parent company, rather than the state where it operates.¹³² The Report notes that this point was (unsuccessfully) argued in *Vava and others v AASA*,¹³³ but it is actually unclear whether this could succeed as

¹²⁷ Álvarez Rubio and Yiannibas (n20).

¹²⁸ Ibid; ECJ 1 March 2005 – C-281/02 *Owusu v Jackson* [2005] ECR I-01383.

¹²⁹ 'Human Rights in Business' (n20) pp 19.

¹³⁰ *Akpan v Shell*, ECLI:NL:RBSGR:2013:BY9854 (30 January 2013).

¹³¹ *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECLI:EU:C:2011:798.

¹³² 'Human Rights in Business' (n20) pp19.

¹³³ *Vava v Anglo American South Africa Ltd (No 2)* [2013] EWHC 2131 (QB).

it requires extensive knowledge of the corporate group's decision-making process and internal organisation.¹³⁴ Meanwhile, the ECJ has refrained from ruling on the definition of what a central administration actually is.¹³⁵

European case law shows that the rigid nature of the Brussels I Regulation has given rise to considerable problems for claimants attempting to hold corporations to account for the actions of their subsidiaries in third countries. In the *ENI* case, the court found that the Brussels I Recast Regulation was only applicable to EU-domiciled defendants, meaning that EU private international law rules on jurisdiction are only applicable to the legal proceedings brought against the parent company (in this case Italian oil and gas company ENI) and not its subsidiary Nigerian Agip Oil Company which spilled oil in the Niger Delta.¹³⁶ Theoretically, the subsidiary 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.¹³⁷

Similarly, in the *KiK* case, proceedings in Germany were filed against KiK alone and not its Pakistani supplier, Ali Enterprises. Germany private international law rules therefore took over to determine whether German courts had jurisdiction over Ali Enterprises. Under German private international law, the courts cannot exercise jurisdiction over foreign subsidiaries or suppliers, therefore excluding the possibility of extending the jurisdiction of German courts over Ali Enterprises in this case.¹³⁸ The fact that EU private international law rules on jurisdiction set out in the Brussels I Regulation are limited to EU defendants while the domestic law of the forum state determines residual jurisdiction over non-EU entities can give rise to legal uncertainty. The best-case scenario for victims is where the foreign subsidiary of an EU defendant is added as a co-defendant, but this is rarely provided for in EU Member State domestic law.¹³⁹

¹³⁴ Human Rights in Business' (n20) pp19

¹³⁵ 'Human Rights in Business' (n20).

¹³⁶ 'Access to Legal Remedies' (n34) pp56.

¹³⁷ Ibid.

¹³⁸ Access to Legal Remedies' (n34).

¹³⁹ Ibid.

1.2.1.2. *Residual Jurisdiction*

If a claimant cannot obtain jurisdiction under the narrow guises of the Brussels I, there is still an opportunity to assert jurisdiction through the domestic law of the Member State in question through a concept called residual jurisdiction. As Article 6 of the Brussels I regime states, ‘if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall ... be determined by the law of that Member State’. This can be achieved via either *forum necessitatis* or the joining of defendants.¹⁴⁰

1.2.1.2.1. *Forum necessitatis*

Forum necessitatis is a legal mechanism that will permit a court to accept jurisdiction in cases where there is no other forum available in which the plaintiff could pursue their claims. There is currently no *forum necessitatis* provision in the Brussels I Regulation, although it was considered in the 2009 reform of the regime but ultimately discarded.¹⁴¹ Despite this, *forum necessitatis* is still a recognised ground of jurisdiction in many EU Member States. The conditions for *forum necessitatis* vary from Member State to Member State, yet it always constitutes an exceptional ground of jurisdiction. Claimants have to demonstrate that bringing a claim abroad would be unreasonable or unacceptable.¹⁴² This may be due to legal or practical obstacles, such as where there would be no guarantee of a fair trial in the third country, ultimately depriving the claimant of an effective remedy. Normally, the case must have a sufficient connection with the Member State concerned.¹⁴³

Forum necessitatis jurisdiction is so important because of its connection to the human rights obligations of Member States, particularly as Article 6 ECHR guarantees all the right

¹⁴⁰ Article 6(1) Brussels I.

¹⁴¹ REPORT on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)) para (27).

¹⁴² Human Rights in Business’ (n20) pp 28.

¹⁴³ Ibid.

to a fair trial. The 2009 Commission proposal to include *forum necessitatis* in the Brussels I Regulation made explicit reference to the ‘right to a fair trial or the right to access to justice’.¹⁴⁴ In other Member States, *forum necessitatis* is linked to the prohibition of a denial of justice as a requirement of national constitutional law and a principle of public international law.¹⁴⁵ For example, in the Netherlands, *forum necessitatis* has statutory basis in Article 9 of the Dutch Code of Civil Procedure which has been used to grant jurisdiction to Iraqi claimants in the Netherlands on the basis that they could not expect a fair trial in Kuwait.¹⁴⁶ Meanwhile, Spain has amended its private international law to include a statutory basis for *forum necessitatis*,¹⁴⁷ and its courts have recognised the concept in light of Article 6 ECHR and the prohibition of a denial of justice.¹⁴⁸ That *forum necessitatis* is still not a recognised concept in the European Union must be rectified immediately in order to harmonise EU-wide compliance with international human rights law and prevent further denials of justice.

1.2.1.2.2. *Joining of Defendants*

The second way to overcome jurisdictional hurdles in relation to the subsidiary/contractor domiciled outside the EU is to join the proceedings against the parent and the subsidiary in a Member State court. Article 8(1) Brussels I Regulation permits the joining of defendants under the condition that ‘the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.¹⁴⁹ The ECJ allows this joining of defendants provided the following requirements are fulfilled. Firstly the claimant cannot claim against the parent company with the sole intention of bringing the foreign subsidiary to European jurisdiction. Secondly, a

¹⁴⁴ Report on the proposal for Brussels I (recast) (n135) para 27.

¹⁴⁵ Human Rights in Business’ (n20).

¹⁴⁶ Ibid; *Abood/Kuwait Airways Corp.*, Amsterdam Sub-District Court [1996] Nederlands Internationaal Privaatrecht 145, 222 (Kuwait Airways case I).

¹⁴⁷ See Organic Law 7/2015 Art 22.3 whereby the Organic Law 6/1985, on the Judiciary Power.

¹⁴⁸ See *Murcia Court of Appeals* (decision of 12 May 2003); *Madrid Commercial Court N.I* (order of 5 July 2013).

¹⁴⁹ Brussels I Article 8(1) (n109).

prior established relationship between the two defendants must exist..¹⁵⁰

The joining of corporate defendants in European courts is gaining traction. In 2021, the Court of Appeal of The Hague granted jurisdiction over the claims against both the parent company and the Nigerian subsidiary on the basis of Dutch law.¹⁵¹ For the first time, the court held that a parent company could face jurisdiction and liability for damages resulting from the conduct of its subsidiary.¹⁵² This occurred because, as per Article 8(1) of Brussels I, 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 in accordance with Article 8(1) of Brussels I. This ruling indicates that the tide of jurisdiction in EU Member State courts could be turning – but is piecemeal improvement from the initiative of EU Member State courts enough? Or is a more thorough overhaul required?

1.2.2. The Issue of Applicable Law

Once a transnational civil claim has been granted jurisdiction by a court, courts must also grapple with the key question of whether the law of the EU Member State in question should be used to decide the case, as opposed to the law of the host state where the harm occurred. The claimants therefore must attempt to convince the court to select the most favourable law that shall adjudicate the claim. The most favourable law for the claimant is almost always the law of the forum state. With more stringent regulations and enhanced civil protections, EU forum state law will often appear more favourable to claimants than the law of the host country, which in most cases (but not all) will have granted greater immunity to businesses due to their role played in supporting the economy in those countries. The court will then

¹⁵⁰ Eva-Maria Painer v Standard VerlagsGmbH and Others C-145/10 (7 March 2013); Solvay SA v Honeywell Fluorine Products Europe BV and Others C-616/10 (12 July 2012).

¹⁵¹ Dutch Code of Civil Procedure Article 7(1).

¹⁵² Business & Human Rights Resource Centre, 'Nigera: In landmark verdict, Dutch court rules Shell Nigeria responsible for Niger Delta oil spills & Royal Dutch Shell violated its duty of care' available at <<https://www.business-humanrights.org/en/latest-news/nigeria-in-landmark-verdict-dutch-court-rules-shell-nigeria-responsible-for-niger-delta-oil-spills-royal-dutch-shell-violated-its-duty-of-care/>> accessed 30 May 2021.

select, based on the domestic rules of private international law of the forum state, the law that shall govern the dispute. One might think that the outcome to this dilemma is simple: that the law of the state in which the claim is lodged should govern the claim. However, due to the fact that the claim has strong connections to the host country (the country in which the harm occurred), it is more likely that the court of the forum state will choose the law of the host country to adjudicate the claim.¹⁵³ In this section, the main instrument that governs the choice of law in transnational civil disputes in the European Union, the Rome II Regulation, shall be analysed, from its key rules and the subsequent exceptions to those rules, and ultimately how it can fail to accommodate tort claims for corporate-related human rights abuses.

1.2.2.1. The Rome II Regulation

Issues of applicable law are governed by Regulation of the European Parliament and of the Council of 11 July 2009 on the law applicable to non-contractual obligations, also known as the Rome II Regulation.¹⁵⁴ This Regulation provides a mandatory and exhaustive regime of unified rules on applicable law in cases of tort law. Crucially, it involves solely events giving rise to damage that have occurred on or after 11 January 2009.¹⁵⁵ Therefore, claims involving damage occurring prior to this date shall be governed by the international private law rules of the Member State where the claim has been filed. Much like the Brussels I Regime, Rome II is a closed system of laws created in an attempt to provide uniformity and legal certainty to the choice of law decisions by Member State courts on an EU-wide basis. This means that there is almost no space for courts to openly interpret the law, and as a result its application is strict.¹⁵⁶

The key provision of Rome II is Article 4(1), which states:

“Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to

¹⁵³ Álvarez Rubio and Yiannibas (n20) pp 49.

¹⁵⁴ OJ L 199.

¹⁵⁵ Rome II Regulation (Article 32) (n31).

¹⁵⁶ Rome II Regulation (Recital 6) (n31); Álvarez Rubio and Yiannibas (n20).

the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

Rome II subscribes to the legal concept of *lex loci damni*, which means that it is the law of the country in which the damage occurred that shall apply under the Regulation. Therefore, where a transnational claim is lodged in the forum state alleging harm in a host state, it is the law of the host state that shall apply. While the application of this *lex loci damni* rule is rigid, the Rome II Regulation does offer two possible escape routes for claimants.¹⁵⁷ The first situation in which the law of the home country will apply is if both the defendant and the claimant had their habitual residence in the country at the time the harm occurred.¹⁵⁸ However, as transnational civil litigation usually involves third country citizens, this is unlikely. The second situation in which the law of the home country may apply is where ‘it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country’.¹⁵⁹ It is unclear how this operates in practice, and how a claimant could prove that the case is in fact more closely connected to the home country. However, the Regulation does provide guidance on what constitutes a ‘manifestly closer relationship’ which it describes as ‘a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question’.¹⁶⁰

Despite this supposed escape clause, it is unlikely that the courts will pay much heed to ambitious arguments connecting the case to the home country as they seek to rule consistently with the Rome II’s closed nature. Additionally, while the Rome II Regulation provides an opportunity for both parties to agree on which law shall be applied, it is very unlikely that the defendant corporation would agree to having the claim adjudicated on the law of the home country, given that the level of protection is usually much higher for the claimant.¹⁶¹ Therefore, it is unlikely that either of these escape routes will in fact allow claimants to have their claims considered in line with the tort law of the EU forum state.

¹⁵⁷ Álvarez Rubio and Yiannibas (n20) pp 52.

¹⁵⁸ Rome II Regulation Art. 4(2) (n31).

¹⁵⁹ Rome II Article 4(3) (n31).

¹⁶⁰ Ibid.

¹⁶¹ Álvarez Rubio and Yiannibas (n20) pp 52.

1.2.2.2. *Exceptions to the lex loci damni of Rome II*

While the Rome II Regulation's general rule of *lex loci damni* will normally result in the application of the host country tort law in transnational civil claims, there are several ways in which the home country law will apply, as identified by Álvarez Rubio and Yiannibas.¹⁶²

The first possibility comes in the form of mandatory overriding provisions. These provisions, described by the ECJ as national provisions that must be complied with in order to protect the political, social or economic order of a Member State.¹⁶³ Such provisions are applied only in the most exceptional circumstances, and up until this moment have only been applied in cases involving anti-trusts or monetary regulations. Therefore, their applicability to human rights tort cases remains to be seen. It is unlikely that they will apply given that these cases tend to involve harms that have taken place outside of the EU which many Member states may not consider to threaten their political, social or economic order. However, with the upcoming Directive this could change.

The second possible exception involves Rome II's provisions on safety and conduct, which states that courts, 'in assessing the conduct of the person claimed to be liable, [must take into account] ... the rules of safety and conduct which were in force at the place and time of the event giving rise to liability.'¹⁶⁴ This provision may provide a lifeline to victims of corporate human rights violations because it allows the victim to have the defendant judged by the usually-stricter rules on safety and conduct that exist in the EU. This may well apply to foreign direct liability cases against European TNCs for human rights violations particularly with regard to those cases which involve rules on safety and conduct in the workplace.

The final exception is the public policy exception. According to Article 26 of the Rome II Regulation, 'the application of a provision of the law of any country specified by

¹⁶² 'Human Rights in Business' (n20) pp 55.

¹⁶³ As held in *Arblade & Fils SARL* C-369/96.

¹⁶⁴ Rome II Article 17 (n31).

this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum'.¹⁶⁵ While provision is reserved for the most exceptional cases, it will allow EU Member State courts to refuse to apply provisions of host country law that would amount to serious violations of international human rights law. However, the fact that the law of the forum state is 'wrong' is usually not enough.¹⁶⁶ There has to be a conflict with fundamental legal principles for the court seized of the matter to be allowed to refuse to apply a host country regulation on the basis of the public policy exception, and apply its own law instead. However, given the contentious nature of civil claims alleging damage against powerful corporations, this would be difficult to prove and has yet to be done in practice.

1.2.2.3. Rome II and the rule on environmental damage

Perhaps the most relevant exception to Rome II's *lex loci damni* rule is the special exception in cases of environmental damage. Contained in Article 7 of the Regulation, it is provided that:

'The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.'¹⁶⁷

This means that a claimant affected by environmental damage is able to choose between the law of the host country and the law of the forum state. Environmental damage is defined by paragraph 24 of the Regulation as:

'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by

¹⁶⁵ Rome II Paragraph 26 (n31).

¹⁶⁶ *Renault/Maxicar* ECJ Case C-38/98 [2000].

¹⁶⁷ Rome II (n31) Article 7.

that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms'.¹⁶⁸

By being able to choose the law of the forum state to adjudicate the claim, victims may have access to higher regulatory standards, stricter environmental-related liabilities and higher damages awards.¹⁶⁹ However, the question of which claims exactly Article 7 would apply to is unclear, particularly when it comes to its applicability to environmental damage which has occurred beyond the remit of the EU. European case law is yet to answer this question, but it would be particularly interesting to link Article 7 with damages to human rights abuse. Nevertheless, Article 7's potential for aiding victims of corporate-related environmental abuses is strong.

¹⁶⁸ Rome II (n31) Paragraph 24.

¹⁶⁹ Álvarez Rubio and Yiannibis (n20).

II. AN ANALYSIS OF THE UPCOMING EUROPEAN UNION LEGISLATION ON HUMAN RIGHTS DUE DILIGENCE AND CORPORATE ACCOUNTABILITY

2.1. The EU's Approach to Responsible Business Conduct to Date

The idea that corporations should be held liable when they harm – or contribute to harming – the environment, human rights or good governance has been building for some time.¹⁷⁰ Yet while no broad mandatory provisions that place human rights and environmental obligations upon corporations currently exist, there are several laws of this nature that apply to specific sectors or individual Member States.¹⁷¹

The European Union framework has witnessed an increasing number of regulations and directives which apply to human rights and environmental due diligence, albeit in a narrow set of circumstances. One such Regulation is the EU Timber Regulation, which requires operators who place timber and timber products (whether EU-sourced or not) on the EU market to exercise due diligence.¹⁷² Reports on the enforcement of the Regulation have been mixed – while action taken by the EU against non-compliant parties has been praised,¹⁷³ the implementation of the Regulation has been criticised for ‘not living up to its spirit and intent’ in stopping illegal logging.¹⁷⁴ Another key regulation is the Conflict Minerals Regulation which aims to promote responsible sourcing by requiring supply chain due diligence obligations from EU importers of resources originating from conflict-affected and

¹⁷⁰ United Nations Human Rights Office of the High Commissioner, ‘The Corporate Responsibility to Respect Human Rights – An Interpretative Guide (2012) available at <https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf> accessed 18 May 2021.

¹⁷¹ European Parliament Briefing, ‘Towards a binding international treaty on business and human rights’ PE 620.229 (April 2018).

¹⁷² Regulation (EU) of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market [2010] OJ 2 295/1.

¹⁷³ ‘Briefing Note for the Competent Authorities implementing the EU Timber Regulation’ (UNEP-WCMC December 2019-January 2020).

¹⁷⁴ WWF, ‘WWF Enforcement Review of the EU Timber Regulation (EUTR)’ (EU Synthesis Report 2019) available at <http://d2ouvy59p0dg6k.cloudfront.net/downloads/wwf_eutr_implementation_eu_synthesis_report_2019.pdf> accessed 8 July 2021.

high-risk areas.¹⁷⁵ Perhaps most similar in nature to the upcoming Directive is the EU Non-Financial Reporting Directive which requires large companies to include non-financial statements in their annual reports from 2018 onwards and disclose their policies on issues such as environmental protection, social responsibility, anti-corruption, human rights, and due diligence procedures throughout the supply chain.¹⁷⁶ Like the upcoming due diligence directive, this promises to have the largest scope of any EU law so far, encompassing all large companies and all companies listed on regulated markets.

There are also a range of voluntary initiatives which focus on supporting sustainable garment, textiles, leather, and related supply chains across the producing countries.¹⁷⁷ For example, the Trade for Decent Work Project, established by the EU in conjunction with the International Labour Organisation (ILO), aims to improve labour relations and working conditions in EU trading partner countries.¹⁷⁸ Another landmark was the adoption by the European Commission of the Action Plan on Finance for Sustainable Growth in March 2018,¹⁷⁹ complemented by the 2019 Shadow EU Action Plan on Human Rights.¹⁸⁰ Much of this has arisen in the context of the European Green Deal, which has led the European Commission to look at how the Green Deal should be implemented in each sector. Finally, in early 2021, the European Commission Sustainability Reporting Directive, which could be approved by the European Parliament and Council in the coming months.¹⁸¹

¹⁷⁵ Regulation (EU) of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ 2 130/1.

¹⁷⁶ Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ 2 330/1.

¹⁷⁷ OECD (2017), 'OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector'.

¹⁷⁸ International Labour Organisation, 'Trade for Decent Work Project (2019-2021)' GLO/18/30/EUR.

¹⁷⁹ European Commission, 'Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth' (2018) available at <https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy_en> accessed 19 May 2021.

¹⁸⁰ European Parliament Working Group on Responsible Business Conduct, 'Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU' (2019) available at <<https://responsiblebusinessconduct.eu/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf>> accessed 19 May 2021.

¹⁸¹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM/2021/189 final.

This increasing trend in legally-binding due diligence obligations in Europe follows a wealth of evidence from academia, government bodies and activist groups suggesting that the existing isolated and voluntary approaches lack effectiveness.¹⁸² In the absence of enforcement mechanisms and proper coordination, ensuring compliance with voluntary initiatives is extremely challenging. With a scattershot collection of piecemeal frameworks in select industries, widespread confusion as to what constitutes proper practice arises.¹⁸³ Companies need uniform regulations to provide certainty as to how these due diligence obligations should be adequately implemented. There is therefore a clear need for binding cross-sectoral legislation to create a single, legal standard of care.

Several Member States have taken the initiative in this area and have now placed legally-binding statutory obligations upon business to prevent violations of human rights in their supply chains. In the Netherlands, the Dutch Child Labour Due Diligence Bill (entered into force in 2020) requires companies conducting business in the Dutch market from anywhere in the world to identify, prevent and address child labour in their supply chains.¹⁸⁴ Meanwhile, the French Corporate Duty of Vigilance Law (2017) requires large French companies to develop and implement publicly available vigilance plans with regard to the companies they control, as well as their contractors and suppliers, and to identify and prevent risks to human rights and the environment.¹⁸⁵ The German government has also passed its first ‘Act on Corporate Due Diligence in Supply Chains’ which will require companies with 1,000 or more employees to conduct supply chain due diligence from 2024 onwards.¹⁸⁶

¹⁸² Business and Human Rights Resource Centre ‘Towards EU Mandatory Due Diligence Legislation – Perspectives from Business, Public Sector, Academia and Civil Society’ (2020).

¹⁸³ Business and Human Rights Resource Centre ‘Towards EU Mandatory Due Diligence Legislation – Perspectives from Business, Public Sector, Academia and Civil Society’ (2020).

¹⁸⁴ Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Jaargang 2019) available in Dutch at <<https://zoek.officielebekendmakingen.nl/stb-2019-401.html>> accessed 14 June 2021

¹⁸⁵ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (1) available in French at <<https://www.vie-publique.fr/rapport/273894-loi-sur-la-vigilance-des-societes-meres-et-entreprises-donneuse-d-ordre>> accessed 14 June 2021.

¹⁸⁶ Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten (2021) available in German at <https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?_blob=publicationFile&v=1> accessed 14 June 2021.

The development of a legally-binding EU Directive was officially set in motion in 2020 when the European Parliament identified corporate accountability and due diligence as a key initiative that many in academia and civil society had been calling for.¹⁸⁷ Soon after, the European Commission presented a ‘Study on due diligence requirements through the supply chain’ which highlighted the need for an upheaval in the ways businesses are encouraged to exhibit sustainable corporate governance responsibilities.¹⁸⁸ It agreed with the consensus that ‘current voluntary regimes across Europe involving the principle of corporate social responsibility had failed to make any real improvement to the ways in which businesses affect the communities and environments in which they operate’.¹⁸⁹ The study preceded an announcement two months later by the European Commissioner for Justice that the Commission would make a formal legislative proposal for a Directive on Due Diligence and Corporate Accountability. Then, on 10 March 2021, the European Parliament adopted a legislative initiative report headed by the Parliament’s Legal Affairs Committee and MEP Laura Wolters setting out recommendations to the European Commission on corporate due diligence and corporate accountability. The centrepiece of the report was a Draft Directive on corporate due diligence and corporate accountability.¹⁹⁰ The report acknowledged that voluntary due diligence standards ‘have not achieved significant progress’ and proposed the introduction of a mandatory corporate due diligence obligation to ‘identify, prevent, mitigate and account for human rights violations and negative environmental impacts in businesses’ supply chains’.¹⁹¹

The adoption of the report by the European Parliament by 504 votes to 79 has prompted a very serious discussion and collaboration with a variety of stakeholders from the

¹⁸⁷ Cecilia Navarra, ‘Corporate due diligence and corporate accountability: European added value assessment’ European Parliamentary Research Service (2020) available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU\(2020\)654191_EU.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EU.pdf)> accessed 8 June 2021.

¹⁸⁸ Final Report (January 2020) available at <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>> accessed 14 June 2021.

¹⁸⁹ Ibid.

¹⁹⁰ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) available at <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html> accessed 14 June 2021.

¹⁹¹ ibid para 1.

United Nations to civil society. It now befalls the Commission to make a formal legislative proposal, which will, more likely than not, draw heavily upon the Parliament's report, which will be made public in mid to late 2021. The proposed Directive forms part of the Commission's wider focus on sustainable corporate governance and due diligence as an integral element of its Recovery Plan, particularly in the context of the COVID-19 pandemic and the rapidly escalating climate emergency.¹⁹² The Resolution and accompanying draft Directive represent an ambitious attempt of the European legislature to establish sector-wide mandatory human rights due diligence obligations equipped with a civil liability regime. A broad, mandatory and legally enforceable due diligence law such as this will have an enormous impact on businesses across Europe, not only harmonising due diligence requirements and providing legal certainty for businesses, but also aiding stakeholders through increased supply chain scrutiny.

Although the Commission's proposal is yet to be formally announced, and is bound to be subject to substantial discussion and amendment by the Parliament and Council before its final adoption, the newly adopted Parliament Report nevertheless gives a valuable preview of the EU measures which will eventually be introduced. The aim of this Chapter is to analyse the Directive with the aim of ascertaining whether its provisions will operate to facilitate access to civil remedies third country plaintiffs against TNCs and consequently lower barriers to justice for victims of corporate-related human rights abuses.

2.2. Overview and Key Elements of the Legislative Proposal: Legally Binding Obligations for Businesses

While the European Parliament Resolution represents the first legislative initiative of its kind, the Draft Directive begins by immediately referencing the key European, international and domestic norms that pave the way for an eventual law on due diligence.¹⁹³ From Article 225 of the Treaty of the European Union and the Charter of Fundamental Rights of the EU to

¹⁹² See the European Commission's 'Recovery Plan for Europe' available at <https://ec.europa.eu/info/strategy/recovery-plan-europe_en> accessed 14 June 2021.

¹⁹³ European Parliament Resolution (2021) (n179) pp 1.

the Paris Agreement and the 2011 United Nations Guiding Principles on Business and Human Rights, the legal authority for a due diligence law has been in motion for some time. One of the first points underlined by the Draft is the acknowledgement that voluntary due diligence standards as they currently exist have not been able to adequately protect against human rights and environmental abuse, and calls on the European Commission to urgently adopt binding laws to combat such harms.¹⁹⁴ It stresses the need for broadness in any prospective legal framework in order to cover all large undertakings, from State-owned activities to the financial services sector.¹⁹⁵ It emphasises that compliance with these due diligence obligations should be a condition for access to the internal market.¹⁹⁶ The Motion concludes by requesting that the Commission submit a legislative proposal on mandatory supply chain due diligence (which has since been confirmed by the Commission).¹⁹⁷

The core text of the Directive and its 21 Articles draw heavily on the values outlined at the beginning of the draft. Article 1 establishes the subject matter and objective of the Directive, while Articles 2 and 3 outline the scope and definitional aspects (which shall be discussed below). Article 4 outlines the due diligence strategy, requiring Member States to ensure that undertakings adequately carry out human rights due diligence in assessing adverse human rights impacts. Article 5 governs stakeholder engagement and allows undertakings to inform and be held to account by stakeholders who may be concerned by adverse human rights impacts. Member States should also ensure that undertakings publish their most up-to-date due diligence strategy according to Article 6, while Article 7 obliges undertakings to publish non-financial statements of their policies related so environmental, social and employee matters.

Article 8 requires yearly appraisals by undertakings evaluating their due diligence processes. Articles 9 and 10 concern remedies and mandate the introduction of adequate grievance mechanisms against undertakings while also requiring undertakings to cooperate

¹⁹⁴ European Parliament Resolution (2021) (n179), Recital 1.

¹⁹⁵ Ibid Recital 9.

¹⁹⁶ Ibid Recital 10.

¹⁹⁷ Ibid Recital 34.

with investigations. Article 11 requires Member States to encourage the adoption of voluntary sectoral due diligence action plans both at national and EU level, while Article 12 calls for Member States to designate competent national authorities to oversee adequate implementation of the Directive. Article 13 governs investigations that must be carried out in order to ensure that undertakings are complying with the directive while Article 14 requires the relevant authorities to create guidelines as to how undertakings should formulate and apply due diligence strategies. Article 15 includes specific measures in support of small and medium-sized undertakings, Article 16 oversees cooperation at Union level and Article 17 focuses on delegation issues. Article 18 grants the power to Member States to apply sanctions where national provisions in accordance with the Directive have been violated – the other enforcement mechanism other than civil liability. Article 19 addresses issues of civil liability – the key Article for the purposes of this work. Article 20 requires Member States to bring into laws, regulations and administrative provisions necessary to comply with the directive while Article 21 declares that the Directive shall enter into force 20 days following its publication. It is important to note, however, that this is a Directive and not a Regulation. As such, it cannot impose any direct obligations on companies but must first be transposed into national law by the Member States.¹⁹⁸

2.2.1. 'Negative Impacts on Human Rights, the Environment and Good Governance'

The entire purpose of the Directive revolves around protection against potential or actual adverse impacts on human rights, the environment and good governance. 'Potential or adverse impact on human rights' is defined as 'any potential or actual adverse impact that may impair the full enjoyment of human rights by individuals or groups of individuals'.¹⁹⁹ Such rights include social, worker and trade union rights. 'Potential or adverse impacts on the environment' means 'any violation of internationally recognised and Union environmental standards'.²⁰⁰ 'Potential or adverse impacts on good governance' means 'any potential or

¹⁹⁸ Ibid Article 21.

¹⁹⁹ Ibid Article 3(6).

²⁰⁰ Ibid Article 3(7).

actual adverse impact on the good governance of a country, region or territory’.²⁰¹

The Directive goes on to elaborate on how these adverse human rights impacts may arise in practice.²⁰² It lists different types of impacts, many of which are included in international human rights conventions that already bind the European Union and its Member States. These include the International Bill of Human Rights, International Humanitarian Law, the UN Human Rights instruments and the fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO Conventions on forced labour and child labour are included.²⁰³ The Directive broadens the scope of applicable rights further to include the African Charter of Human and People’s Rights and the American Convention on Human Rights – at first, one might question why these are applicable to EU Member States. The Directive is clearly attempting to prescribe a globally applicable scope as possible, particularly given the turbulent history of European TNCs in Africa.

Environmental adverse impacts are often closely linked to human rights adverse impacts. The United Nations Special Rapporteur on human rights and the environment has stated that the rights to life, health, food, water and development, as well as the right to a safe, clean, healthy and sustainable environment, are necessary for the full enjoyment of human rights.²⁰⁴

2.2.2. *Value Chain Scope*

The use of the term ‘value chain’ as opposed to ‘supply chain’ is of particular importance in the Directive. ‘Value chain’ is defined as:

²⁰¹ Ibid Article 3(8).

²⁰² Ibid Annex xx para 21.

²⁰³ International Labour Organisation, C029 Forced Labour Convention [1930] (No. 29) C029; ILO, Worst Forms of Child Labour Convention [1999] C182.

²⁰⁴ Michelle Langrand, ‘I’m not afraid to point a finger’: UN Special Rapporteur on human rights and the environment’ (*Geneva Solutions March 2021*) available at <<https://genevasolutions.news/climate/i-m-not-afraid-to-point-a-finger-un-special-rapporteur-on-human-rights-and-the-environment>> accessed 25 May 2021.

‘all activities, operations, business relationships and investment chains of an undertaking and includes entities with which the undertaking has a direct or indirect business relationship, upstream and downstream, and which either:

- a) Supply products, parts of products or activities that contribute to the undertaking’s own products or services, or
- b) Receive products or services from the undertaking’²⁰⁵

This broader classification of value chain is preferred by the Directive because it encapsulates all aspects of commercial operations within an entity as opposed to solely relationships between the company and its suppliers. This lessens the risk of a particular business activity from falling outside of the scope of the Directive, fulfilling the desire of the legislators to ensure the broadest possible scope.²⁰⁶

2.2.3. Company Scope and Definitional Aspects of the Directive

The scope of the Directive relating to companies is outlined in Article 2 of the Draft and applies to ‘all large undertakings governed by the law of a Member State or established in the territory of the Union’.²⁰⁷ It also applies to all publicly listed small and medium-sized undertakings, as well as high-risk small and medium-sized undertakings’.²⁰⁸ Crucially, for the purposes of civil liability, it is important to note that the scope is further extended to encompass undertakings that ‘are governed by the law of a third country and are not established in the territory of the Union when they operate in the internal market selling goods or providing services’.²⁰⁹ This means that every publicly-listed undertaking, regardless of whether it is domiciled in EU territory, falls under the scope of the Directive if it is operating in the EU internal market. Therefore, they would fall under the scope of the national law of the Member States which will foreseeably transpose the content of the

²⁰⁵ Article 3(5)

²⁰⁶ European Parliament Resolution (2021) (n179) pp 1.

²⁰⁷ Article 2(1).

²⁰⁸ Article 2(2).

²⁰⁹ Article 2(3).

Directive. Should this very broad scope pass into EU Law, companies trading in the EU would potentially be liable for the adverse impacts on human rights and the environment even if they are based on a different continent. Whether this ambitious provision survives the legislative process of the European Union bodies remains to be seen, but if passed, it could represent a lifeline for victims of corporate-inflicted human rights abuses in third countries seeking justice.

It is also important to note the definitions prescribed to several key concepts. Much like the scope, Article 3 of the Draft takes a broad approach to defining key terms. ‘Business relationships’ is defined as ‘subsidiaries and commercial relationships of an undertaking throughout its value chain, including suppliers and sub-contractors, which are directly linked to the undertaking’s business operations, products or services’. Note the term ‘contributed to’ as opposed to merely being ‘linked to’. This means that ‘an undertaking’s activities, in combination with the activities of other entities, cause an impact, or that the activities of the undertaking cause, facilitate or incentivise another entity to cause an adverse impact’.²¹⁰ The contribution has to be substantial, meaning that minor or trivial contributions are excluded.²¹¹ The threshold is therefore much higher than previous corporate social responsible standards. It does however allow for indirect adverse impacts in stating ‘facilitate or incentivised another entity to cause an adverse impact’.²¹² This is expanded further by the consideration of three key factors, from the extent to which an undertaking may encourage or motivate an adverse impact, the extent to which an undertaking could or should have known about the adverse impact or the potential for an adverse impact, and the degree to which any of the undertaking’s activities actually mitigated the adverse impact or decreased the risk of the impact occurring.²¹³ While the threshold is a high one, these clear definitions will undoubtedly provide much-needed legal certainty in allowing courts to consider the establishment of the causality of adverse human rights impacts.

²¹⁰ Article 3(10)

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

One key term of the Directive that has gone undefined is ‘undertaking’. This is surprising, as a definition of the term would indicate clearly which business enterprises would likely fall under the scope of the Directive. Undertaking has been defined by the EU before in the Non-Financial Reporting Directive but in a narrower sense and relating solely to limited liability companies within the realm of investor and creditor protection.²¹⁴ If this definition remains unaddressed, it could give Member States license to provide their own definitions, which could undermine harmonisation efforts and lead to significant protection gaps as well as a lack of legal certainty. A clear and comprehensive definition should be included in the Directive, clarifying that “undertaking” refers to ‘any legal entity that provides goods or services on the EU internal market’.

2.3. Provisions on Civil Liability

One of the most important features of the Draft Directive is its civil liability regime. If passed, the European Union Member States would be obliged to hold their undertakings liable in accordance with national law for any infringements arising out of adverse impacts on human rights, the environment, and governance that either they or the entities under their control have caused or contributed to by acts or omissions.²¹⁵ A civil liability regime has been confirmed to form part of the Commission’s future proposal.²¹⁶ The civil liability section begins by welcoming the announcement that the Commission proposal will include a liability regime and stresses that undertakings should be held liable for such human rights violations in accordance with national law ‘unless the undertaking can prove that it acted with due care in line with its due diligence obligations and took all reasonable measures to prevent such harm’.²¹⁷ It then underlines what it identifies as key barriers to accessing civil remedies for victims from third countries, such as time limitations, difficulties to access evidence as well as gender inequality, vulnerabilities and marginalisation.²¹⁸ It calls for effective access to remedies ‘without fear of retaliation and in a gender-responsive manner’ while also

²¹⁴ Non-Financial Reporting Directive (n104).

²¹⁵ European Parliament resolution of 10 March 2021 (n101) para 26.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

emphasising the right of persons in situations of vulnerability and those who lack sufficient resources to receive legal aid as guaranteed by Article 13 of the Convention on the Rights of Persons with Disabilities and Article 47 of the Fundamental Charter.²¹⁹

It further notes that while a robust and effective due diligence process can help avoid undertakings causing harm, it stresses that conducting such due diligence should not automatically relieve undertakings of liability for harms which they have caused or contributed to.²²⁰ Interestingly, the Directive provides that due diligence legislation ‘should apply without prejudice to other applicable subcontracting, posting or supply chain liability frameworks established at national, European and international level, including joint and several liability in subcontracting claims’.²²¹ The use of the terms ‘international level’ and ‘joint and several liability’ clearly refers to transnational claims brought against a parent company for the actions of the subsidiary. The scope of this directive and its civil liability provisions are clearly intended to encompass claims brought by victims of third countries for human rights abuses by European TNCs and their subsidiaries.

Another important general note made by the European Parliament is its considerations of the international law obligations placed upon States to ensure effective access to remedy. It frames the right to an effective remedy as an internationally-recognised human right, from Article 8 of the Universal Declaration of human Rights and Article 2(3) of the International Covenant on Civil and Political Rights. It adds to these authorities by reminding states of their duty ‘to ensure, through judicial, administrative, legislative or other appropriate means, that those affected by business-related human rights abuses have access to an effective remedy’.²²²

²¹⁹ Ibid.

²²⁰ Ibid para 28.

²²¹ Ibid.

²²² Ibid. para (55).

2.3.1. Article 19: Civil Liability

The first key provisions on civil liability are contained within the section of the Directive titled Article 19: *Civil Liability*. Article 19 contains four key provisions on civil liability, concerning the liability of undertakings, the imposition of a civil liability regime within Member States, the creation of a duty of care and the introduction of reasonable limitation periods.

2.3.1.1. Article 19(1):

Article 19(1) provides that

‘the fact that an undertaking respects its due diligence obligations shall not absolve the undertaking of any liability which it may incur pursuant to national law’.

The purpose of this article is to note that while due diligence obligations are the centrepiece of the Directive, they must be accompanied by a civil liability regime. This is the primary enforcement mechanism present in the Directive. The consequences of this are that even if an undertaking respects and follows through on all aspects of its due diligence obligations will still be liable for harms that it causes or contributes to under national law.²²³ This provision is elaborated upon by paragraph (52):

‘In line with the UNGPs, conducting due diligence should not absolve undertakings per se from liability for causing or contributing to human rights abuses or environmental damage. However, having a robust and adequate due diligence process in place may help undertakings to prevent harm from occurring.’

The idea of undertakings using completed due diligence tasks as an excuse to avoid liability for the harms they cause was a possibility considered by the UN Human Rights Council (and later the 2020 Commission Study) which suggested that conducting human

²²³ Ibid Article 19(1).

rights due diligence could serve as a defence in some liability cases.²²⁴ Although it acknowledged that this would depend on the type of harm involved, the company's connection to the harm, as well as the victims' alternative paths to remedy, it concluded that 'permitting a defence to liability based upon human rights due diligence activities could incentivise companies to meaningfully engage in such activities...'.²²⁵ The Human Rights Council did note, however, that due diligence defences could lead to companies completing due diligence obligations in a 'tick box' manner that could give rise to situations of 'inappropriateness and unfairness'.²²⁶ Experts stress that the devolution of due diligence requirements into superficial exercises that will relieve corporate wrongdoing of liability is an outcome that must be avoided at all costs.²²⁷ As Bueno and Bright have concurred, 'any regulation that links human rights due diligence and legal liability, in particular through a due diligence defence, should nonetheless make it clear that conducting due diligence as a tick-box exercise will not be sufficient to avoid liability in the event of harm'.²²⁸ Human rights due diligence is therefore 'more than a mere process, and refers to a standard of expected conduct to prevent a human rights impact'.²²⁹

2.3.1.2. Article 19(2):

The second key civil liability provision, Article 19(2), places the obligation on Member States to

'ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or

²²⁴ UN Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability' A/HRC/38/20/Add.2 (2018) para 8; European Commission Due Diligence Study (2020) (n177).

²²⁵ Ibid. para 29.

²²⁶ Ibid.

²²⁷ Lise Smit & Dr Claire Bright, 'Human Rights and Environmental Due Diligence as a Standard of Care' Towards EU Mandatory Due Diligence Legislation (2020).

²²⁸ Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability 69(4) *International and Comparative Law Quarterly* (2020).

²²⁹ Ibid.

good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions.’

It is firstly important to note that the imposition of a civil liability regime will not come from the Directive itself but rather at the initiative of the individual Member States. Where EU Regulations have binding legal force throughout every Member State and enter into force on a set date in all Member States, Directives alternatively lay down certain results that must be achieved by Member States, which are free to decide how to transpose the Directive into national law.²³⁰ The key question with Article 19(2) is whether it will facilitate the establishment of civil liability upon parent companies whose subsidiaries have caused or contributed to harms against people or the environment in third countries beyond the EU. The wording here is key – stresses that Member States must ensure that they have a liability regime in place to hold liable not only undertakings in question, but also ‘undertakings under their control’.²³¹ This means that parent companies could be held liable for the acts or omissions of their subsidiaries overseas. Key to this is dependent on how the Directive defines ‘control’. ‘Control’ is defined as:

‘the possibility of an undertaking to exercise decisive influence on another undertaking, in particular by ownership or the right to use all or part of the assets of the latter, or by rights or contracts or any other means, having regard to all factual considerations, which confer decisive influence on the composition, voting or decisions of the decision-making bodies of an undertaking’.²³²

This conceptualisation of ‘control’ is broad, classifying subsidiaries that are owned, contracted with or even exert considerable influence on the executive of a company as satisfying the definition of control.²³³ Therefore, whether it is a subsidiary that is owned by the parent company or a supplier contracted by the parent company, both subsidiary and parent company will be directly linked. The phrase ‘by any other means’ is also extremely broad. Does this include more casual relationships between parent company and third company abroad that work together without formal ties of ownership or contract? For

²³⁰ See Article 21 of the Directive, titled ‘Transposition’.

²³¹ Article 19(2).

²³² Article 3(9).

²³³ Ibid.

example, relationships with independently-run affiliates established through minority stakes? The phrasing ‘having regard to all factual considerations’ is also a very open-ended direction which could foreseeably give substantial judicial discretion to the courts. Whether this is in keeping with legal certainty is one thing – indeed, the Directive makes no mention of how Article 19(2) will bypass the long-established concept of legal separation. Does this provision mean that the courts should disregard all existing rules and regulations regarding the exceptional situations in which the corporate veil should be pierced in order to create a link between a parent company and subsidiary? The idea of holding a parent company and subsidiary jointly and separately liable solely via Directive-granted judicial discretion is an alien concept to transnational tort litigation. This provision, while bold and clearly helpful for victims of human rights abuses by corporations seeking justice, needs further clarification in order to provide legal certainty for courts and respective parties as regards the status of separate legal personality. That said, it is clear that Article 19(2) will make strong strides in assigning liability to parent companies for harm caused by business entities under their control against persons or the environment in third countries.

Perhaps the most explicit reference to the application of the Directive to non-EU based subsidiaries is contained in Article 2 which confirms that the Directive as a whole will apply to undertakings ‘operating in high-risk sectors governed by the law of a third country and are not established in the territory of the Union’. High risk sectors have previously been defined as the extraction of conflict minerals and logging (see discussion of the two Directives on the matter, discussed in Section 2.1) so it is unclear whether this would apply to all instances of human rights violations by corporations in third countries which may not operate in these sectors. The exact scope of the phrase ‘high-risk sectors’ is therefore unclear.

Also important is paragraph 27, where the European Parliament:

“notes that the traceability of undertakings in the value chain can be difficult; calls on the Commission to evaluate and propose tools in order to help undertakings with the traceability of their value chains; stresses that digital technologies could assist

undertakings with their value chain due diligence and reduce costs; considers that the innovation objective of the Union should be linked to promoting human rights and sustainable governance under the future due diligence requirements.”

The European Parliament recognises the difficulties inherent in tracing different entities in global supply chains first identified and discussed in detail by the European Commission’s supply chain study.²³⁴ While this provision is focused on aiding the undertakings themselves trace their own supply chain, it does not mention the difficulties in tracing supply chains for the victim’s sake, which could improve their standing in making judicable claims. This could be easily resolved, however, by requiring the undertakings to identify and disclose their findings in the traceability of their supply chains in order to enhance the transparency of their business dealings.

2.3.1.3. Article 19(3)

Meanwhile, Article 19(3) places a further obligation upon Member States to ensure that their liability regime is such that

‘undertakings that prove that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, are not held liable for that harm.’

With this provision, the Directive will for the first time reverse the burden of proof from the plaintiff to the corporate defendant. The claimant’s case will come with a rebuttable presumption, meaning that the court will take their claims to be true unless proven otherwise. The level of evidence required for the corporate defendant to discharge the burden of proof is likely to be exhaustive –the Directive requires undertakings to prove that it ‘took all reasonable measures to prevent such harm’.²³⁵ The effect that this proposal would have on lowering barriers to civil liability of TNCs could be pivotal. Should this provision make it to the Directive in its final form, it will remove the barrier of the burden of proof that victims

²³⁴ European Commission Due Diligence Study (2020) (n177).

²³⁵ European Parliament Resolution (10 March 2021) (n 179) Paragraph 26.

have faced since the mid-1990s. From the collection of evidence required to satisfy the burden of proof to the establishment of corporate causality, these barriers that for a long time have stifled corporate human rights claims will be not so much lowered as removed from the picture entirely. Instead, it will be the obligation of the defendant to prove that it took all measures to take all due care in line with the aforementioned due diligence obligations – only then shall the burden of proof be discharged.

This provision reflects Switzerland's Popular Initiative on Responsible Business launched by the Swiss Coalition for Corporate Justice, also studied by the Commission, which in its liability regime provides that controlling companies are not liable if they can prove that they carried out their due diligence obligations appropriately.²³⁶ Essentially this provides for a reversal of the burden of proof. It is key to note here however that the Directive does not allow for a discharge of the burden of proof if the company has followed all due diligence obligations – instead, the company must show that it took 'all due care' with respect to the harm that occurred.²³⁷

2.3.1.4. Article 19(4)

The final provision is Article 19(4) which requires Member States to ensure that:

'the limitation period for bringing civil liability claims concerning harm arising out of adverse impacts on human rights and the environment is reasonable.'

Time limitations are the second practical barrier to be directly addressed by Article 19. The Directive takes up recommendations made by the European Parliament study on access to legal remedies which identified time limitations as greatly hindering chances of success for claimants.²³⁸ A key question that this provision raises is what exactly constitutes a 'reasonable' limitation period? Limitation periods are deemed to be reasonable and

²³⁶ Swiss Coalition for Corporate Justice ('SCCJ'), 'The Initiative Text with Explanations' para 2c., available at: https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf accessed 1 July 2021; see also Commission Study 2020. (n113) pp 193.

²³⁷ European Parliament Resolution (10 March 2021) (n 179) Article 19(1).

²³⁸ European Parliament 'Access to legal remedies' (2019) (n47).

appropriate if ‘they do not restrict the right of victims to access justice, with due consideration for the practical challenges faced by potential claimants.’²³⁹ The recognition of limitation periods as a major practical barrier is coupled with other concerns, from evidential burdens, gender inequality, vulnerabilities and marginalisation. Paragraph (54) then calls on the courts to grant sufficient time for victims of human rights, environmental and governance adverse impacts to bring judicial claims, ‘taking into account their geographical locations, their means and the overall difficulty to raise admissible claims before Union courts’.

What period of time, therefore, should be deemed sufficient for transnational human rights claims against European TNCs? Given that the majority of Member States currently impose a three-year limitation period, would this be extended in cases of business-related human rights abuses? If so, would this be achieved via national legislation or will the courts simply be granted a wider margin of appreciation in the matter? Despite these technical uncertainties, this provision would foreseeably go some way to allowing plaintiffs to express the difficulties they encounter in such litigation to the court, and to ultimately have their complaints heard. This could considerably help level the playing field between plaintiff and defendant.

While the provisions of Article 19 are promising in its tackling of the burden of proof and strict limitation periods, it is curious to note the absence of several other key barriers that have gone unaddressed. There are no provisions aimed at alleviating financial barriers. Nor are there any provisions that seek to introduce collective redress mechanisms for victims. With these practical barriers going unaddressed, they will remain in the path of victims seeking justice.

2.3.2. Rejected amendments to Brussels I and Rome II

While the Draft Directive was retained in its entirety in the final resolution passed by the European Parliament in February 2021, the original motion first proposed by the Parliament’s JURI Committee included several key aspects that were ultimately rejected by the legislative body’s members.²⁴⁰ In addition to the Draft Directive, the original motion also proposed

²³⁹ European Parliament Resolution (10 March 2021) (n 179) Paragraph 54.

²⁴⁰ European Parliament, ‘Recommendations as to the Content of the Proposal Requested’ (Motion of 11 February 2021) available at <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html>.

amendments to the Brussels I and Rome II Regulations.²⁴¹ They were advocated with the ultimate intention of lowering barriers in international private law (in jurisdiction and applicable law) and ultimately ensuring that EU undertakings can be held to account for their role in human rights abuses in third countries. However, once the motion was voted on in Parliament, its Members ultimately voted against the amendments to the Regulations.²⁴² To many familiar with the matter, this did not come as a surprise. The European Parliament had considered previous amendments before, including an Article 26 *forum necessitatis* rule that is identical to the one discussed here, but it was ultimately rejected by representatives from States who thought that the amendments were not keeping with the nature and objective of Brussels I and would constitute an overreach of EU Member State jurisdiction.²⁴³

2.3.2.1. Proposed Amendments to Brussels I

The first proposal sought to amend the Brussels I Regulation by introducing a new paragraph (5) in Article 8 of the Brussels Regulation, which was worded as follows:

(5) In matters relating to business civil claims for human rights violations within the value chain within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, an undertaking domiciled in a Member state may also be sued in the Member State where it has its domicile or in which it operates when the damage caused in a third country can be imputed to a subsidiary or another undertaking with which the parent company has business relationship within the meaning of Article 3 of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability.

The aim of this amendment is clear – in order to escape Article 4(1) of Brussels I, which excludes foreign subsidiaries from the Regime, this amendment seeks to create an exception which would include foreign subsidiaries under the jurisdiction of Brussels I and ultimately would allow claimants to establish jurisdiction in EU courts against subsidiaries of EU parent companies which have caused harm in third countries. In doing so, the European Parliament

²⁴¹ Ibid.

²⁴² European Parliament, ‘Announcement of Voting Results’ (9 March 2021) Brussels available at <https://www.europarl.europa.eu/doceo/document/PV-9-2021-03-09-ITM-017_EU.html> accessed 30 June 2021.

²⁴³ Álvarez Rubio and Yiannibas (n20) pp 52

sought to extend the jurisdiction of Member States' courts in cases of business-related civil cases against EU undertakings on account of violations of human rights caused by their subsidiaries or suppliers in third countries. This amendment would have applied to parent companies which have a business relationship with an entity in a third country. A 'business relationship' takes on the same definition highlighted earlier in Article 3. It is interesting to note that the earlier definition of control used by the Directive in Article 3(9) is not used here. At first this seems inconsistent, but the alternative use of the term 'business relationship' accounts for a much wider array of relationships between companies and as a result third country subsidiaries and partners are less likely to fall outside of the scope of the Directive, even if the relationship between the two entities is more casual and does not strictly constitute control.

The second proposed amendment to the Brussels I Regulation, Article 26a, reads:

Regarding business-related civil claims on human rights violations within the value chain of a company domiciled in the Union or operating in the Union within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely related; or (b) if a judgment is given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimants are satisfied; and the dispute has a sufficient connection with the Member State of the court seised.

This article forms what known in law as a *forum necessitatis*, and allows a court to assume jurisdiction over a dispute where it is considered that there is no other forum in which the dispute may be adjudicated or in which the plaintiff may reasonably be expected to initiate

the suit.²⁴⁴ This is provided that there is a sufficiently close connection with the Member State of the court seised. This would have near-guaranteed jurisdiction for victims of human rights abuses from third countries, and would have emphatically reversed many of the barriers associated with establishing jurisdiction for claimants. Despite this, the amendment attracted considerable criticism from scholars of international private law who contested that the EU would be overreaching its legislative jurisdiction.²⁴⁵ After all, the Brussels I Regulation's entire basis is built upon the granting of competence to the EU to legislate on judicial cooperation in such cases.²⁴⁶ Such a global long-arm statute may inadvertently deviate from this assigned competence, leading to questions of its legality in the realm of international private law jurisdiction.²⁴⁷ Yet the legislators were obviously aware of the potential overreach of EU jurisdiction to third countries, and stress that while EU courts can seise matters of third countries, this is only possible for business-related civil claims on human rights violations brought against undertakings located 'within the supply chain of an EU undertaking'. However, with the amendment ultimately rejected by Parliament, it is safe to say that these fears of EU legislative strong-arming were echoed by a majority of MEPs, leaving advocates for Brussels I reform as well as victims of corporate human rights violations left with the same barriers to establishing jurisdiction in EU Member State courts.

2.3.2.2. Proposed Amendments to Rome II

The amendment to Rome II would have involved the insertion of a new Article 6a, titled *Business-related human rights claims*:

In the context of business-related civil claims for human rights violations within the value chain of an undertaking domiciled in a Member State of the Union or operating in the Union within the scope of Directive xxx/xxxx on Corporate Due Diligence and Corporate Accountability, the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1),

²⁴⁴ Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30(78) *Utrecht Journal of International and European Law* 24, DOI available at <http://dx.doi.org/10.5334/ujiel.cb>

²⁴⁵ Chris Thomale, 'Chris Thomale on the EP Draft Report on Corporate Due Diligence' (Conflict of Laws, October 27) available at <<https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/>> accessed 29 June 2021.

²⁴⁶ Consolidated Treaty on the Functioning of the European Union [2012] Article 81 para 2.

²⁴⁷ Tomale (n 227).

unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.

The aim of this amendment sought to radically overhaul the way in which the applicable law rules of Rome II apply. By allowing the victim to make a choice between various options for the law governing this type of dispute, this amendment reflects calls among academia to introduce choice-of-law provisions for victims of corporate human rights abuses from third countries.²⁴⁸ This would have given the victim not only the right to choose the law applicable to his or her claim, but also to choose between up to four different applicable laws. This choice would have included 1) the law of the country in which the damage occurred, 2) the law of the country in which the event giving rise to the damage occurred, 3) the law of the country where the parent company is domiciled (where the parent company does not have a domicile in a Member State); and 4) the law of the country where the parent company operates. These were summarised by Geert van Calster in terms of *of lex loci damni, lex loci delicti commissi, lex loci incorporationis and lex loci activitatis*.²⁴⁹ Therefore, what this means is that the law to be adjudicated in business-related civil claims for corporate-related human rights violations shall be the law of the host country (the third country where the harm occurred) unless the claimant chooses the law of the home country (the EU Member state where the court has been seised) – which in the majority of cases the claimant would choose.

What was behind the decision of the JURI Committee to open up the applicable law from two to four laws at the choice of the claimant? The JURI Committee was clearly aware of the risk that Article 4(1) Rome II would lead to the application of the law of the host state (non-EU law) at the expense of the victim. Therefore, in attempt to ensure that the Directive would actually apply, the Committee took the step to allow the plaintiffs to choose the

²⁴⁸ Claire Bright, Axel Marx, Nina Pineau and Jan Wouters, ‘Towards a corporate duty for lead companies to respect human rights in their global chains?’ 22(4) Business and Politics (2020), 667-697.

²⁴⁹ Geert Van Calster, ‘First Analysis of the European Parliament’s draft proposal to amend Brussels Ia and Rome II with a view to corporate human rights due diligence’ (Conflict of Laws, October 2) available at <<https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/>> accessed 29 June 2021.

applicable law. This has been recommended by various scholars throughout the years.²⁵⁰ Giesela Rühl at the University of Berlin notes that while this amendment is clearly modelled on Article 7 Rome II which allows EU law to apply in cases of environmental damage, the difference here is that this amendment grants the claimants themselves the opportunity to choose the applicable law.²⁵¹ Furthermore, this amendment allows the victims to choose up to four different laws while Article 7 Rome II limits the choice of law to 1) the place of injury or 2) the law of the place of action.²⁵²

However, the ultimate rejection of these amendments by the European Parliament means that barriers posed by international private law will remain unchanged. Therefore, the Directive only really confronts several practical and procedural barriers, namely the burden of proof and time limitations. Claimants will continue to struggle to establish jurisdiction in Europe while in the great majority of cases the law of the host country where the damage occurred will continue to apply. It can therefore be concluded that the Draft Directive in its current form will not serve to ‘pierce the corporate veil’.

²⁵⁰ See Access to Justice, ‘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’ [2014] available at https://corporatejusticecoalition.org/wp-content/uploads/2015/02/eu_business.pdf.

²⁵¹ Giesela Rühl, ‘Human rights in global supply chains: Do we need to amend the Rome II Regulation?’ (Conflict of Laws, October 9) <<https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>> accessed 2 July 2021.

²⁵² Ibid.

3. RECOMMENDATIONS AND A WAY FORWARD FOR A FUTURE EU DUE DILIGENCE LAW

Having identified the gaps in civil liability in the Draft Directive, this final Chapter shall provide recommendations as to how a future EU Due Diligence Law can address these gaps. In formulating recommendations on civil liability, it will be extremely useful to study other separate due diligence initiatives both at international and domestic levels that the European Commission could potentially study to improve the future Directive. On an international level, the other high-profile due diligence initiative is the future United Nations Binding Treaty on Business and Human Rights, now in its Second Revised Draft, which also has a civil liability regime. Also relevant are select due diligence laws and initiatives that have been applied on a domestic level with an accompanying civil liability regime. A selection of these shall be discussed and compared with the EU Due Diligence Draft Directive in order to ascertain where the EU's proposal stands globally. Following this, a series of recommendations will then be made that will seek to improve the European Parliament's Draft that the European Commission can take into account when formulating an official legislative proposal.

3.1. A Comparative Analysis between the Upcoming European Union Due Diligence Directive and the United Nations Draft Treaty on Business and Human Rights

Since 2014, the United Nations Human Rights Council has been negotiating a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. In August 2020, a Second Revised was published.²⁵³ Similar in nature to the EU Draft Directive, the UN Draft Treaty calls upon States to 'regulate the activities of business enterprises through the adoption of legal and

²⁵³ Open-Ended Intergovernmental Working Group (OEIWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational corporations and Other Business Enterprises: Second Revised Draft (6 August 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf> accessed 8 July 2021.

policy measures at the domestic level to ensure that all persons conducting business activities within their territory or jurisdiction or otherwise under their control undertake human rights due diligence'.²⁵⁴ Much like the EU Draft Directive, it includes accompanying provisions on legal liability for business-related human rights abuses.²⁵⁵ In this section, the legal liability provisions of the Second Revised Draft Treaty shall be analysed and compared with the civil liability provisions of the EU Draft Directive. Given that the legal liability provisions of the EU Due Diligence Directive ultimately do not pierce the corporate veil, this section will seek to ascertain whether the UN Second Revised Draft Treaty itself manages to do so. And if it does, it will be determined whether there is anything that the European Commission's formal proposal can take from it.

Legal liability provisions are contained within Article 8 of the Second Revised Draft. Like the EU Draft Directive, the Second Revised Draft does not impose any direct obligation on States to adopt a specific liability regime. Instead, States are required to ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities.²⁵⁶ Article 8(7) contains provisions on liability for third parties with whom the parent company has a relationship. When such instances occur, the parent company will be liable in two particular cases. The first is where the parent company is seen to 'legally or factually controls or supervises such an entity or the relevant activity that causes the human rights abuse'. The second case is where the company 'should have foreseen the risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse'.²⁵⁷

It is therefore the omission of a parent company to prevent a third party from causing or contributing to harm that results in liability. As Bueno and Bright point out, Article 8(7) prevents a company from arguing that it had completed all of its due diligence standards in an

²⁵⁴ Ibid, Article 6(1).

²⁵⁵ Second Revised Draft (n136) Article 8(1).

²⁵⁶ Article 8(1).

²⁵⁷ Article 8(7).

attempt to escape liability from the harm caused.²⁵⁸ When harm is caused, and the parent company failed to act to prevent it, it will not matter that the parent company had complied with its due diligence obligations. What would need to be proven instead is that the damage would have resulted even if the company had exercised the required human rights due diligence.²⁵⁹ Liability will therefore be triggered for a parent company either when it exercises sufficient legal or factual control or supervision over the subsidiary or its business activities, or when it should have foreseen the risk of the human rights abuse. While this bears considerable similarity with the Draft Directive's Article 19(1), which has also taken up recommendation to prevent TNCs from carrying out tick box exercises to avoid liability. However, where the Directive reverses the burden of proof, the Second Revised Draft will likely place it upon the claimant. This leaves the victim to prove control and foreseeability in order to establish liability of the parent company. This is made considerably more challenging by the fact that the Second Revised Draft does not provide a definition of control – a facilitator of legal uncertainty. In this regard, the EU Draft Directive is much more developed than the UN Draft Treaty.

The Second Revised Draft's provisions on jurisdiction and applicable law are key to determining whether the future Treaty will effectively pierce the corporate veil.²⁶⁰ Article 9(2) on the applicable law allows the competent forum court to apply, as an alternative to its own domestic law, either the law of the place where the harm occurred, the law of the place where the victim is domiciled, or the law of the place where the defendant is domiciled, as well as the law governing 'all matters of substance regarding human rights law'. Despite this choice of multiple laws, the provision is limited by the fact that the choice is not left up to the victims themselves. Instead, it is the court of the forum state that shall decide on the law applicable. As pointed out by Bueno and Bright, this is a step back from the original Zero Draft of the Treaty which left the choice of law in the hands of the victim.²⁶¹ This makes little sense, considering that choice-of-law provisions are found in instances where the claimant is in a weaker position than the defendant (such as in consumer or employment

²⁵⁸ Bueno and Bright, 'Implementing Human Rights Due Diligence' (n40).

²⁵⁹ Ibid.

²⁶⁰ Second Revised Draft (n136) Articles 9 and 11.

²⁶¹ Bueno and Bright, 'Implementing Human Rights Due Diligence' (n40).

cases). It therefore appears as though the UN Treaty in its Second Revised Draft will do little to alleviate barriers faced by victims regarding the applicable law. It lacks the same ambition of the EU Draft's provisions on affording the choice of applicable law to the victim. However, as the EU Draft's amendments were ultimately rejected, both Drafts will ultimately lead to the same end result – that victims will still struggle to obtain jurisdiction and continue face problems related to the applicable law.

3.2. A Comparative Analysis of Civil Liability Provisions between Domestic Mandatory Due Diligence Laws and the EU Draft Directive

The proliferation of due diligence legislation and initiatives on a domestic level is of relevance to the development of the future EU Due Diligence Directive, and an analysis of the key features of their respective civil liability regimes can provide valuable insight to the European Commission as it develops an official legislative proposal. One issue that the Directive must confront is the lack of harmonisation between these individual due diligence laws of different Member States. This is recognised in the Annex to the Resolution which warns against 'significant differences between Member States' legal and administrative provisions on due diligence, including civil liability, that apply to EU undertakings'.²⁶² It notes the possibility of the 'divergent development' of such laws, and sees an EU-wide due diligence law as a key opportunity for harmonisation and the ensuring of legal certainty.²⁶³ Differences in domestic legislation between Member States are noticeable, and many do not include a civil liability regime at all. For example, the Dutch Child Labour Due Diligence Law does not create a civil cause of action permitting third parties to sue a company for the adverse consequences of failure to comply with the law. However, it does have strong enforcement mechanisms and is one of the first criminal enforcement tools in the field of business and human rights.²⁶⁴ Likewise, the German Supply Chain Act does not create any new basis for civil liability but instead provides for heavy fines by the German Federal Office

²⁶² Annex to the Resolution (para 11).

²⁶³ Ibid.

²⁶⁴ Dutch Child Labour Due Diligence Law (n109).

of Economics and Export Control.²⁶⁵ As a result, the only two domestic pieces of legislation/legislative initiatives in the EU that include a civil liability regime are the French Duty of Vigilance Law and the Swiss Popular Initiative (the latter of which was never passed into law). Each legislative initiative shall now be examined in conjunction with the EU Draft Directive in order to ascertain whether there are any components of these initiatives that could benefit the future Directive.

3.2.1. The French Duty of Vigilance Law

The French Duty of Vigilance Law imposes a legal duty of vigilance on certain large companies by requiring them to exercise human rights due diligence through the introduction and effective implementation of a vigilance plan.²⁶⁶ This vigilance plan is similar in nature to due diligence obligations under the EU Draft Directive as it is aimed at risk prevention of severe violations to human rights and the environment. However, the Vigilance Law's provisions on civil liability are markedly different. It is first important to note that where the EU Directive only proposes desired characteristics of future liability regimes for Member States, the French Duty of Vigilance Law contains the first concrete civil liability regime in Europe. This provides a unique opportunity to study how such a civil liability regime operates in practice.

The Vigilance Law's civil liability regime provides for the filing of civil proceedings against a company whose failure to comply with its due diligence obligations has caused damage that could otherwise have been avoided.²⁶⁷ This liability is a fault-based liability, which is determined pursuant to three conditions under French law: a breach, damage and causation between the two.²⁶⁸ Unlike the Draft Directive and indeed the UNGPs, it is not relevant whether the company caused, contributed to or was directly linked to the harm.

²⁶⁵ German Act on Corporate Due Diligence in Supply Chains (111).

²⁶⁶ LOI n° 2017-399 du 27 mars 2017 (n110).

²⁶⁷ Le Code de commerce due 14 juillet 2017, Article L225-102 available at <https://www.legifrance.gouv.fr/article_lc/LEGIART1000035181850/> accessed 20 June 2021.

²⁶⁸ Bueno and Bright (n40) pp 818.

Rather, what is relevant is whether the damage could have been avoided had the company complied with its obligation of vigilance.²⁶⁹ This is a major difference compared to the Directive, which operates via a strict liability regime where it is only necessary that the harm occurred, and that the parent company was responsible.

A key issue is whether this civil liability regime includes within its scope the subsidiaries of European TNC parent companies who have caused harm in third countries. There are three types of activities for which parent company TNCs could be held liable: for the activities of the company itself, the activities of the company under its control, and the activities of the subcontractors or suppliers with whom it maintains an established commercial relationship.²⁷⁰ Much like the EU Draft Directive, the Vigilance Law also defines the concept of control, which is defined as ‘exclusive control’.²⁷¹ Like the EU Draft Directive, the Vigilance Law defines control as having ‘decision-making power, in particular over the financial and operational policies of another entity’.²⁷² Yet where the Directive classifies control via ‘ownership or the right to use all or part of the latter, or by rights or contracts or any other means’ the Vigilance Law is much more precise, referring to legal control, de facto control or contractual control.²⁷³

Although the Vigilance Law’s definition of control is narrower than the EU Draft Directive, it still includes within its scope subsidiaries that are indirectly and directly controlled by the parent company. Therefore, if a parent company exercises decision-making power over another entity that causes harm, it shall be liable under the law.²⁷⁴ The difference in the level of precision between the Directive and the Vigilance Law is to be expected, as one is a draft while the other has been scrutinised by the French legislative bodies. However,

²⁶⁹ Ibid.

²⁷⁰ Le code de commerce (n 249) Art 104(1).

²⁷¹ Bueno and Bright (n 40) pp 802; S Brabant, C Michon and E Savourey, ‘The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance’ (2001) 50 *Revue Internationale de la Compliance et de l’Éthique des Affaires* 93.

²⁷² Ibid.

²⁷³ Bueno and Bright (n40).

²⁷⁴ Ibid.

the Vigilance Law is much more restricted in scope in a number of other areas. This extends to its definition of ‘established commercial relationships’, which means a ‘stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last’.²⁷⁵ This differs significantly from the much more broadly defined ‘business relationships’ in the Directive which includes all ‘commercial relationships of an undertaking throughout its value chain’. It is clear that the Vigilance Law’s definition ultimately limits the scope of suppliers and subcontractors that a company must include in its vigilance plan – potentially a compromise aimed at improving legal certainty for businesses. That being said, it is still smaller in scope than the definition of business relationships laid down in the UN Guiding Principles, which includes ‘relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services’.²⁷⁶ Therefore, the definition of control and business relationships outlined in the Draft Directive is more in line with the UN Guiding Principles than the Vigilance Law, and as a consequence will likely result in more parent company-subsidary relationships being included in its scope, therefore enhancing the strength of its civil liability regime over the Vigilance Law.

The limitations of the Vigilance Law extend beyond its company liability scope. The burden of proof remains upon the plaintiff, who is required to prove that the company breached its vigilance obligations.²⁷⁷ Once again, this carries with it all the barriers associated with establishing the burden of proof, from access to evidence to proving causality. Not only will the plaintiff be required to prove that there was a breach, it will also have to prove that this breach or failure to implement actually caused the harm. It is unclear how the French courts would interpret such arguments. No use is made of the UNGPs which could provide clarity on whether the company caused or contributed to the harm,²⁷⁸ and as a result, there is great legal uncertainty in this area.

²⁷⁵ Ibid.

²⁷⁶ United Nations Guiding Principle 13, available at <<https://globalnaps.org/ungp/guiding-principle-13/>> accessed 11 July 2021.

²⁷⁷ Le code de commerce (n 249) Arts. 225-102.

²⁷⁸ Bueno and Bright (n40).

It appears as though the civil liability regime proposed by the Directive will afford greater chance of obtaining a civil remedy for victims due to the fact that it places the burden of proof on the corporate defendant. The Vigilance Law requires the victim to both prove the harm and that the defendant caused the harm. Should the Directive come into force, it seems as though the Vigilance Law will have to undergo certain key changes, including the reversal of the burden of proof. The more restrictive and compromised nature of the Vigilance Law is a reminder of the challenges ahead for the EU Draft Directive. Passing through various legislative bodies and undergoing scrutiny will inevitably result in key changes. It is important that the key provisions of the EU Draft Directive, including the burden of proof provisions in its liability regime, do not change. Overall, however, the EU Draft Directive has a much wider scope and a stronger civil liability regime than the French Vigilance Law.

3.2.2. The Swiss Responsible Business Initiative

While the French Duty of Vigilance Law has been the only law of its kind in Europe to contain a civil liability regime, Switzerland came close to passing a similar law in 2016. Known as the Popular Business Initiative on Responsible Business, the law was proposed in 2016 by Swiss civil society organisations with the hope of it being drafted into the Swiss Constitution.²⁷⁹ The initial proposal reached 100,000 votes and was then voted on by Swiss citizens as to whether to incorporate it into the Swiss Constitution. If adopted, Article 101a of the Swiss Constitution would have been implemented in a federal law, most likely in the Swiss Code of Obligations.²⁸⁰ However, the proposal was ultimately rejected, and a counterproposal adopted by the Parliament entered into force and modified the Code of Obligations.²⁸¹ However, while this counterproposal contains certain due diligence obligations, it does not contain a civil liability provision. Despite the Popular Business Initiative never becoming law, it is certainly beneficial to study the civil liability provisions

²⁷⁹ Swiss Coalition for Corporate Justice Initiative (n218).

²⁸⁰ Business and Human Rights Resource Centre, 'Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote' available at <<https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/>> accessed 17 May 2021.

²⁸¹ Ibid.

of the rejected proposal, which could ultimately provide useful guidance for the future EU Directive.

The Swiss Initiative bears similarities to the Directive and other proposals of its kind in requiring companies to carry out human rights due diligence.²⁸² However, where it differs from the French Vigilance Law and aligns more with the EU Directive and even the UN Draft Treaty is its strong adherence to the UN Guiding Principles. For example, the Swiss initiative has similar provisions to the EU Directive's Article 19(1) and clarifies that carrying out due diligence as a tick-box exercise will not be sufficient to constitute a defence for TNCs, clearly taking into account the concerns previously raised by the OHCHR.²⁸³ It also notes that due diligence obligations could provide an incentive to meaningfully engage with human rights due diligence.²⁸⁴

The liability regime of the Swiss proposal places liability upon TNC parent companies for harms caused by a 'controlled company'.²⁸⁵ However, the definition of control is once again different to the French Vigilance Law and the EU Draft Directive. It is defined as both the control that a parent company may exercise over its subsidiaries and the 'economic control' that a lead company may exercise, for example, over a supplier in its supply chain.²⁸⁶ Economic control is not actually defined, which leads to confusion in its interpretation. This appears to be more restrictive in company scope than the EU Draft Directive as it focuses very much on supply chain relationships. There is, however, an explanatory report for the initiative that suggests some criteria for establishing the existence of economic control over a supplier.²⁸⁷ This idea of additional explanatory guidance could play a useful role in the EU Draft Directive which is at this moment still quite vague in its

²⁸² Swiss Initiative (n218) Article 101a.

²⁸³ UN Human Rights Council, 'Improving accountability' (n 224).

²⁸⁴ Ibid.

²⁸⁵ Bueno and Bright (n40).

²⁸⁶ Ibid Article 101a(2)(c).

²⁸⁷ Bueno and Bright (n 40) pp 805; Swiss Coalition for Corporate Justice 'Explanatory Report on Popular Initiative' <https://initiative-multinationales.ch/wp-content/uploads/2018/05/20170912_Erl%C3%A4uterungen-FR.pdf> accessed 10 June 2021.

provisions. Additional explanatory details such as a published set of EU Due Diligence and Civil Liability Guidelines could prove very useful for Member States, businesses and victims alike. This has already been confirmed to be part of the Directive in Article 14 of the Draft, but it must be ensured that sufficient guidelines exist specific to the civil liability provisions.

One similarity that the Swiss Initiative bears with the EU Draft Directive is its use of a strict liability mechanism. It provides that ‘companies are also liable for damage caused by companies under their control ... They are not liable however if they can prove that they took all due care ... to avoid the damage, or that the damage would have occurred even if all due care had been taken.’²⁸⁸ This due diligence defence places the burden of proof directly upon the corporate defendant – another key similarity to the Draft Directive. The relief of the onus off the victim would once again have eliminated many of the barriers associated with establishing the burden of proof.

The counterproposal that eventually took the place of this original constitutional proposal contains a due diligence obligation for certain large companies in only two areas: conflict minerals and child labour.²⁸⁹ It does not contain any civil liability provision, but a criminal provision in case a company does not report on its due diligence obligations. Despite this disappointing result for advocates and the civil society organisations that supported the initiative, it could bear meaningful guidance for the European Draft Directive as to how domestic due diligence legislation should appear in practice. The rejection of the proposal is ultimately a reminder, however, of the difficulties of getting human rights due diligence legislation passed and implemented on a national level.

²⁸⁸ Ibid; Article 101a(2)(c).

²⁸⁹ Counterproposal recommended by the Swiss Parliament (2018) available at <www.parlament.ch/centres/eparl/curia/2016/20160077/N11%20F.pdf> accessed 30 June 2021.

3.2.3. Comparative analysis conclusions

Having conducted a comparative analysis of the civil liability provisions of the Draft Directive with the UN Second Revised Draft Treaty on Business and Human Right as well as the domestic civil liability regimes of France and Switzerland, it is clear to see that despite its shortcomings, the EU Draft Directive is by far the most ambitious in nature of any legislation of its kind. Its broad definitions, while still requiring refinement to improve legal certainty, will enhance the Directive's inclusion of a wide range of human rights abuses and harmful corporate activity under its scope. If there is one theme that can be taken from this analysis it is the sheer difficulty in getting ambitious due diligence legislation passed on a national level. The few due diligence laws that exist vary wildly in their definitions, scope and purpose, and aligning these laws while maintaining an ambitious nature will be an extremely complicated task that the Commission must overcome. However, with the following set of recommendations, it is hoped that the Commission can forge a clear path forward towards better understanding of due diligence laws and effective implementation harmonised civil liability regimes throughout the European Union.

3.3. Recommendations for the Future Proposal of the European Commission on a Directive on corporate due diligence and accountability

Through identifying the barriers inherent in transnational civil claims and through conducting a comparative analysis of the European Parliament's Draft Directive on Due Diligence with similar initiatives at UN and domestic level, a clearer picture of the strengths and shortcomings of the Draft has been distilled. While the Draft Directive contains broad and bold decisions on company scope, the burden of proof and the easing of time limitations, the rejection of its Brussels I and Rome II amendments aimed at easing private international law barriers mean that the Directive will ultimately not allow claimants to 'pierce the corporate veil'. As the European Commission is still finalising an official legislative proposal for a Due Diligence Directive, this thesis shall put forward five concrete recommendations to be taken into account by the Commission. They call for the addition of legal aid provisions for foreign human rights-affected claimants, the introduction of collective redress

mechanisms into the Directive, the restoration of a *forum necessitatis* provision in the Brussels I Regulation, the restoration of a new jurisdictional rule in Brussels I for business human rights claims, and the reworking of Article 7 Rome II to expand the environmental damage exception to cover business and human rights claims.

3.3.1. The Addition of Legal Aid Provisions for Foreign Claimants

The omission of provisions in the Directive aimed at lowering financial barriers for claimants should be rectified. It is therefore suggested that a provision is introduced that will allow for Member States to provide legal aid to foreign claimants affected by business-related human rights violations. The Directive mentions international legal instruments that guarantee legal aid to claimants throughout the preamble, such as Article 13 of the Convention on the Rights of Persons with Disabilities and Article 47 of the Fundamental Charter. The European Commission must take this further in its future proposal by incorporating an additional provision in Article 19 that obliges Member States to set aside additional funding for foreign plaintiffs in claims that involve human rights violations allegedly committed by businesses. It is suggested that this is inserted as a new additional provision Article 19(5):

‘Member States shall ensure legal aid is provided to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice for victims of business-related adverse impacts.’

The restriction of legal aid to foreign claimants of business-related human rights violations only is a measure that will both protect vulnerable claimants and prevent forum shopping for wealthy foreign claimants pursuing claims unrelated to business-related human rights harms in the European Union.

3.3.2. *The Introduction of Collective Redress Mechanisms into the Directive*

Another key procedural obstacle that has prevented many victims from having their day in court is the lack of collective redress mechanisms that are available in the European Union. Despite collective redress featuring often in scholarship as a barrier to justice, it has received scarce attention from the Directive. The Commission should consider adding such a provision to the civil liability section of its future proposal that would allow claims to be heard class-action style as is currently the case in the United States.²⁹⁰ The new provision could take the form of an additional Article 19(6):

‘Member States shall ensure that their civil liability regime provides for collective redress mechanisms for the protection of the collective interests of victims of business-related adverse impacts, as well as ensuring that qualified entities that represent the collective interest of victims can bring representative actions for the purpose of achieving redress’.

This provision would provide a much-needed harmonisation of collective redress mechanisms in the EU and would provide for uniformity and legal certainty as well as enhanced access to justice for victims of business-related human rights abuses. In doing so, multiple claimants and entire communities could be represented in EU Member State courts. It also allows for civil society organisations with a demonstrable interest in the case to bring claims on behalf of victims. Such a measure could greatly alleviate the financial and organisational burdens that victims face in filing a claim.

3.3.3. *The Restoration of a Forum Necessitatis Provision in the Brussels I Regulation*

The remainder of the recommendations shall focus on what has been identified as a key shortcoming in the Draft Directive – the ultimate exclusion of provisions aimed at lowering barriers presented by international private law. The first recommendation shall be the restoration of a *forum necessitatis* provision to be added to the Brussels I Recast

²⁹⁰ Class Action Fairness Act (2005) 28 USC 1332(d) (CAFA)

Regulation in the form of the previously-rejected Article 8(5). This shall take the exact form as recommended by the Draft Directive amendments section.

Concerns over legislative strong-arming by the European Union by some are diluted by the fact that the *forum necessitatis* is not an alien concept in the EU. The EU's FRA²⁹¹ and the European Parliament²⁹² have conformed with calls in scholarship²⁹³ to implement a *forum necessitatis* provision in the Brussels I Regulation for business and human rights claims. Not only would such a provision improve the outlook for victims of business-related human rights harm, but would also provide much legal certainty rather than relying on the uneven and scattershot rules on residual jurisdiction of individual Member States.

With no allowance for *forum necessitatis* present in the European Union, Member State courts will inevitably continue to turn away claimants and administer denials of justice. This comes in direct contravention of the obligations European countries under Article 6 of the European Convention of Human Rights. Of course, there will inevitably be concerns that since this is not a provision unique to business and human rights claims it could result in the EU hearing claims from all over the world on a whole series of matters distinct from corporate human rights violations. It is of course entirely possible that the *forum necessitatis* provision can be designed to apply solely to business and human rights claims. Yet even if the provision remained broadly applicable, it would still be most relevant to claims involving third State claimants suing foreign subsidiaries or business partners of EU companies when they are unable to obtain justice in their host country. Therefore, the upcoming formal legislative proposal on a due diligence directive is the perfect opportunity for the Commission to simultaneously amend Brussels I.

²⁹¹ FRA 'Access to Remedy' Report (2020) (n28).

²⁹² Directorate General for Internal Policies, 'The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)' Policy Department for Citizen's Rights and Constitutional Affairs'.

²⁹³ See Chilenye Nwapi, 'Jurisdiction by Necessity (n 226).

3.3.3. The Restoration of a New Jurisdictional Rule in Brussels I for Business Human Rights Claims

The second recommendation aimed at improving the private international law provisions of the Directive is the reintroduction of the jurisdictional rule specific to business human rights claims. This would be worded in an identical manner to Article 26a of the Directive. This rule would allow the grouping together of subsidiary and parent company in cases where the claims bear so much similarity that it is in the best interests of the court to rule on them jointly. This proposal would ensure far greater access to justice and remedies for victims of corporate human rights abuses in third countries and would simultaneously achieve harmonisation of jurisdiction in Europe. Once again it would prevent residual jurisdiction of the individual Member State from taking over the claim which would create legal uncertainty for all parties involved. There is a real need for harmonisation at EU level of the jurisdictional criteria on these aspects, which would be best achieved through a modification of the Brussels I Recast Regulation with Article 26a.

3.3.4. The Reworking of Article 7 Rome II to expand the Environmental Damage Exception to Cover Business and Human Rights Claims

The final recommendation concerns the rejected Article 6a amendment to Rome II. The most straightforward option would be to recommend that Article 6a be reinstated and the victim to be given four options of applicable law to choose from. However, a choice of law from potentially four different jurisdictions would be incredibly difficult for both businesses attempting to stay aware of all the laws with which they are liable to and lawyers attempting to advise their clients on multiple jurisdictions which requires very complicated analysis in international private law. This would potentially lead to legal uncertainty and very uneven judgments throughout the EU. Instead, an alternative recommendation is put forward. This involves the reworking of Article 7 Rome II to include adverse business-related human rights

impacts as well as environmental damage.²⁹⁴ This would not require the creation of a new Article 6a Rome II from scratch, but rather a slight reworking of Article 7 to extend its choice of law provisions beyond cases of environmental damage to accompany instances of human rights abuses by corporations.

Critics may argue that environmental damage constitutes a separate matter to a human rights violation. However, environmental tort and climate change litigation is increasingly spilling over into the realm of business and human rights. There are clear developments towards the recognition of a human right to a healthy or “satisfactory” environment. This is already the case within the systems of the American Convention on Human Rights and the African Charter on Human and People’s Rights.²⁹⁵ In fact, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably).²⁹⁶ It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) “business-related”. As advocated by Eduardo Álvarez-Armas at Brunel University, ‘We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly’.²⁹⁷ It is therefore suggested that the newly proposed Article 6a amendment of the Draft Directive be discarded and an expansion of the Article 7 Rome II adopted instead.

This thesis shall develop this idea and put forward a new recommendation for an Article 7 that incorporates business human rights harms with environmental damage as a justification for choosing the law of the forum state, to be worded as follows:

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage, *as well as adverse impacts on human rights by businesses*, shall be the law determined

²⁹⁴ Jan von Hein, ‘Álvarez-Armas on potential human rights-related amendments to the Rome II Regulation (II): The proposed Art 6a; Art 7 is dead, long live Article 7?’ (Conflict of Laws, 27 January 2021) <<https://conflictoflaws.net/2021/alvarez-arms-on-potential-human-rights-related-amendments-to-the-rome-ii-regulation-ii-the-proposed-art-6a-art-7-is-dead-long-live-article-7/>> accessed 10 July 2021.

²⁹⁵ Article 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights; African Charter on Human and People’s Rights Article 24.

²⁹⁶ Álvarez Armas, ‘Potential human rights-related amendments to the Rome II Regulation’ (n 272).

²⁹⁷ Ibid.

pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Given that environmental damage is defined, so to shall ‘adverse impacts on human rights by businesses’. This shall build upon the definition of ‘potential or adverse impact on human rights’ definition contained in Article 3(6) of the Directive:

‘Any adverse impact resulting from business activity that may impair the full enjoyment of human rights by individuals or groups of individuals.’

This slight reworking of Article 7 would allow the extension of Rome II’s choice of law provisions beyond cases of environmental damage to accompany instances of human rights abuses by corporations – ultimately lowering barriers inherent in international private law for victims.

3.4. Conclusions

The 10th Anniversary of the United Nations Guiding Principles on Business and Human Rights has seen enormous progress towards the first ever region-wide due diligence regime. For the first time, the European Union shall place legally-binding obligations upon Member States to protect against potential and actual adverse impacts on human rights, the environment and good governance by business activities, effectively operationalising the United Nations Guiding Principles into EU law.

However, the construction of a due diligence law from scratch, and without concrete precedent, is an extremely daunting prospect. There is a high-stakes balancing act to be performed in order to reconcile the endlessly conflicting interests of business, politics and civil society in a single legislative proposal. On one hand, the European Commission must ensure the effective enforcement of due diligence obligations upon both Member States and businesses. On the other hand, it must avoid the temptation to over-legislate. If businesses become over-regulated, the idea of directly investing in third countries becomes much less appealing, and given that foreign direct investment plays an important role in developing countries, the withdrawal of TNCs from those territories could damage both the economic and human rights situation of the people living there.

Through conducting a comparative analysis between the Directive and the liability regimes of other due diligence initiatives, this thesis has reached the conclusion that the EU Directive in its current form is by far the most wide-reaching and ambitious legislative proposal yet for human rights due diligence. Its provisions in Article 19 alone, such as the reversal of the burden of proof and the extension of limitation periods will go a long way to lowering barriers to justice for victims. This is already more ambitious than the French Vigilance Law, which places the onus of proof for harm and causation upon the claimant, as well as the Swiss Popular Business Initiative, which has a narrower company scope.

Yet the European Parliament's Draft Directive is far from perfect. Stripped of its proposed amendments to Brussels I and Rome II, the Directive in its current form will do little to ease hurdles presented by international private law and claimants pursuing justice

against subsidiaries of European TNCs will undoubtedly continue to struggle to establish jurisdiction in EU Member States while seeing the chances of their case succeeding diminish as a result of the application of host country law by EU courts. However, time is still left. The Commission is still in the process of finalising an official legislative proposal, meaning that the Draft Directive is not set in stone. More can still be done. This is the opportunity of a generation for the European Union to take a leading role in the protection of human rights. With the United States turning victims away from its courts, the European Union remains the largest hub of corporations worldwide that is willing to hear claims. More must be done.

While the Draft Directive is not the ultimate solution for all the various hurdles victims may face in transnational human rights or environmental litigation, it is by far the most ambitious legally-binding document that exists and a milestone in human rights law. Should the Commission take this ambition further and publish a legislative initiative with Article 19 fully intact and complete with additional provisions on legal aid and collective redress as well as the three key amendments to Brussels I and Rome II mentioned, the European Union will find itself as the global leader in human rights and access to justice, culminating in a milestone fulfilment of John Ruggie's often-forgotten Third Pillar.

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