Transnational Tort Law

Cees van Dam

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Abstract and Keywords

This chapter deals with harm caused and suffered across national borders, such as nuclear damage, road and air traffic accidents, defective products, and human rights violations by transnational corporations. First, it explores how supranational, international, and national tort law may respond to such harmful events. This also identifies gaps, such as the lack of international regulation of company behavior when it comes to protecting human rights. Subsequently, this chapter analyzes how soft law instruments are aimed at filling this void and how soft law is translated into binding regional and domestic regulation. This may in turn tort law standards to protect human rights. Finally, this chapter looks in more detail into various aspects of transnational tort law, from the perspective of the hurdles faced by victims and with references to key cases.

Keywords: business and human rights, soft law, nuclear damage, road traffic accidents, defective products, supranational tort law, international tort law, parent company liability, private international law, fact-finding.

I. Setting the Scene

A. Introduction

HARM is increasingly caused and suffered across national borders. Tort law is therefore more and more gaining transnational dimensions.[1] As from the second part of the twentieth century, this has become apparent in areas such as liability for nuclear damage, liability for road and air traffic accidents, and liability for internationally traded defective products with components from various parts of the world.

Since the beginning of this century, transnational tort law is increasingly linked to the involvement of transnational companies (TNCs) in human rights violations abroad, particularly in developing countries. Examples are poor labor conditions, including child and slave labor, cooperation or collusion with violent or corrupt governments, and grand-scale environmental pollution.

Public international law protects the freedom of trade but does not regulate the way companies use this freedom. International human rights law imposes obligations on states, but it is disputed whether it also does so on companies. This means that there are no binding international legal instruments that impose duties on companies not to infringe human rights. Remedies for human rights infringements by companies have to be established on the basis of domestic tort law.

This international legal void has triggered the development of nonbinding soft law instruments,[2] particularly the UN Guiding Principles (section 4). These instruments are implemented and enforced in various nonlegal ways. They are also the basis for a new wave of regional and domestic legislation on reporting and due diligence obligations (nr. 5). (p. 556) Moreover, international soft law standards have the potential to trickle down in the courts when setting the required standard of care in domestic tort law. These developments have created a dynamic transnational and polycentric process of standard setting for TNCs and for the global protection of human rights.

This chapter will first explore the existing supranational and international tort law framework as well as the lack of international regulation of company behavior when it comes to protecting human rights (nr. 2–3). Subsequently, the chapter will analyze how soft law instruments are aiming to fill this void and how this development is followed up in regional and domestic regulation, which in turn may influence tort law standards in order to protect human rights (nr. 4–6). Finally, this chapter will look in more detail into various aspects of transnational tort law, from the perspective of the hurdles faced by victims and with references to key cases (nr. 7–11).

It is not self-evident to use the terminology of “tort” rather than “delict” or “extracontractual liability.” Although the word “tort” derives from the French word for wrong,[3] in a legal sense “tort” is a typical common law term that does not have a true parallel in continental legal systems. That said, most English language comparative law books on extracontractual liability currently use the terminology “tort,” and this now has become common parlance.[4]

B. Regional and Global Tort Law

Transnational tort law plays a role both at a regional and a global level. At the regional level, the European Union and the European Convention on Human Rights are good examples.

EU tort law can be found in EU Treaty provisions, in certain Regulations and Directives, and in the case law of the Court of Justice of the European Union in Luxembourg. Prominent examples of EU tort law include the *Francovich* case law concerning liability of member states for breach of EU law and the Product Liability Directive on liability for defective products. The latter has been an important example for other jurisdictions all over the world to reform their product liability regimes.[5]

Generally, EU law regulates liability questions and leaves the provision of an effective remedy to domestic law. An exception is the Antitrust Damages Directive, which aims to create and harmonize remedies for breach of EU competition law. This may influence the development of remedies at the domestic level.[6]

The European Court of Human Rights applies the European Convention of Human Rights, and its case law is of growing importance for domestic tort law. The geographic scope is broader than that of the European Union and encompasses forty-seven states. The Convention protects fundamental rights, including the right to life, safety, health, privacy, family life, and property. It impacts various areas of domestic tort law, and it also has a (p. 557) considerable impact on the case law and legislation of the European Union, not only with respect to liability questions but also as regards providing an effective remedy for the infringement of fundamental rights.[7]

To a considerable extent, supranational tort law is based on principles common to the member states or the contracting parties.[8] Domestic tort law systems, diverse as they may be in their structure and content, both influence and are influenced by supranational law and, due to increasing international information exchange at academic, legislative and judicial levels, they are also influenced by other national systems. These vertical and horizontal lines of influence are typical for the state of affairs in various areas of tort law and illustrative for the emergence of a multilayered international order, also in the area of tort law.[9]

Just like regional supranational tort law, international (global) tort law has developed in a limited and piecemeal way, notably in the areas of nuclear accidents and international transport.

Treaties regarding liability for damage caused by nuclear accidents date from the early 1960s, shortly after the first nuclear power stations began to operate.[10] Liability is channeled to the operator of the nuclear installation, is absolute, and limited to SDR 300 million.[11] After the Chernobyl disaster (1986), the contracting parties created a fund providing additional financial means for compensation.[12]

International liability of air carriers is mainly governed by the Montreal Convention 1999.[13] Remedies for breach of the Convention are to be decided on the basis of the applicable domestic law. However, the differences between and deficiencies of these domestic laws are exposed in aircraft accidents with passengers from various nationalities on board the same aircraft. After the crash of a Germanwings flight in the French Alps in 2015 caused by a suicide pilot, bereaved parents of a group of school children on-board the aircraft did not have a substantive claim for damages under German tort law. This triggered the amendment of the German Civil Code, acknowledging the right of next of kin to claim damages for bereavement (sec. 844(3) BGB).[14]

Other areas of international tort law concern the liability of a sea carrier toward passengers,[15] and third parties,[16] as well as the liability of oil-carrying ships for oil pollution at

(p. 558) sea.[17] These substantive conventions are complemented by conventions regarding private international law topics in the area of tort law.[18]

C. Free Trade and the Lack of International Tort Obligations

The freedom of trade is facilitated and enforced by international law: since 1948 by the General Agreement on Tariffs and Trade, and since 1995, by the World Trade Organisation (WTO).[19] The WTO's aim is to liberalize international trade, removing trade barriers and adjudicate trade disputes. This process is driven by the most powerful countries and the most powerful corporate lobbies with little or no democratic control.[20]

Where the freedom of trade is strongly regulated and enforced, the way companies trade is hardly subject to international binding rules.[21] Conventions in the area of international tort law only cover a fraction of transnational corporate behavior (nr. 2). There is a considerable range of international treaties protecting human rights but the current view is that they do not impose obligations on companies.[22] Human rights obligations only apply to corporations if they serve a public function such as a privatized state-owned company.[23]

In 2003, an effort was made at the United Nations to introduce human rights obligations for companies. However, these so-called Norms regarding multinational companies' responsibility with regard to human rights appeared to be very controversial. One of the reasons was that the Norms not only obliged companies to respect human rights but also to fulfill them.[24]

The lack of a binding international legal framework means that there are considerable legal voids, particularly in the area of human rights protection. This means that to a (p. 559) considerable extent it is for domestic tort law to provide human rights protection. However, where the enforcement of rights through the tort law system is already limited in Western countries, in many developing countries it is compounded by a number of factors. First, developing countries are often strongly dependent on TNCs for their economy and, in a race to the bottom, they compete for their foreign investment with business-friendly rules as regards health and safety, environment, labor, and tax.[25] Second, many governments are economically considerably less powerful than TNCs. And third, the hands of developing countries' regulators are usually tied by investment treaties, requiring them to provide a range of privileges and guarantees to investing corporations, including freezing or stabilization clauses stipulating that existing legislation must not be changed to the detriment of the corporation until the end of the investment period. This may be decades, sometimes up to half a century. This prevents the host country from upgrading its legislation in the areas of labor law, environmental law, and human rights law. Conflicts between the host government and the corporation remain confidential as they are subject to arbitration. Arbitration panels barely take human rights into account when adjudicating conflicts.[26]

These factors limit public and private enforcement of domestic regulations, including tort law. The result is that costs are shifted to the environment, to people living in the company's vicinity, and employees, including children who are deprived of their youth and their right to education. Although international trade may also have great benefits for to the poor, the legal balance between free trade and human rights is fundamentally flawed.

Companies do not necessarily use this void for their own benefit. Indeed, for various reasons many businesses are committed "to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."[27] However, until recently it was very much up for discussion what it meant to respect the principles of relevant international instruments. Also businesses were looking for guidance, provided it would not lead to binding obligations.

II. Developing Transnational Tort Standards

A. Filling Legal Void by Soft Law and the Impact on Tort Law

The failure of the UN Norms (nr. 3) made clear that there was insufficient support for binding rules for TNCs involved in human rights abuses abroad. To break the deadlock, Kofi (p. 560) Annan, the then UN Secretary-General, appointed John Ruggie as his Special Representative on human rights and transnational corporations and other business enterprises. After broad consultations and research, Ruggie presented the "Protect, Respect and Remedy" Framework in 2008, and provided Guidelines to operationalize it. The UN Human Rights Council endorsed the UN Guiding Principles (UNGPs) in 2011.[28]

The UNGPs consist of three pillars: the state's duty to protect human rights, the business's responsibility to respect human rights, and the responsibility of states and businesses to provide adequate remedies in case of adverse human rights impacts. Where human rights are interpreted in the broadest sense possible, the UNGPs are currently considered to be the global standard for businesses when it comes to respecting human rights. They capture both aspects of tort law: the standard of care and the provision of remedies, but in a legally nonbinding way.

The second pillar, the corporate responsibility to respect human rights, builds upon other soft law instruments, such as the OECD Guidelines for Multinational Enterprises (first issued in 1976)[29] and the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977).[30] As regards the former, National Contact Points deal with complaints that corporations do not comply with the Guidelines: they can provide mediation and a declaration.[31]

Both the OECD Guidelines and the UNGPs flesh out the companies' responsibility to conduct human rights due diligence. In line with modern views on governance and regulation, the emphasis of this responsibility is on process rather than substance and outcome. Following the endorsement of the UNGPs, companies increasingly implement due dili-

gence processes with respect to their subsidiaries, suppliers, customers, governments, and joint venture partners. For many companies this process is closely linked to traditional business instruments to controlling risks and protecting reputation, as well as to forms of self-regulation and codes of conduct. An important difference is that the perspective of the UNGP due diligence process is to protect the position of rights holders, rather than that of the company.

Although soft law instruments are not legally binding, they bind in many nonlegal ways. In a number of countries, complying with the UNGPs is a condition to receive government favors, such as export credit guarantees, participating in trade missions, and gaining contracts for services or goods under procurement procedures. By linking procurement with human rights, governments effectively "buy" social justice and human rights protection and help enlarge the market for sustainable and fair goods and services.[32]

(p. 561) Moreover, financial institutions are increasingly requiring clients (both borrowers and investees) to comply with the UNGPs or comparable sets of rules to respect human rights. The same goes for lead companies in global value chains imposing their human rights and sustainability policies and practices on their suppliers.[33] Respect for human rights is also a condition for funding inasmuch as they are included in the Performance Standards of the International Finance Corporation, which is part of the World Bank.

Hence, even though the UNGPs are not legally binding, they have a considerable impact on companies. Even though there is still much room for improvement, they increasingly have due diligence procedures in place to detect their possible negative impacts on human rights and to report about their policies and practices in this regard.[34]

Where the UNGPs were drafted in cooperation with all major stakeholders (businesses, civil society organizations (CSOs), and governments), their interpretation and operationalization requires similar forms of cooperation and partnerships. An example is the Dutch process of multistakeholder agreements on International Responsible Business Conduct to implement the UNGPs.[35] This way, a new way of norm-setting and -enforcement can be developed in an area that is to a great extent an unregulated or low regulated part of tort law.

B. Turning International Soft Law into Domestic Tort Law

Soft law is generally considered to be not binding, but the reality is more complex. Not only are there various nonlegal ways in which soft law rules are enforced (nr. 4), elements of soft law instruments are also turned into binding legislation, and the internationally soft standards of conduct may start to trickle down into the decisions of local courts, applying the open norm of the standard of care in domestic tort law. Viewed in this light, soft law is indeed an intermediate stage on the path leading to binding law.[36]

Notable legislative initiatives include the EU Timber Regulation,[37] the EU Directive on Non-Financial Reporting 2014,[38] the EU Regulation on conflict minerals 2017,[39] the Unit-

ed Kingdom Modern Slavery Act 2015,[40] and the French Act on the duty of vigilance 2017.[41]

(p. 562) In the United States, legislative initiatives include the Dodd-Frank Act (sec. 1502),[42] the Business Supply Chain Transparency on Trafficking and Slavery Act,[43] and the California Transparency in Supply Chains Act.[44]

Several other initiatives are pending in the legislative process (popular initiative on duty of care for Swiss-based multinational corporations;[45] Private Members Bill on Child Labour due diligence in Dutch Parliament), or have stranded (green card procedure national parliaments[46]). Mention can also be made of the process to negotiate a Treaty on Business and Human Rights under the auspices of the United Nations.[47]

So far, the legislative emphasis is on reporting and transparency obligations. The idea is that such obligations may stimulate the process of due diligence and the learning process as to how to conduct this process. In the future, this may lead to more specific regulation in the area of due diligence. An obstacle for developing further obligations is that reliability and compatibility of company reports is unclear because few companies apply recognized audit standards.[48] For example, only a limited number of companies report according to the rules of the Global Reporting Initiative.[49]

This legislative drive usually faces strong opposition from companies and particularly its representing business organizations. However, also here the picture is more gray than black and white, as a growing number of companies that take human rights and sustainability more seriously, increasingly see fair competition distorted because of companies that do not respect these fundamental values. Therefore, legislation sometimes also gains support from businesses to eliminate unfair competition and create a level playing field.

These developments all have a potential bearing on the standard of care in domestic tort law. When applying the standard of care in domestic tort law, courts usually need to assess what a reasonable acting (legal) person would do or, in slightly different wording, what a (legal) person can be required to do from a societal point of view. It goes without saying that this societal perspective is also shaped by the UNGPs and other soft law instruments, as well as by the consequential implementing legislation.

Considering the preceding, one may distinguish four phases in legislative activity in the area of transnational tort law regarding human rights and sustainability. The first phase roughly started in the 1990s, comprising voluntary corporate social responsibility (CSR), voluntary reporting, and the development of principles of good governance. From 2005, legislative activity started with a focus on reporting on nonfinancial aspects, which (p. 563) coincided with the introduction of the UNGPs and an update of the OECD Guidelines. From 2015, the focus is beginning to move to include regulating mandatory due diligence, partly with fines or (indirectly) damages, potentially in civil law countries. In the course of the next decade, we may very well see a further shift to mandatory human rights obligations toward victims, partly sanctioned by fines and partly by damages.

C. Domestic Tort Law as Human Rights Protector

As public international law does not impose human rights obligations on companies (nr. 3), it is mainly down to domestic tort law to protect human rights against corporate conduct. This is not self-evident, as not everyone may consider tort law as a system protecting (human) rights. However, this view is flawed in a number of ways.

First, tort law is an important instrument to enforce human rights domestically against public bodies. Under the European Convention on Human Rights, tort law provides an important way to an effective remedy (art. 13).

Second, whereas tort law is usually framed in terms like repairing harm or compensating damage, the underlying issue is often not (only) the damage in terms of monetary loss but the encroachment of more fundamental values that can be encapsulated in terms of rights. Long-standing examples are the common law trespass torts that are actionable per se. This means that an action also lies if no damage is suffered: the underlying value that is negatively impacted by people being touched (battery) or threatened (assault) by another person is the right to protection of the personal sphere, also when this does not lead to tangible or legally recognized damage.[50]

Third, also in cases where someone does suffer damage, this monetary loss is often the consequence of a fundamental right being infringed, such as the right to life, to health, or to physical integrity. This is clearly illustrated in the German Civil Code (in force since 1900) that in Section 823(1) protects a number of rights, such as the right to life, to physical integrity, to health, to personal liberty, and to property. These rights are also protected by international human rights treaties. Hence, when it comes to personal injury and property loss, tort law does not so much protect against damage as protect against the consequences of the infringement of a fundamental right. French tort law, with its emphasis on strict liability rules that apply to cases of death and personal injury, is not explicitly rights-based, but with its extensive application of strict liability rules, it is implicitly so, and de facto perhaps even more so than German tort law.[51]

Fourth, maintaining and developing domestic tort law is one of the ways in which a state discharges its public international duty to protect its citizens' human rights, also in horizontal relationships, and to provide effective remedies in case these rights are infringed. This may have been more apparent in areas like the protection of privacy and the freedom of speech, but it is equally the case in the areas of death and personal injury.[52]

(p. 564) Fifth, the UNGPs are assuming that corporations can negatively impact virtually all internationally recognized human rights—not only economic, political, and labor rights but also civil rights like the rights to life, freedom, safety, physical and mental health, privacy, protection from discrimination on grounds like disability, gender, religion, race, age or sexual orientation, and the freedoms of thought, speech, expression, religion, and movement.[53] The corporate responsibility to respect these human rights in the second pillar of the UNGPs is the recognition of a fundamental principle that may not be enforceable under public international law but may have a considerable influence on how

transnational tort cases are framed, conducted, and decided under domestic tort law. Indeed, many claims against TNCs for involvement in human rights abuses by their business partners in other, particularly developing countries, are based on domestic tort law (nr. 11).

Tort law is not only an instrument to hold governments, companies, and individuals to account by imposing duties of care or strict duties on them not to infringe rights, it also aims to provide an effective remedy when a right has been infringed. Where the second pillar of the UNGPs is influential in shaping the company's duties through the development of human rights due diligence, the third pillar may become influential in the responsibility of governments and companies to provide an effective remedy. In the end, human rights are only properly protected if infringed rights are effectively remedied. And although litigation of human rights victims against TNCs has considerably increased over the past decades, the results so far indicate that it only very rarely serves its function to a provide a remedy for victims (nr. 11).

The UNGPs third pillar may therefore provide a middle way to ensure remedies for victims for the consequences of adverse human rights impacts. Not only do the UNGPs require businesses to actively conduct due diligence in order to detect these adverse impacts but also to provide a remedy if a company has caused or contributed to this impact. Whereas in tort law, companies may sit back until claims are being filed and then vigorously defend their position without taking into account the interests of the claimants, under the third pillar they are required to provide remedies in a proactive way: the company should not wait until the victims asked for one.

An example is the aftermath of the Rana Plaza disaster in Bangladesh in 2013 where over 1,100 people were killed when a factory producing garments for a number of brands collapsed. In order to pay compensation, the Rana Plaza Donors Trust Fund was established under the Rana Plaza Arrangement. Its over $30 million is financed by a combination of funds, including contributions from buyers and other private donors. The Trust Fund will be used to pay victims and their families. After a claim process under the terms of the Arrangement, independent commissioners recommend the payable amounts. This process ensures a swift remedy for victims.[54]

Next to monetary compensation, a tort remedy may also consist of an injunction. In the framework of the Rana Plaza disaster, one may think of the necessity to improve factory safety. In practice, tort law is generally not an effective road to such a remedy. A more effective instrument was included in the Accord on Fire and Building Safety. This is an independent and legally binding agreement between brands and trade unions to reinforce safety **(p. 565)** and welfare of Bangladeshi garment-factory workers. It aims to prevent the recurrence of similar incidents. The Accord includes a system for dispute resolution, including arbitration. In this framework, trade unions can compel TNCs to comply with remedying life-threatening hazards at its factories.[55]

All in all, it can be submitted that tort law is, at least in theory, an appropriate instrument to protect human rights against infringements by TNCs but that in practice its effectiveness is limited. Soft law instruments like the UNGPs may provide a more effective instrument to prevent human rights from being infringed and to remedy infringed human rights.

III. Transnational Tort Litigation

A. Introduction

Transnational tort law includes a variety of claims (nr. 1) and increasingly concerns claims of victims in developing countries alleging that their human rights have been directly or indirectly infringed by TNCs based in Western countries. The substance of many of these claims is that the parent company did not do enough to prevent its subsidiary from causing human rights violations.[56] Claims for harm caused in the supply chain are usually not claims by victims but by CSO's or consumers alleging that the company has provided misleading information about its practices as regards its supply chain.[57] In Europe, such actions are possible under the EU Unfair Commercial Practices Directive, banning a company from issuing false information about its products or services if this deceives the average consumer and is likely to cause him to buy a product or service, which he would not have done otherwise.[58]

Obviously, victims could choose to bring a claim for infringing human rights by a TNC in a local court against the local subsidiary or supplier that is the direct cause of the harm. However, for a number of reasons, they may prefer to bring the claim against the parent company in a Western country or the lead company in the global value chain. Such a strategy exposes the heart of the company to its involvement in the human rights violations and helps affecting the company's reputation by the media coverage. It also means that victims have a solvent debtor when the entities that directly inflicted the harm may not be able to pay, particularly in the case of grand-scale human rights violations.

(p. 566) Moreover, litigating in local courts may lead to uncertainty, for example, if the judiciary is susceptible to corruption. Western courts usually also have a better legal infrastructure for cases with many victims, and they may provide better opportunities for legal aid.[59] That said, only very few law firms take on such cases because they are complex, risky, hard-fought by the TNCs, resource-intensive, of uncertain duration and outcome, and have significant cash-flow implications for the lawyers, who also tend to be at the less wealthy end of the legal profession. Corporate lawyers, by contrast, are funded on an ongoing basis irrespective of outcome.[60]

Apart from problems every personal injury victim faces, victims in developing countries holding a Western TNC to account face a number of factual and legal problems that are more specific to transnational law claims. One may particularly think of problems of fact-

finding (nr. 8), parent-subsidiary relationship (nr. 9), the competent forum (nr. 10), and the law applicable to the substantive liability question (nr. 11).

B. Fact-finding and Funding

Perhaps the most fundamental problem for transnational tort litigation is fact-finding, particularly when it comes to litigation by victims of human rights violations against transnational corporations.

First, the harm is often suffered in a country with a weak infrastructure, and it may be problematic to get to the area. Collecting and investigating the facts may also be troubled by security issues, as violence may be a common feature of daily life or the country's central or local government may ban foreigners.

Second, communication issues may occur when the victims do not have modern means of communication like telephone and internet or are not used to reporting in writing. Also, communication and reporting cultures may differ from what is common in Western countries. And victims may not feel free to speak out, either because of fear of the corporation or because of fear of the government.

For these reasons, collecting evidence is often extremely time-consuming and costly, particularly when there are many victims. For example, in the English *Trafigura* case the claimants' lawyers recruited and trained dozens of staff to interview almost 30,000 potential victims about their experiences, health, and damage, and to properly report on the results.[61]

These problems contribute to the high burden to prepare claims against TNCs, costs that need to be prefinanced without any certainty as to whether enough evidence will be collected to start litigation against the company and in the end be successful. Sometimes CSOs like Global Witness are prepared to finance fact-finding missions. In Anglo-American systems law firms may be able to prefinance fact-finding costs in the hope that they will be able to recoup them in a settlement or after a court decision. In other cases investors and insurers are taking the litigation risks, expecting a share of the damages if the claims are successful. (p. 567) This makes litigation against TNCs for which there is hardly financial limits look like a fight between David and Goliath, and the outcome is often different than in that historic fight.

C. Parent-Subsidiary Issues

Many transnational tort cases for violation of human rights by TNCs are filed against parent companies headquartered in Western countries, usually not because they actively caused harm but because they were involved in the harm caused by a subsidiary. In practice, it is usually difficult to find evidence supporting such claims, as it requires information held by the companies involved. This is even more problematic in civil law jurisdictions, as they lack effective disclosure or discovery rules (nr. 10). More generally, the

question is under which circumstances a parent company may be held liable for harm caused by its subsidiary.

Corporations are nowadays multiheaded organizations, comprising many entities that are linked in a usually very complex way. Despite this complexity, many will regard the corporation as a unity. Corporations also consider themselves as a unity, particularly for marketing and branding reasons. When it comes to legal accountability, however, corporations argue that they consist of independent legal entities. Therefore, they argue, a parent company cannot be held liable for its subsidiaries' conduct.[62]

This tort law concept of a group consisting of independent legal entities contrasts with areas such as financial reporting and tax law. The tax authorities are allowed to look through the group and make the parent pay for its subsidiary's liabilities. In financial reporting, companies are obliged to include other legal entities that they own for more than 50 percent in their consolidated accounts. This means that debts of subsidiaries directly affect the annual account of the group. Hence, in tax law and in financial reporting, the parent company is strictly liable for the subsidiary's debts. In EU competition law, the fact that the parent holds a majority of shares in a subsidiary is a strong indication that it has control over the subsidiary's policies and operations.[63] This approach to parent company liability may trickle down into private damages claims for breach of competition law through the EU Antitrust Damages Directive.[64]

The UNGPs and the OECD Guidelines entirely ignore the principle of independent legal entities. They rather assume that a parent company has control over its subsidiaries. This assumption also applies to codes of conduct that are usually applied to all group entities and internally enforced. Generally, it will be hard for a parent to argue that it complies with the UNGPs responsibility to respect human rights in its group but in a tort case argue that it does not have control over its subsidiaries. Hence, the negation of the independent entity theory in soft law instruments may lead to an erosion of the credibility of the independent entity theory in tort law.

(p. 568) Currently, there are two ways to hold a parent company liable for a subsidiary's conduct, and both are subject to high thresholds: piercing the corporate veil (basically when the subsidiary's conduct can be identified with that of the parent) and the breach of a duty of care by the parent company (negligent conduct vis-à-vis third parties).[65]

Many countries recognize the possibility of "piercing the corporate veil," but they require abuse of legal entities leading to fraud, which is only accepted in very serious cases.[66] One of the reasons for this reluctance may be that these cases usually concern pure economic loss, and courts may prefer a stricter approach in cases of serious human rights violations.[67]

Another basis for claims against parent companies is the breach of a duty of care owed to individuals affected by its subsidiary's operations, such as employees and local communities.[68] In many continental European systems, a duty of the parent vis-à-vis its subsidiary requires that the parent has at least a supermajority stake in the subsidiary's shares (two-

thirds, or 75 percent), and that it directs, controls, or coordinates the activities of the subsidiary. Often, additional requirements have to be met.[69]

In English law, the situation is more fluid.[70] A recent example is *Chandler v. Cape*. Between 1959 and 1962, David Chandler had been exposed at work to asbestos, and in 2007 he was diagnosed with asbestosis. As his employer had gone out of business, he pursued his claim against parent company Cape plc. The Court of Appeal held that the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees, such as in a situation where (1) the business of parent and subsidiary are the same; (2) the parent has superior knowledge on the relevant aspects of health and safety in the industry; (3) the parent company knows or ought to know that the subsidiary's system of work is unsafe; (4) the parent knows or ought to foresee that the subsidiary or its employees rely on using its superior knowledge for employees' protection.[71]

(p. 569) In the subsequent case of *Lungowe*, Zambian citizens brought a claim for damages before an English court against UK-based Vedanta and its Zambian subsidiary KCM, claiming that waste discharged from a copper mine had caused them personal injury and other harm. The Court of Appeal held that the claimants had an arguable case on duty of care against the parent company, inter alia because the company had emphasized in its sustainability report that it had oversight over its subsidiaries.[72] This latter aspect may pose a serious dilemma for companies. If they fulfill their responsibility to respect human rights under the UNGPs, which require them to take responsibility for human rights risks in their group and supply chain, this may increase the risk of owing a duty of care to third parties.

D. Competent Forum

Common law and civil law jurisdictions have many different procedural features, and claimants will take these into consideration when choosing a forum. Particularly the US forums provide for punitive damages, class actions, discovery procedures, "no win no fee" arrangements, contingency fees, and that all parties bear their own costs.

Particularly, the so-called discovery procedure (in England known as disclosure procedure) is of crucial importance to claimants. It means that before the start of the trial documents related to the facts of the claim must be submitted to the court and the other party. It goes without saying that these documents may be of crucial importance to complement the prelitigation fact-finding (nr. 8). It is telling that companies are usually very willing to come to a settlement out of court once a date for the trial is set and the discovery procedure is to become effective.

Another feature that makes US forums stand out from European forums is the possibility to file a claim on behalf of a group of people who do not need to be identified. For example, the *Khulumani* case concerned a lawsuit against dozens of companies "on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damages as a result of apartheid."[73] European jurisdictions do not provide for such opt-out class actions, and it is unlikely this will change any time soon.[74] Only some jurisdictions,

such as the United Kingdom and the Netherlands, provide for an opt-in variety of a class action.

Until recently, the US jurisdiction also stood out for the possibility to file human rights claims against TNCs on the basis of the Alien Tort Statute (ATS).[75] This statute dates from 1789 but had been dormant for a long time. The first modern case dates from 1980 when it was held in *Filártiga* that a US court has jurisdiction to hear "any civil action by an alien for (p. 570) a tort only, committed in violation of the law of nations."[76] The subsequent decision in *Kadic*,[77] holding that ATS cases can also be brought against private persons, opened the way for the filing of claims against corporations. Thus far over fifty cases have been filed. In none of them a final judgment on the merits has been handed down, and only two cases ended in an out of court settlement.[78]

Over the past decades, the US courts have considerably limited the scope of the ATS. In *Sosa*, the US Supreme Court interpreted "violation of the law of nations" as "the modest number of international law violations with a potential for personal liability" at the time the ATS was introduced. This implied that claims for environmental damage and for violation of socio-economic rights were excluded under the ATS.[79]

For a long time it was thought that it was enough for the court's competence to hear a case if there was some link with the US jurisdiction, for example, an office or a subsidiary. However, in *Kiobel v. Royal Dutch Shell*, the US Supreme Court rejected the notion that the purpose of the ATS was to make the United States a forum for adjudicating violations of international law from around the world. It concluded: "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. […]. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[80]

It is illustrative for the increasingly transnational law context of these claims, that after the Supreme Court's decision, Esther Kiobel decided to file her claim against Shell before a Dutch court. Under the Foreign Legal Assistance Statute, a US federal court granted Esther Kiobel access to documents, originally gathered during the US litigation, and held by the law firm that defended Shell in the United States.[81]

Despite procedural disadvantages, claimants do not only use English forums but also continental European jurisdictions to hold TNCs to account. The forum's competence to hear a case is regulated by EU law, and it allows claims against European headquartered companies to be filed before an EU court.[82] Where the claim concerns the parent company's (p. 571) conduct vis-à-vis its subsidiary or supplier that caused the harm abroad, a link is required between the claims against the parent and the subsidiary. To establish this link, the court may need to consider the merits of the claim at an early stage. *Lubbe v. Cape* concerned a claim before an English court against a parent company domiciled in the United Kingdom by employees in its South African subsidiary for health damage caused by exposure to asbestos. The House of Lords held that the English courts had jurisdiction

to hear the claim, after it had established that there was evidence to support the allegation that the parent company's own negligence was a cause of the harm.[83]

In the Dutch case of Nigerian farmers against Shell, the The Hague District Court and the The Hague Court of Appeal in The Netherlands held they were competent to hear the case against the parent company as its seat was in The Hague. The courts also held that they were competent to hear the case against subsidiary Shell Nigeria because the claims against parent and subsidiary were linked in such a way that for reasons of efficiency they could be heard jointly.[84]

E. Applicable Law

Generally speaking, the law of the forum determines procedural questions, including most evidentiary rules, whereas the private international law rules of the forum determine the law applicable to the substantive questions of liability. In transnational litigation, this often means that foreign law applies to substantive liability questions.

Once again, the ATS takes a special position in this respect. The competence of the forum is determined by whether the claim is about a violation of the law of nations in eighteenth-century terms and whether there is sufficient connection with the US jurisdiction (nr. 10). However, despite thirty years of case law, it remains disputed which law applies to ATS claims. Some argue that international criminal norms should be applied, but this does not sit well with the character of the tort claim. Others argue that US federal tort law should be applied. It seems that the US Supreme Court supported the latter view in *Sosa*.[85]

In the European Union, the Rome II Regulation determines the applicable law.[86] In principle, this is the law of the country where the damage occurs (art. 4(1)). In most cases, this will be the law of the country where the victim resides rather than the law of the country of the company's seat. There are some exceptions to the main rule, but it is uncertain whether they will be applied or help the victim much, such as if the tort is manifestly more closely (p. 572) connected with another country (art. 4(3))[87] or in case of environmental damage where the victim has a choice between the law of the place where the damage occurred and the law of the place where the event giving rise to the damage occurred.[88]

Article 26 of Rome II provides that the application of a foreign law provision may be refused if this is manifestly incompatible with the forum's public policy (*ordre public*). This exception can arguably be applied if a foreign domestic rule undermines human rights, such as allowing child labor, but this will usually not concern the key of the allegations.[89]

Finally, overriding mandatory provisions of the forum law remain applicable irrespective of the law otherwise applicable to the dispute (art. 16). These are "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all le-

gal relationships within that State."[90] The question is whether, for example, due diligence legislation (nr. 5) amounts to such mandatory provisions.[91]

The disadvantage of applying foreign law is that the court will usually follow the legal status quo in the foreign country, which makes the court's interpretation static rather than dynamic. The forum court is not in a position to develop foreign law in the way it could do with the forum's law. This is usually disadvantageous for claimants because tort liability of TNCs for involvement in human rights violations is a new area where hardly any precedent lies. This is a major obstacle to dynamically develop transnational tort law, particularly in conjunction with developments in soft law (nr. 5).

Selective Bibliography

Alson, Philip (ed.). *Non-State Actors and Human Rights.* Oxford: Oxford University Press, 2005).

Augenstein, Daniel. *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union.* Edinburgh: University of Edinburgh, 2010).

Castermans, A.G. and van der Weide, J.A. *The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights.* Leiden University 2009, 53. Online. (**<http://ssrn.com/abstract=1626225>**).

Clapham, Andrew (ed.). *Human Rights Obligations of Non-State Actors.* Oxford: Oxford University Press, 2006.

van Dam, Cees. *European Tort Law*. Oxford: Oxford University Press, 2013.

(p. 573) van Dam, Cees. *Enhancing Human Rights Protection. A Company Lawyer's Business.* Rotterdam: Rotterdam School of Management, 2017.

Dine, Janet. *Companies, International Trade and Human Rights.* Cambridge: Cambridge University Press, 2005.

Joseph, Sarah. *Corporations and Transnational Human Rights Litigation.* London: Hart, 2004.

Korten, David. *When Corporations Rule the World.* Boulder: Kumarian Press, 1995.

Meeran, Richard. "Tort Litigation Against Multinationals ('MNCs') for Violation of Human Rights: An Overview of the Position Outside the US." *City University of Hong Kong Law Review* 3 (2011): 1.

Reimann, Mathias. "Product Liability in a Global Context: The Hollow Victory of the European Model." *European Review of Private Law* 11 (2004): 128–154.

Zerk, Jennifer. *Multinationals and Corporate Social Responsibility*. Cambridge: Cambridge University Press, 2006. (p. 574)

Notes:

([1]) Rotterdam School of Management, Erasmus University, Professor of European Tort Law at Maastricht University, and Visiting Professor at King's College London.

([2]) See Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961). Dina Shelton, "Soft law," in *Handbook of International Law* (Routledge: Abingdon, 2008), 1–30.

([3]) In French one could say: "On a *tort* de parler de transnational tort law."—It is *wrong* to talk about transnational tort law.

([4]) Cees van Dam, *European Tort* Law (Oxford: Oxford University Press, 2013), nr. 101–102.

([5]) Mathias Reimann, "Product Liability in a Global Context: The Hollow Victory of the European Model," *European Review of Private Law* 11 (2004), 128–154. He argues that this global dissemination has influenced the law in the books rather than the law in action.

([6]) Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

([7]) van Dam, *supra* note 3, nr. 203–205.

([8]) *Id*., nr. 104–101.

([9]) *Id*., nr. 101–102, 103–102, 104–102, and 602.

([10]) Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960); Brussels Convention Supplementary to the Paris Convention (1963); Vienna Convention on Civil Liability for Nuclear Damage (1963).

([11]) Protocol Amending the Vienna Convention on Civil Liability for Nuclear Damage (1997).

([12]) Convention on Supplementary Compensation for Nuclear Damage (1997).

([13]) Convention for the Unification of Certain Rules for International Carriage by Air (Montreal 1999), preceded by the (sometimes still applying) Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929). The Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome 1952) is ratified by only 49 countries. The replacement Convention on Compensation for Damage Caused by Aircraft to Third Parties (Montreal, 2009) is not yet in force.

([14]) Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld vom 17.07.2017 (BGBl. I, p. 2421). The Act entered into force on July 22, 2017.

([15]) Convention Relating to the Carriage of Passengers and Their Luggage by Sea (Athens 1974) and the Protocol (2002).

([16]) Convention on Limitation of Liability for Maritime Claims 1976.

([17]) International Convention on Civil Liability for Oil Pollution Damage (1969) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

([18]) The Hague Convention on the Law Applicable to Products Liability 1973; The Hague Convention on the Law Applicable to Traffic Accidents 1971. See http://www.hcch.net.

([19]) J.E. Stiglitz, *Globalisation and Its Discontents* (Penguin: London, 2002), 9. See also, inter alia, David Kinley, *Civilising Globalisation. Human Rights and the Global Economy* (Cambridge: Cambridge University Press, 2009).

([20]) See also Cees van Dam, *Enhancing Human Rights Protection. A Company Lawyer's Business* (Rotterdam School of Management: Rotterdam, 2017), 56–60.

([21]) John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Human Rights Council, A/HRC/4/35, February 9, 2007, no. 82. See also Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011).

([22]) An exception may become the Treaty on Business and Human Rights, which is currently discussed in an open-ended intergovernmental working group on transnational corporations and other business enterprises: http://www.ohchr.org/EN/HRBodies/HRC/WG-TransCorp/Pages/IGWGOnTNC.aspx.

([23]) Philip Alson ed., *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005); Andrew Clapham ed., *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

([24]) Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights: *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*: http://www.un.org/press/en/2003/hr4686.doc.htm.

([25]) See, inter alia, David Korten, *When Corporations Rule the World* (Kumarian Press: Boulder, 1995), 159 ff.

([26]) Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005), 10; Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (Edinburgh: University of Edinburgh, 2010), 46–48.

([27]) Submission to the Ruggie mandate by the International Organisation of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee, *Business and Human Rights: The Role of Government in Weak Governance Zones* (2006), para. 15: http://www.reports-and-materials.org/Role-of-Business-in-Weak Governance-Zones-Dec-2006.pdf.

([28]) Human Rights Council, June 15, 2011, Resolution A/HRC/17/L.17/Rev.1 All documents produced during John Ruggie's mandate can be found at https://www.business-humanrights.org/SpecialRepPortal/Home.

([29]) See for the 2011 update: https://www.oecd.org/dataoecd/56/36/1922428.pdf.

([30]) International Labour Office, Official Bulletin, Volume XCI, Series A, 2008. The ILO Declaration on Fundamental Principles and Rights at Work (1998) specifies five fundamental employee's rights: the freedom to establish trade unions, the right to collective negotiations, and the abolition of forced labor, child labor, and discrimination. See http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

([31]) For critical analysis, see https://www.oecdwatch.org.

([32]) See, for example, Christopher McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change* (Oxford: Oxford University Press, 2007).

([33]) An important instrument is provided by the Equator Principles, a financial industry benchmark for determining, assessing, and managing environmental and social risk in projects. The latest update was published in 2013: https://www.equator-principles.com.

([34]) Unilever was the first TNC to report on its human rights policies and practices: *Enhancing Livelihoods, Advancing Human Rights*, Human Rights Report 2015 (Unilever: London/Rotterdam, 2015). See also van Dam, *supra* note 19, at 26–28.

([35]) See https://www.imvoconvenanten.nl/?sc_lang=en. The Dutch process is carried out under a government warning that if not sufficient progress is made, binding legislation may follow.

([36]) John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Human Rights Council, A/HRC/8/5, April 7, 2008, no. 49. See on the importance for companies to treat soft law as hard law: van Dam, *supra* note 19, at 56–60.

([37]) Regulation (EU) 995/2010 laying down the obligations of operators who place timber and timber products on the market.

([38]) Directive 2014/95/EU, amending Directive 2013/34/EU as regards disclosure of nonfinancial and diversity information by certain large undertakings and groups.

([39]) Regulation (EU) 2017/821 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.

([40]) Modern Slavery Act 2015: https://www.gov.uk/government/collections/modern-slavery-bill.

([41]) Loi no. 2017–399 du 27 mars 2017 relative au devoir de vigilence des sociétés mères et des entreprises donneuses d'ordre: https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017–399/jo/texte.

([42]) https://www.congress.gov/bill/111th-congress/house-bill/4173.

([43]) https://www.congress.gov/bill/114th-congress/house-bill/3226/text.

([44]) http://www.leginfo.ca.gov/pub/09–10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.pdf.

([45]) The Responsible Business Initiative: protecting human rights and the environment: http://konzern-initiative.ch/?lang=en.

([46]) European Coalition for Corporate Justice, Members of eight European Parliaments support duty of care legislation for EU corporations, May 18, 2016: http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations. The European Commission refused to take this matter forward.

([47]) http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

([48]) Recognised audit standards are the International Standard on Assurance Engagements 3000 (ISAE 3000): http://www.ess-home.com/regs/isae-3000.aspx, and the AA1000 Assurance Standard Revision Process: http://www.accountability.org/images/content/0/7/074/AA1000APS%202008.pdf.

([49]) https://www.globalreporting.org. About a third of the five hundred largest companies in the world (the Fortune Global 500) report according to GRI standards.

([50]) Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), as well as van Dam, *supra* note 3, nr. 608 with further references; also to the protection of the rights to family life and self-determination in cases no physical harm is suffered.

([51]) van Dam, *supra* note 3, nr. 608, with further references.

([52]) See, for example, ECtHR July 7, 2009, Appl. 58,447/00 (*Zavoloka/Lettonie*), about the right to compensation for nonpecuniary loss for the loss of a loved one not caused by the state.

([53]) John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Human Rights Council, A/HRC/8/5, April 7, 2008, para. 52.

([54]) See https://ranaplaza-arrangement.org.

([55]) See https://www.bangladeshaccord.org. See, for example, Dominic Rushe, “Unions reach $2.3m settlement on Bangladesh textile factory safety,” *The Guardian*, January 22, 2018.

([56]) The website of the Business and Human Rights Resource Centre keeps a list of pending and decided cases: https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled.

([57]) See, for example, *Kasky v. Nike, Inc., et al.*, 45 Pacific Reporter, Third Series (P 3d) 243 (California 2002), and *Nike, Inc., et al. v. Kasky*, 539 U.S. Supreme Court Reports (US) 654 (2003); *Barber v. Nestlé*, Central District of California, 9.12.2015, SACV 15-01364-CJC. The Canadian case of *Das v. George Weston Limited*, 2017 ONSC 4129A, concerns a substantive class action for human rights violations in the supply chain, particularly the involvement in the Rana Plaza disaster in Bangladesh in 2013. The claim was dismissed.

([58]) Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

([59]) For example, *Connelly v. RTZ Corporation plc & Another* [1998] (AC) 354 (HL).

([60]) Richard Meeran, “Tort Litigation Against Multinationals (‘MNCs’) for Violation of Human Rights: An Overview of the Position Outside the US,” *City University of Hong Kong Law Review* 3 (2011): 1, 18.

([61]) https://www.business-humanrights.org/en/latest-news/trafigura-lawsuits-re-côte-divoire.

([62]) See, for example, *Adams v. Cape Industries* [1992] Law Reports, Chancery Division (Ch) 433. A company is liable for acts and omissions of its agents or branches as these will be per definition subordinate to the parent company.

([63]) Case C-286/98 P, *Stora Kopparbergs Bergslags AB v. Commission* [2000] ECR I-9925, paras. 26–28, and Case 48/69, *Imperial Chemical Industries Ltd. v. Commission* [1972] ECR 619, para. 132 f.

([64]) Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union.

([65]) See, inter alia, Janet Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (London; Hart, 2004); Jennifer Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006).

([66]) The criteria differ from country to country. See John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Human Rights Council, A/HRC/4/35, February 9, 2007, no. 29; Daniel Au-

genstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh, 2010), 62ff.

([67]) van Dam, *supra* note 3, nr. 711–714, with further references. See, for example, *In Re Oil Spill by the Amoco Cadiz*, AMC 2123, 2 (Lloyd's Rep) 304 (Northern District of Illinois 1984); Cour de Cassation (Chambre criminelle) September 25, 2012, no. 10–82.938 (*Erika*).

([68]) Meeran, *supra* note 59, at 4ff.

([69]) Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh, 2010), 63ff.

([70]) See already *Lubbe v. Cape plc* [2000] 1 WLR 1545 (HL); *Connelly v. RTZ* [1998] AC 854; *Ngcobo v. Thor Chemical Holdings Ltd*. (1995) *The Times*, November 10; *Sithole v. Thor Chemical Holdings* (1999) *The Times*, February 15.

([71]) *Chandler v. Cape* [2012] EWCA Civ 525. In *Thompson v. The Renwick Group* [2014] EWCA Civ 635, the Court of Appeal decided on the facts that the *Chandler* requirements were not met. In the American case of *John Roe I v. Bridgestone Corporation* (2007) 492 F. Supp. 2d 988 (Southern District of Indiana) parent Bridgestone instructed its subsidiary Bridgestone in such a way that human rights violations (forced labor and child labor) were inevitable.

([72]) *Lungowe and Ors. v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

([73]) *Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler*, 504 F.3d 254 (2007).

([74]) European Commission Recommendation of June 11, 2013 on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, at 60–65.

([75]) Section 1350 of the US Code, included in the Judiciary Act of 1789.

([76]) *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir 1980). See Beth Stephens, "Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," *Yale Journal of International Law* 27, no. 1 (2002): 1–57.

([77]) *Kadic v. Karadzic*, 70 F.3d 232, 236–37 (2d Cir. 1995).

([78]) *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002); 395 F.3d 978 (9th Cir. 2003), and *Ken Saro-Wiwa v. Royal Dutch Shell*; see https://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa.

([79]) *Sosa v. Alvarez-Machain*, 542 U.S. Supreme Court Reports (US) 692 (2004), 734.

([80]) *Kiobel v. Royal Dutch Petroleum Co.*, No. 10–1491, at 12–13 (U.S. Sup. Ct. Apr. 17, 2013). Initially, the question before the Supreme Court in *Kiobel* was about whether ATS suits can be brought against corporations, but after the hearing the Supreme Court issued an order to be briefed about the extent to which the ATS could be applied to conduct occurring outside the United States. The former question remained unanswered.

([81]) Upasana Khatri, "The view from the US: The Kiobel case, and how a little-known US law can be used as a litigation tool overseas," *The Law of Nations Blog*, February 22, 2017: https://lawofnationsblog.com/2017/02/22/view-us-little-known-us-law-can-used-litigation-tool-overseas.

([82]) Article 4 Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Unlike in the United States, EU courts are not allowed to refuse to hear a case on the basis of the *forum non convenience* doctrine: ECJ case C-281/02, *Andrew Owusu v. N B Jackson* [2005] ECR I-1383; ECJ case C-412/98, *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)* [2000] ECR I-5925.

([83]) *Lubbe v. Cape plc* [2000] 4 All ER 268.

([84]) District Court The Hague September 14, 2011, ECLI:NL:RBSGR:2011:BU3535 (Oguru-Efanga/Shell); ECLI:NL:RBSGR:2011:BU3538 (Dooh/Shell); ECLI:NL:RBSGR:2011:BU3529 (Akpan/Shell). Court of Appeal The Hague December 17, 2015, ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell). The applied test is based on Article 7(1) Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering).

([85]) *Sosa v. Alvarez-Machain*, 542 U.S. Supreme Court Reports (US) 692 (2004), 734.

([86]) Regulation (EC) No. 864/2007 of July 11, 2007, on the law applicable to noncontractual obligations (Rome II) OJ L 199, 31.7.2007, 40–49.

([87]) See COM(2003) 427 def, 13. See also, for example, Liesbeth Enneking, "The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation," *European Review of Private Law* 16 (2008): 283.

([88]) See, for example, A.G. Castermans and J.A. van der Weide, *The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights* (Leiden University, 2009), 53 (<http://ssrn.com/abstract=1,626,225>).

([89]) See ECJ Case C-7/98, *Dieter Krombach v. André Bamberski* [2000] ECR I-1935, para. 44.

([90]) ECJ Joint Cases C-369/96 and C-376/96, *Arblade* [1999] ECR I-8453, para. 30.

([91]) Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh, 2010), 72.

Cees van Dam

Cees van Dam is Professor of International Business and Human Rights at the Rotterdam School of Management, Erasmus University, Professor of European Tort Law at Maastricht University and Visiting Professor at King's College London.