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Francisco Javier Zamora Cabot /
Lukas Heckendorn Urscheler /
Stéphanie De Dycker (eds)

Implementing the U.N. Guiding Principles on Business and Human Rights

Private International Law Perspectives

UNIVERSITAT JAUME·I

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Suggested citation: Francisco Javier Zamora Cabot / Lukas Heckendorn Urscheler / Stéphanie De Dycker (eds), *Implementing the U.N. Guiding Principles on Business and Human Rights,* Publications of the Swiss Institute of Comparative Law, Geneva / Zurich 2017, Schulthess Éditions Romandes

ISBN 978-3-7255-8661-5

www.schulthess.com

Diffusion en France : Lextenso Éditions, 70, rue du Gouverneur Général Éboué, 92131 Issy-les-Moulineaux Cedex, www.lextenso-editions.com

Diffusion et distribution en Belgique et au Luxembourg : Patrimoine SPRL, Avenue Milcamps 119, B-1030 Bruxelles ; téléphone et télécopieur : +32 (0)2 736 68 47 ; courriel : patrimoine@telenet.be

Information bibliographique de la Deutsche Nationalbibliothek : La Deutsche Nationalbibliothek a répertorié cette publication dans la Deutsche Nationalbibliografie ; les données bibliographiques détaillées peuvent être consultées sur Internet à l'adresse http://dnb.d-nb.de.

Table of Contents

Foreword

The UN Guiding Principles on Business and Human Rights, unanimously endorsed by the UN Human Rights Council in 2011, have received a lot of attention, both at the political and academic level. However, for a long time, domestic lawyers have, in European jurisdictions at least, paid them relatively little notice. Moreover, academic discourse seems to have generally been limited to that among Human rights lawyers. All this is in spite of the fact that the Principles are closely linked to national law in their content, and that different national laws have been instrumental in the process leading to the adoption of the Principles.

The Swiss Institute of Comparative Law has started developing an interest in comparative aspects of the UN Guiding Principles over recent years, initially, as part of research commissioned in the context of the political debate on implementing the principles in Switzerland (see Volume 79 in the series). However, the scarcity of discussion in private international law, a core area of research of the Swiss Institute, was striking. For this reason, the Institute organized a conference in 2014 on the implementation of the UN Guiding Principles in the area of private international law. The conference had two aims: first, to illustrate experiences and approaches in other jurisdictions, and second, to start a discussion in Switzerland on the implementation of the Principles and access to remedies under private international law. It gave rise to interesting debates and exchanges.

The proceedings of the conference are published in this volume. They bring together general considerations on the Principles and some of their potentially controversial aspects, analyse relevant case law, and conclude with some future perspectives for Switzerland and the European Union.

We would like to express our gratitude to several people who contributed in one or another way to this publication: First of all, our thanks go to the authors of this volume and to the contributors to the conference held at the Swiss Institute of Comparative Law. Second, we would like to thank Andrea Bonomi, co-organiser of the conference, who, due to other commitments (and a sabbatical abroad) could not participate in the editing of this volume. Finally, we would like to thank all the people who contributed to the formal realisation of this publication, especially Françoise Hinni, secretary, who prepared the final formatted version of this book. The linguistic revisions were carried out by Victoria Garrington. Without the help of all these people, this publication would not have been realized.

Last but not least, we would like to pay tribute to the late Henry S. Dahl who passed away unexpectedly before the publication of this volume was finalized. Henry S. Dahl was a true pioneer in the promotion of access to justice on a worldwide basis and in the field of dispute resolution involving corporate human rights violations. He was also a citizen of the world. His openness and passion for his work will hopefully inspire future research in this area.

Lausanne, 15.10.2016

Francisco J. Zamora Cabot *Lukas Heckendorn Urscheler* *Stéphanie De Dycker*

Part I

Implementing the UN Guiding Principles in Private International Law: General Aspects

Stéphanie De Dycker*

Permeability and Complementarity of Public and Private International Law:

The Case of the UN Guiding Principles on Business and Human Rights

Table of Contents

Public international law and Private international law are commonly considered as two separate areas of law. Public international law is traditionally seen as the law that essentially regulates the rights and obligations of States and the relations between States. It is a true international law: a State-centric system regulating

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horizontal relations. This explains why, in addition to international custom and general principles of law, treaties – agreements between States – are a main source of Public international law, and why these typically deal with matters that are of interest to States. In stark contrast, Private international law is traditionally considered as the law that regulates the transboundary relations between private actors such as individuals and corporations; it is generally seen as part of the municipal domain, which is organized along vertical lines. This explains why, traditionally, domestic statutes and decisions of domestic courts have been the principal source of Private international law. Private international law essentially covers conflicts of jurisdiction, conflicts of laws and issues of recognition and enforcement of foreign decisions.[1]

However, when confronted with the reality of international relations, this traditional divide appears questionable.[2] The international stage is no longer the exclusive privilege of States. Next to States, international organizations, non-governmental organizations, individuals and corporations have made their appearance. More than ever, issues such as the safeguarding of the environment or the economic, security or financial crisis are transnational by nature. Disputes with a transnational element often concern both public and private interests, and involve both public and private actors. Hence, we are witnessing a high level of permeability between Private and Public international law, which can be observed at various levels (section 1).

Rather than being a static phenomenon and a source of confusion, such permeability between Public and Private international law can be seen as developing its own dynamics. In several ways, the permeability between these two traditionally separated worlds has been used in a constructive way, showing that Public international law may contribute to the development of Private international law and vice-versa (section 2).

Such permeability and complementarity of Public and Private international law can be observed in the area of international human rights law. In particular, the UN Guiding Principles on Business and Human Rights (hereinafter referred to as "UN Guiding Principles")[3] offer a useful illustration of both phenomena. The UN

[1] This is also the comprehension of the term followed for the purposes of the present article.

[2] See in particular: DE BOER, Living apart together, 183-207; see also FERNÁNDEZ ARROYO & LIMA MARQUES (eds.) Private International Law and Public International Law: A Necessary Meeting; WEERAMANTRY, Universalising International Law.

[3] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 21 March 2011. See also: UN Human Rights Council, res. 17/4, Human Rights and transnational corporations and other business enterprises, 16 June 2011, UN Doc. A/HRC/RES/17/4, 6 July 2011.

Guiding Principles set up a number of guiding principles to be followed by business enterprises and States in order to prevent human rights violations and ensure access to remedy in case of such violations. By nature, these principles illustrate the permeability and interrelationship between Private international law and Public international law as they address, in an international instrument, the complex issue of human rights violations by transnational corporations. Moreover, the UN Guiding Principles also show how addressing global issues of our times, including that of ensuring corporations' respect of human rights wherever they exercise their activities, requires a close cooperation and interaction between these two areas of law (section 3).

1. Permeability of Public and Private International Law

Although Public and Private international law are generally considered to be two separate branches of law, one can observe, in recent years, a renewal[4] of convergences between Public and Private international law. One can observe such permeability between Public and Private international law at several levels: material sources (1), object (2), subjects (3) and dispute settlement mechanisms (4).

1.1. Material Sources of Public and Private International Law

Public international law is traditionally considered to have its sources in treaty, international custom and general principles of law. Such sources are essentially State-centric in the sense that they require for their emergence some level of participation of States: this is fundamentally the case for international treaties, international custom and general principles of law. It is also indirectly the case for judicial decisions since the existence and the legitimacy of interstate dispute settlement mechanisms that issue such judicial decisions are based on the consent of States who participate in it.

However, next to these formal sources of Public international law, the recent past has seen the emergence of solutions that are not included in the formal sources but that nevertheless constitute an important source of inspiration for the

[4] It is referred to a *renewal* as indeed in its early theoretical development, Private international law was often seen as part of a broader corpus of the "Law of Nations". See e.g.: MILLS, Rediscovering the public dimension of private international law; BERMAN, Is Conflict of Laws becoming passé?.

development of Public international law.[5] These instruments, which are generally referred to as soft-law instruments, consist of principles, guidelines, codes of conduct, standards and practices. They are generally developed and adopted by a plurality of non-State actors such as international organizations,[6] non-governmental organizations, professional associations or experts committees.[7] Of course, such instruments are not – and never could be – a formal source of Public international law. However, through their process of emergence, they nevertheless may play an important role in the identification of new rules of Public international law. Indeed, soft law enables States to agree on principles that they wish to test, at the international level but also at the domestic level, before agreeing to their internationally binding character.

A similar shift in sources can be witnessed in the field of Private international law. As the law that regulates the transboundary relations between private actors such as individuals and corporations, Private international law is traditionally seen as being largely grounded in municipal law. As a result, its main sources are domestic statutes and decisions of domestic courts. Nevertheless, as a result of ever increasing trends of globalization, international sources tend to increase. Indeed, new Private international law situations emerge such as in the field of Internet-related disputes, the global terrorism threat or surrogacy arrangements. So as to address these new issues, two particular approaches may be followed. First, States may endeavour to develop unified substantive rules to regulate certain transnational relations. Such substantive rules offer a solution to issues of a private international law nature. This is, for instance, the case of the United Nations Convention on the International Sale of Goods.[8] Second, States may choose to develop harmonized or unified rules of Private international law. Indeed, harmonized or unified rules of private international law enable States to follow a similar, if not identical approach. This offers a more efficient way to solve transnational issues of our times, or at least reduce discrepancies between municipal laws, which in turn would ensure enhanced predictability in the system. Such common or harmonized

5 Soft law instruments play an important role also in the development of private international law. See for instance, UNIDROIT Principles on International commercial contracts; UNCITRAL Model Law on Secured transactions, available at: www.unidroit.org (01.09.2016). This effect is however less relevant for the purpose of this paper.

6 See for instance: The UN Guiding Principles were developed under the auspices of the Human Rights Council; see also the unanimous endorsement of the UN Guiding Principles by the Human Rights Council on 16 June 2011, which provided a special aura to this soft law instrument: UN doc., 6 July 2011, A/HRC/RES/17/4.

7 See for instance: The Council for international organizations for medical sciences in the field of biomedical research for instance. See: BOISSON DE CHAZOURNES, Gouvernance et régulation au 21ème siècle, p. 26.

8 See e.g.: United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.

rules are developed by States through international conventions or regional legally binding instruments. This effort towards increased cooperation between States so as to develop harmonized rules of Private international law has resulted in a trend towards internationalization of the sources of Private international law. From essentially municipal law, sources of Private international law have evolved to more internationalization.

Hence, while material sources of Public international law can increasingly be found in soft law instruments developed by non-State actors, sources of Private international law increasingly result from agreement between States.

1.2. The Object of Public and Private International Law

Public international law is traditionally considered as regulating the relations between States. However, increasingly since the end of the Second World War, Public international law has witnessed the development of new areas of focus that are not merely State-centric but rather directed towards individuals or corporations. This is the case for international human rights law and international criminal law, which may qualify as areas of Public international law that have an impact on individuals. Similarly, international trade law and investment law are fields of Public international law that have an impact on business activities. These areas of law, which are generally speaking considered to be part of Public international law, embody relations at the international level between States on the one hand, and individuals or corporations on the other hand. Public international law therefore also regulates relations where individuals and corporations are involved.

Similarly, Private international law is commonly considered to regulate transnational relations between individuals and/or corporations. However, in our globalized world, new situations always arise which require new rules of Private international law. Moreover, situations arising from transnational relations between individuals and/or corporations may always potentially develop in conflicts between the States of nationality of the persons involved, whether legal or natural. Indeed, judicial decisions on a Private international law issue rendered in a State bind that State at the international stage towards the other State(s) concerned, and may potentially create an interstate conflict.[9] Similarly, when States adopt unified rules of Private international law, the object of Private

[9] See, for instance: *Jurisdiction and enforcement of judgments in civil and commercial matters* (Belgium vs. Switzerland), Application, 21 December 2009, available at: www.icj-cij.org (30.10.2015); *Jurisdictional Immunities of the State* (Germany vs. Italy: Greece intervening), judgment of 3 February 2012, *I.C.J. Reports*, 2012, p. 99; *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants*, (Netherlands vs. Sweden), *I.C.J. Reports*, 1958, p. 55.

international law appears *de facto* to be double: while it regulates transnational relations between individuals or corporations, it also governs relations in a specific area between two or more States.

As a result, the object of Public and Private international law are no longer considered to be hermetically separated from each other.

1.3. The Subjects of Public and Private International Law

Similar to the evolution as to the object of Public and Private international law, the subjects of Public and Private international law – namely, the persons whose relations are governed by each area of law – no longer seem to be drastically different. While formal subjects of Public international law are, and remain, States and international organizations, our contemporary world shows that numerous other actors intervene on the international stage, sometimes with considerable authority. Among such actors, the most important are persons, whether natural or legal. Indeed, the protection of individuals at the international level has developed considerably since the end of the Second World War. Nowadays, many international rules – whether under international treaties or customary international law – provide rights to the benefit of individuals and companies, with the possibility for these actors to enforce these rights on the international stage. For instance, it is widely recognized under customary international law that States must ensure to aliens present within their territory a minimum standard of protection.[10] Similarly, in the field of international human rights law, several international treaties provide international rights to individuals, allowing them, in case of violation by a State, to take their complaint before either international courts such as the European Court of Human rights, or political organs of international organizations such as individuals' communications or complaints mechanisms of international human rights treaties.[11] Some authors claim that, as a

[10] The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. See in particular: ROTH, The Minimum Standard of International Law Applied to Aliens; BROWNLIE, Principles of Public International Law; ROUSSEAU, Droit International Public.

[11] For instance: The Committee against Torture (CAT) of the United Nations High Commissioner for Human Rights may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties who have made the necessary declaration under article 22 of the Convention. Similarly, the Committee on the Elimination of Racial Discrimination (CERD) of the United Nations High Commissioner for Human Rights may consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by States parties who have made the necessary declaration

result, individuals and companies have some degree of international personality, but the whole subject remains highly controversial, in particular since only States can confer international rights to individuals or companies[12]. This being said, it is clear that individuals, whether natural or legal entities, play an increasing role at the international level.

While the subjects of Private international law are traditionally persons, whether legal or natural, Private international law is increasingly becoming a question of states' relations. For instance, several cases of the International Court of Justice – deciding upon disputes between States only – in fact originate from a dispute between persons, whether legal or natural. For instance, the case concerning *Jurisdiction and enforcement of judgments in civil and commercial matters*[13] originated from an international dispute between the Swiss and Belgian shareholders of Sabena, the former Belgian national airline company. The case concerning *the application of the Convention dated 12 June 1902 governing the guardianship of infants*[14] originated from the guardianship-situation of a private person, Ms. Marie Elisabeth Boll. Finally, the case concerning *Jurisdictional immunities of the State*[15], opposing Germany to Italy, with the intervention of Greece, originated in decisions rendered by Italian domestic courts on the initiative of individuals.

As a result, the increasing permeability of Public and Private international law can also be witnessed at the level of the subjects involved in both areas of law.

1.4. The Dispute Settlement Mechanisms in Public and Private International Law

The post-second world war period has seen an important development of international dispute settlement mechanisms. Whereas the area of Public international law is traditionally seen as the exclusive realm of States and international organizations, it is apparent that other non-State actors slowly gain a certain access to international dispute settlement mechanisms at the international stage. They may first intervene as *amicus curiae* or "ami de la Cour". This might be

under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

12 For instance : ALVAREZ, Are corporations « subjects » of International Law?; PETERS, Beyond Human Rights.

13 *Jurisdiction and enforcement of judgments in civil and commercial matters* (Belgium vs. Switzerland), Application, 21 December 2009, available at: www.icj-cij.org (30.10.2015).

14 *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants*, (Netherlands vs. Sweden), *I.C.J. Reports*, 1958, p. 55.

15 *Jurisdictional Immunities of the State* (Germany vs. Italy: Greece intervening), judgment of 3 February 2012, *I.C.J. Reports*, 2012, p. 99.

the case, for instance, with the dispute settlement system of the World Trade organization. Panels have in fact made use of their discretionary right to accept and consider unsolicited *amicus curiae* briefs, albeit infrequently. The Appellate Body of the WTO also maintains that it has the authority to accept and consider any information it considers pertinent and useful in deciding an appeal, including unsolicited *amicus curiae* submission.[16] But private actors also intervene through more formal procedures, for instance, as already mentioned, in the field of international human rights law before the European Court of Human rights or before political organs of international organizations.[17]

More generally, the recent past has seen an increase in the number of international dispute settlement mechanisms that can operate a high degree of flexibility as to the parties involved, the applicable law, the procedure and the persons who will decide upon the dispute. In particular, several international arbitration centers have set up such type of dispute settlement mechanisms at the international stage and welcome corporations and other private actors as parties to a dispute. This is in particular the case of the International Center for Settlement of Investment Disputes and the Permanent Court of Arbitration. Such international arbitration centers have experienced, in the recent past, an important increase in the number of cases which have been decided under their rules and authority.[18]

The shift in dispute settlement mechanisms has equally occurred in Private international law. Indeed, Private international law disputes have also been brought before dispute settlement mechanisms that are typically of a Public international law nature. For example, as already stated above, States have brought before the International Court of Justice ("ICJ") several disputes, the object of which was a disagreement on the application or the interpretation of Private international law rules or principles. Yet, the institution, as the principal judicial organ of the United Nations,[19] is fundamentally and in its essence known as the "temple" of Public international law.

[16] WTO, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/D58/AB/R, adopted 6 November 19998, DSR 1998, VII, 2755, para. 104 ff.

[17] See above: note 9. See also: Complaint procedure for individuals before the Inspection Panel at the World Bank. More information available at: http://ewebapps.worldbank.org/apps/ip/Pages/AboutUS.aspx. See also: BOISSON DE CHAZOURNES, Gouvernance et régulation au 21ème siècle, p. 31.

[18] See: ICSID caseload, Statistics, available at: https://icsid.worldbank.org/apps/icsidweb/resources/pages/icsid-caseload-statistics.aspx (01.09.2016). See also: ROMANO, Trial and Error in International Judicialization, p. 120-121.

[19] Charter of the United Nations, article 92.

Indeed, in the case concerning the *application of the Convention of 12 June 1902 governing the guardianship of infants*, opposing the Netherlands and Sweden, the Court had to decide on whether Sweden had violated its obligations under a multilateral treaty the object of which was Private international law. More recently, the International Court of Justice was seized by Belgium in its dispute with Switzerland on the interpretation and application of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the so-called 1988 Lugano Convention), as well as the application of the rules of general international law governing the exercise of State authority, in particular in judicial matters.[20] Although the case was discontinued upon Belgium's request, it still offers a useful example of disputes on a Private international law issue being brought before an international dispute settlement forum. Finally, in the case on *Jurisdictional immunities of the State*, between Germany and Italy, with the intervention of Greece, the ICJ decided on an issue that lies at the crossroads of Public and Private international law: while State immunities concern the status of State as a subject of Public international law, it also constitutes an exception to the exercise by national courts and other authorities of their jurisdiction as well as their powers to enforce judicial decisions against foreign States, which is typically a question of Private international law.[21]

As a general conclusion, one can observe that while Private and Public international law are typically seen as two separate worlds, they actually seem to share, as a result of ever increasing globalization trends, many common features including similar objects, subjects, sources and dispute settlement mechanisms. This allows us to refer to a high level of "permeability" between Public and Private international law.

2. Complementarity of Public and Private International Law

The existing "permeability" between Public and Private International law refers to the mere existence of features that are common to the two areas of law. In reality however, such permeability is used to foster the advancement of goals of Public and Private international law. In other words, the permeability combines with a certain level of complementarity between Public and Private international law, allowing Public international law to contribute to the development of Private international law (2.1) and vice-versa (2.2).

[20] *Jurisdiction and enforcement of judgments in civil and commercial matters* (Belgium vs. Switzerland), Application, 21 December 2009, available at: www.icj-cij.org (30.06.2015).

[21] *Jurisdictional immunities of the State*, (Germany v. Italy: Greece intervening), judgment of 3 February 2012, *I.C.J. Reports 2012*, p. 99.

2.1. Contribution of Public International Law to the Development of Private International Law

When Private international law rules are contained in municipal law, each State may establish different rules to solve the same situation, which may result in unpredictability problems. Indeed, depending on where the situation arises or the States where a judicial decision is sought, different solutions may be brought to one single situation. States seek to reduce such negative impact by adopting unified or harmonized rules of Private international law. Hence, Public international law may contribute to the optimal development of Private international law through the recourse to one of its main traditional sources, namely international treaties. By developing unified, or at least harmonized, rules of Private international law, States considerably reduce the risk of having similar situations solved differently depending on the State where the solution is sought, and as a result, increase the level of predictability. Developing unified rules of Private international law also contributes to a smoother resolution of conflicts between individuals in an international context, enabling organs of States to operate according to the same rules. Hence, their agreement on unified rules of Private international law contributes to an optimal development of Private international law.

However, it seems that even unified or harmonized rules of Private international law are no guarantee for enhanced predictability for the end beneficiaries of rules of Private international law, i.e. individuals and corporations, and eventually States. In particular, predictability requires not only unified rules but also a single approach to the application and interpretation of such rules among the States concerned.

Indeed, domestic tribunals may for instance develop an interpretation of provisions of an international treaty of Private international law that is either not satisfactory for the system put in place by the treaty, or different from that of other domestic courts.[22] Moreover, the treatment of Private international law issues by regional courts, such as the European Court for Human Rights, might not be satisfactory either. For instance, a regional court may in its decision interpret a provision of an international convention the membership of which is way larger than that of the regional court. While the interpretation of this international convention will carry an important weight for the States that are parties to the international convention and the regional court, it is unlikely that it will have the

[22] See for instance: US Supreme Court, *Société nationale industrielle Aerospatiale et al. v. United States District Court for the Southern District of Iowa*, No. 85-1695, 482, U.S. 222; 107 S. Ct. 2542. *See* also VAN LOON & DE DYCKER, The role of the International Court of Justice, p. 109-110.

same importance for a State party to the international convention that is not part of the regional court system.[23]

Public international law may here contribute to fostering a harmonized interpretation of international rules of Private international law. Indeed, international law has set up rules on the interpretation of international treaties, which have been considered as part of customary international law.[24] More generally, the Vienna Convention on the law of treaties, dated 23 May 1969, also offers many solutions to issues relating to treaty law, which are of relevance to all treaties independently of their object, for as long as States are parties to this Convention. Finally, decisions of international courts and tribunals may also contribute to a harmonized interpretation of treaties. Indeed, a thorough analysis of the case law of ICJ and its predecessor, the Permanent Court of International Justice (hereinafter the "PCIJ"), shows the existence of several judiciary presumptions relating to the interpretation of international conventions, which may assist in the settlement of disputes relating to the interpretation of a treaty, whatever the nature of the rules contained therein.[25]

Moreover, Public international law may contribute to the development of Private international law through its courts, in particular through recourse to the International Court of Justice. Indeed, as already shown,[26] States do bring their disputes of a Private international law nature before the principal judicial organ of the United Nations. In doing so, the International Court of Justice may contribute to developing a harmonized interpretation of rules of Private international law. Considering the fact that the Court's function is "to decide in accordance with

[23] See for instance: ECHR, Neulinger and Shuruk vs. Switzerland (App. 41615/07), 6 July 2010; see also: VAN LOON & DE DYCKER, The role of the International Court of Justice, p. 109-110; BEAUMONT & WALKER, Post *Neulinger* Case Law of the European Court of Human Rights on the Hague Child Abduction Convention, p. 17-30.

[24] The customary status of the interpretation rules included in article 31 of the Vienna Convention on the Law of Treaties was confirmed by the International Court of Justice at several occasions: *LaGrand* (Germany vs. United States of America), judgment of 27 June 2001, *I.C.J Reports*, 2001, p. 501, para. 99*; Avena and other Mexican Nationals* (Mexico v. United States of America), Judgment of 31 March 2004, *I.C.J. Reports* 2004, p. 48, para. 83; *Legal Consequences of the construction of a wall in the occupied Palestinian territory*, advisory opinion of 9 July 2004, *I.C.J. Reports* 2004, p. 174, para. 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), judgment of 26 February 2007, *I.C.J. Reports* 2007, p. 60, para. 160.

[25] Examples of such assumptions include the assumption of internal coherence between the different notions within an international convention, the assumption that the terms in a treaty translate the intention of the Contracting Parties and the assumption that the terms of a treaty have been used in their natural meaning. See: SANDONATO DE LEON, Les présomptions judiciaires en droit international public.

[26] See supra: section 1.4.

international law such disputes as are submitted to it",[27] Private international law rules that are at stake before the Court are to a wide extent rules of international law, whether part of an international convention or constituting general principles of law or customary international law. However, this is not to say that municipal law plays no role at all before the Court. An analysis of its case law as well as that of the Permanent Court of International Justice shows that municipal law may have a decisive influence on the Court's decisions.[28] This seems even truer in cases involving aspects of Private international law, since these cases often arise out of a wrongful application of municipal law, or the wrongful operation of municipal courts.[29]

States' decisions to bring their Private international law disputes before the International Court of Justice seem to be prompted by the fact that the Court, as principal judicial organ of the United Nations, has a unique universal radiance. As a result, even if the decision rendered by the Court is only binding upon the States parties to the dispute, its judgments have a wide authority, expanding to States that are not parties to the dispute. Such universal radiance is a result of several factors: first, the permanent institutional character of the Court ensures its continuity in time; second, the composition of the Court, in particular the fact that judges together represent the main forms of civilization and the principal legal systems of the world,[30] ensures an approach that is acceptable to all forms of legal traditions; finally, the fact that all State members of the United Nations may in principle bring a dispute before the Court is an important factor for its universal radiance.

Through its universal radiance, as principal judicial organ of the United Nations, the World Court is in the best place to foster a harmonized approach on the interpretation or the application of rules of Private international law.

2.2. Contribution of Private International Law to the Development of Public International Law

The complementarity between Private and Public international law may present itself the other way around, namely, Private international law contributing to the development of Public international law.

Public international law governs relations between States and international organizations. As we have already mentioned, non-state actors increasingly play a

[27] Statute of the International Court of Justice, article 38.

[28] PELLET, Commentary on article 38 of the Statute, para. 116.

[29] On the role of municipal Law before the International Court of Justice, see: DE DYCKER, Private international law disputes before the International Court of Justice, p. 475-498.

[30] Statute of the International Court of Justice, article 9.

role on the international stage. Non-State actors may be holders of specific rights at the international level. Sometimes they can even enforce them on the international stage.[31] But this is not always the case. States often disagree as to providing direct international rights to non-State actors such as individuals or corporations. Similarly, if direct international rights are provided to non-State actors, Public international law lacks the ability to complete them with efficient enforcement means at the international level. In such situations, Public international law proves to be inadequate. The main reason for this situation is the lack of agreement among States to impose direct international rights and obligations to certain non-State actors or to provide for efficient enforcement mechanisms at the international stage.

This is, for example, the case in the field of human rights protection. Human rights covenants are conventions under international law and therefore agreements between States. This means that, in the first instance, States are responsible for the implementation of human rights. In the debate on better global implementation of human rights however, the activity of multinational enterprises is playing an increasingly important role. Political developments on the international stage in this field have demonstrated that it is difficult – if not impossible at this stage – to find an agreement among States on a binding legal international instrument ensuring that human rights are respected by multinational enterprises.

In such scenarios, States may tend to adopt a pragmatic approach searching for the indirect recognition of rights and obligations of non-State actors at the international level. In doing so, States agree on setting up international obligations to provide in their municipal law for rights and obligations to non-State actors. They may reach an agreement in the form of the text of an international convention;[32] rather than a formal agreement, States may also develop international soft law instruments. This is for instance the case of the UN Guiding Principles[33] In doing so, States provide for such rights and obligations of non-State actors as part of their municipal law. In such configuration, although it would be difficult to enforce rights and obligations of non-State actors directly at the international stage, there is still a close connection with international law: State negligence in providing for an efficient system of rights and obligations with respect to non-State actors as requested under an international agreement may trigger a State's responsibility at the international level. In case the agreement at

[31] For instance, individuals may bring claims before the European Court of Human rights. One may also think of ICSID as an international dispute settlement Center where investors, i.e. corporations, may bring claims against States.

[32] See e.g.: The Convention on the Elimination of all forms of Discrimination against Women, 18 December 1979; the International Convention on the Rights of Persons with Disabilities, 13 December 2006.

[33] Infra, section 3.

the international level takes the form of a soft law instrument, thereby excluding a State's responsibility in case of non-compliance, political pressure against the non-compliant State, including by civil society may still be exercised so as to encourage and promote full compliance.

The rules that are adopted by States in their municipal law, as a result of their international (soft law) obligations, have different forms: they can be substantial legal norms providing for rights and obligations of individuals or corporations. An illustration of such norms may be found in the fundamental rights included in most countries' Constitutions, which are inspired in a large part from international instruments such as the Universal Declaration of Human Rights that was adopted on 10 December 1948 by the General Assembly of the United Nations. But in a context where the activities of the non-State actors concerned are in a large part transnational, it is important that such substantial municipal law rules be complemented by other rules, especially of a Private international law nature. Indeed, an efficient system to solve situations of conflicts of jurisdiction and applicable law is a clear contributor to an efficient enforcement mechanism of the substantial rights and obligations recognized to non-State actors at the municipal – and eventually international – level.

In this scenario, the role of Private international law appears clearly: By complementing rules and obligations States have recognized for non-States actors at the municipal level as a result of their international (soft law) obligations, with an efficient system to solve conflicts of jurisdiction and applicable law as well as rules on recognition and enforcement of foreign judgments, Private international law contributes to the advancement of Public international law. Without municipal substantial legal norms and Private international law norms, it is highly probable that there would be no recognition of such rights and obligations of non-State actors at the international level whatsoever. Indeed, the only alternative is an enforcement of such rights and obligations at the international level, which has proven to be difficult for States to accept.

But one can also consider that the adoption and application of Private international law rules constitute relevant State practice, which in turn could contribute to the emergence of international standards, general principles of international law, and eventually customary international law. Over time, State practice in Private international law could also lead to the adoption of conventional rules with the same content. In this sense too, Private international law may contribute to the development of Public international law.

3. The United Nations Principles on Business and Human Rights

The UN Guiding Principles offer a useful illustration of the permeability and complementarity between Public and Private international law. After a general presentation of the UN Guiding Principles (3.1), this section will concentrate on how the UN Guiding Principles include common features of both Public and Private international law (3.2) and how they illustrate the existing complementarity between Public and Private international law (3.3).

3.1. General Presentation of the United Nations Principles on Business and Human Rights

Business and human rights has long been the object of debates within the international community. Some important steps have been achieved in the last decade. In 2005, the UN Commission on Human Rights (later the Human Rights Council) asked the UN Secretary-General Kofi Annan to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises. The Secretary-General appointed Professor John Ruggie with the mandate among others to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights" and to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international corporation".[34]

Ruggie's appointment resulted from the decision of the UN Commission on Human Rights, in 2004, not to adopt an earlier instrument that proposed to define the legal responsibilities of corporations with respect to human rights.[35] The draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" were presented in 2003 by a sub-commission of the UN Commission on Human Rights. These draft norms took the approach that although States have the primary responsibility to protect human rights, "transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights",[36] and that they have, as a result,

[34] UN Commission on Human Rights, Res. 2005/69, Human rights and transnational corporations and other business enterprises, 20 April 2005.

[35] UN Commission on Human Rights, Res. 2004/116, Responsibilities of transnational corporations and related business enterprises with regard to human rights, 20 April 2004.

[36] Ibidem.

within their sphere of activity and influence, corresponding legal duties. The UN Commission on Human Rights reacted coolly: it granted that the document contained useful elements and ideas but added that it had not requested it and that, as a draft proposal, it had no legal standing.

Professor John Ruggie proposed in 2008 a concept for human rights and companies based on three pillars: (a) the State duty to protect against human rights abuses; (b) the corporate responsibility to respect human rights; and finally (c) access to effective remedy for victims of human rights abuse.[37] The "Protect, Respect and Remedy" Framework was designed as a response to "governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation".[38]

The first Pillar covers the existing international legal duty of States to protect persons within their jurisdiction from human rights violations, including those committed by business or in which business is complicit.

The second Pillar relates to the business responsibility to respect human rights. Such general business "responsibility to respect" is articulated as a duty assumed "because it is the basic expectation society has of business".[39] The term "responsibility" rather than "duty" is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself. Such responsibility to protect entails two components: a duty not to harm, i.e. not infringing the rights of others, and a due diligence responsibility, i.e. "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities".[40]

[37] Protect, Respect and Remedy: a Framework for Business and Human rights, UN Doc. A/HRC/8/5, 7 April 2008.

[38] Protect, Respect and Remedy: a Framework for Business and Human rights, UN Doc. A/HRC/8/5, 7 April 2008, p. 3, par. 3.

[39] Protect, Respect and Remedy: a Framework for Business and Human rights, UN Doc. A/HRC/8/5, 7 April 2008, pp. 4-5, par. 9.

[40] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/8/5, 7 April 2008, p. 9, para. 25.

Finally, the third Pillar of the Framework requires a remedy for victims when human rights violations occur. States have a responsibility to provide both judicial and non-judicial remedies, while business has a responsibility to provide non-judicial remedies for violations in which it is involved.[41]

Professor Ruggie's "Protect, Respect and Remedy" Framework was largely welcomed because it clearly distinguished between the responsibilities of the various players and clarified the complex interface between human rights and companies.

Based on these three pillars, Professor Ruggie developed the UN Guiding Principles, which were endorsed by consensus by the UN Human Rights Council in June 2011.[42] The UN Guiding Principles contain 31 Principles together with a commentary on each Principle, following the same structure as the UN Framework. Principles 1 to 10 cover the State duty to protect; Principles 11 to 24 cover the business responsibility to respect; and Principles 25 to 31 address the need to provide victims an access to remedy. Importantly, these Principles do not impose new legal obligations, or change existing human rights instruments, but aim to articulate what these established instruments mean, and to address the gap between law and practice.

As a follow-up, the UN Human Rights Council established a Working Group on the issue of human rights and transnational corporations to promote the dissemination and implementation of the Guiding Principles. The Working Group has particularly encouraged States to adopt National Action Plans to implement the UN Guiding Principles. The UN Guiding Principles emphasize that States have a critical role to play and can use a "smart mix of measures – national and international, mandatory and voluntary – to foster business respect by for human rights".[43]

The results in practice of the UN Guiding Principles have given rise to significant debate among governments and with the human rights community.[44] Some argued that the UN Guiding Principles were still new and that the stakeholders needed more time to implement them, whereas others considered that the UN

[41] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/8/5, 7 April 2008, p. 22 ff.

[42] UN Human Rights Council, res. 17/4, Human Rights and transnational corporations and other business enterprises, 16 June 2011, UN Doc. A/HRC/RES/17/4, 6 July 2011.

[43] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 21 March 2011, Principle 3.

[44] See, in particular: INTERNATIONAL COMMISSION OF JURISTS, Needs and Options for a New International Instrument in the field of Business and Human rights, Guidance on National Action Plans on Business and Human rights, version 1.01, December 2014.

Guiding Principles were in any event too weak to impose themselves to business enterprises and that a more effective, "hard law" tool was needed.

On 26 June 2014, following an initiative of certain States, the Human Rights Council also adopted a resolution, according to which an open-ended intergovernmental working group was established with mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[45] Yet, one day later, the UN Human Rights Council adopted another resolution which does not support a binding legal instrument governing business-related abuses, and instead opts to continue the mandate of the UN Working Group on Business and Human Rights for another three years. It further reaffirms the normative content of the UN Guiding Principles, focusing on strengthening domestic measures through implementation of the UN Guiding Principles and improving access to remedies for victims of business-related.[46]

3.2. The UN Guiding Principles as an Illustration of the Existing Permeability of Public and Private International Law

The UN Guiding Principles serve as an ideal illustration of international "legal" instruments of a new generation, lying at the crossroads of Public and Private international law. More precisely, the UN Guiding Principles appear to be the result of a modern conception of international law where Private and Public are not hermetically separated but rather show a high level of permeability. Various reasons appear to allow such conclusion.

First, the UN Guiding Principles are a soft law instrument, not a traditional hard law instrument, and it was developed within the framework of an international organization, the United Nations, and in particular, the UN Human Rights Council. Hence from a Public international law perspective, it is part of the new instruments that are not a formal source of Public international law but that may nevertheless play an important role in the emergence of new rules of Public international law. From the perspective of Private international law, the UN Guiding Principles may be considered as an international instrument designed at offering solutions to new issues of private international law, that is preventing and offering adequate remedies to violations of human rights committed abroad by non-State actors, especially companies with transnational activities. In this way,

[45] Human Rights Council, Resolution, UN Doc. A/HRC/RES/26/9, 26 June 2014. On the open-ended intergovernmental working group's activities: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session2.aspx (01.09.2016).

[46] Human Rights Council, Resolution, UN Doc. A/HRC/RES/26/22, 27 June 2014.

the UN Guiding Principles appear as a material source of both Public and Private international law.

Second, as to their object, the UN Guiding Principles appear also to be at the crossroads of Public and Private international law, as they intend to regulate international relations between non-States actors but are at the same time a soft law instrument that is addressed to States. Indeed, as their full title indicates clearly, the UN Guiding Principles are directed towards individuals and companies, hence non-State actors. In addition, some obligations provided for by the UN Guiding Principles are clearly directed to business enterprises. This is in particular the case of the companies' responsibility to respect human rights as contained in the second pillar and their responsibility to provide non-judicial remedies for violations in which they are involved, as included in the third pillar. But this does not mean that States are excluded: the UN Guiding Principles have been developed and adopted within an international organization the members of which are States. More precisely, the UN Guiding Principles provide for direct obligations upon States under the first pillar, in particular, an obligation to protect persons within their jurisdiction from human rights violations. Under the third pillar, the UN Guiding Principles provide that States must ensure that individuals affected have access to effective remedies. But the UN Guiding Principles also count on States for the implementation within their domestic law of other obligations, in particular those directed to companies such as the responsibility of business enterprises to respect human rights.

Third, the same conclusion can be drawn from the subjects involved in the UN Guiding Principles. In the same manner that the UN Guiding Principles regulate relations between non-State actors as well as between State actors, they concern both subjects that are non-State actors, i.e. individuals and corporations, and traditional Public international law subjects, i.e. States.

Fourth and finally, as to dispute settlement mechanisms, the UN Guiding Principles provide, in the third pillar, that States must ensure that those affected by human rights abuses within their jurisdiction have access to effective remedies, whether State-based or non-State based, judicial or non-judicial. In doing so, States are encouraged to set up effective dispute settlement mechanisms under domestic law. This can occur through different means, including by providing specific rules of Private international law so as to extend competence of the existing judicial system under domestic law to disputes arising out of violations of human rights involving non-State actors and to determine the applicable law in such cases. It could also occur through the setting up of an international dispute settlement mechanism like an international court with specific competence to decide on human rights violations' international disputes between non-State actors.

3.3. The UN Guiding Principles as an Illustration of the Complementarity of Public and Private International Law

In the previous section, we have shown that the UN Guiding Principles offer a useful illustration of the permeability of Private international law and Public international law. However, the UN Guiding Principles also are a good example of how Public and Private international law complement each other and are mutually supportive in the advancement of their common goal, i.e. the prevention and remedy of corporate human rights violations.

As a soft law instrument, the UN Guiding Principles cannot impose rights and obligations in the international relations between States or non-State actors. But, as any soft law instrument, the UN Guiding Principles may encourage and promote action taken by States to either adapt their municipal law so as to ensure enforcement of such rights and obligations at the domestic level, or to push further their negotiation to finally reach an international binding agreement under the form of a multilateral treaty. Such action would, in the case of the UN Guiding Principles, result in a situation where Public international law contributes to the advancement of Private international law. Indeed, developing an international treaty on business and human rights would entail reaching an international agreement on rules of a Private international law nature designed at ensuring that business enterprises can be sued everywhere by victims for violations of human rights or determining the applicable law to such disputes. The elaboration and adoption of such type of multilateral treaty would mean that Public international law contributes to the advancement of Private international law.

But the UN Guiding Principles also show the opposite, namely that Private international law may contribute to the development of Public international law. Indeed, States' implementation of the UN Guiding Principles within their domestic legal system, including through the development of Private international law rules aiming at ensuring effective judicial remedy for the victims of human rights' violations, may contribute to the advancement of Public international law. Such rules of a Private international law could for instance consist in extending jurisdiction of domestic courts to decide on disputes arising from corporate violations of human rights, wherever these violations have been committed. By developing such rules of Private international law, States contribute to the emergence of a relevant practice, which may eventually – next to *opinio juris* – end up in the recognition of a customary international obligation to provide for the means ensuring effective judicial remedy for corporate human rights' violations. At least, such States' practice could contribute to developing a political context favorable to the negotiations between States of an internationally binding

instrument requiring from States that they provide effective remedy for the victims of corporate human rights' violations.

In more general terms, one could also conclude that the increasing global social expectation that companies should respect international human rights standards as provided in the second Pillar of the UN Guiding Principles, combined with States' increasing adoption and implementation of domestic law rules of a Private international law nature – e.g. extraterritorial jurisdiction rules in view of ensuring a better protection to human rights – could change the nature and possibility of developing a firmer basis for corporate legal accountability for human rights.

Both Private and Public international law appear to be mutually supportive in the advancement of a common goal: the prevention and remedy of corporate human rights' violations.

4. Conclusion

When confronted with the reality of international relations, one can observe a high level of permeability between Private and Public international law, which can be witnessed at various levels. Material sources of Public and Private international law, as well as their object, their subjects and their dispute settlement mechanisms appear no longer separated. On the contrary, Public and Private international law seem to increasingly share common features.

More than a static phenomenon and a source of confusion, such permeability between Public and Private international law can be seen as developing its own dynamics. Indeed, in view of the advancement of their goals – which in our interrelated world appear to be common – Public and Private international law may complement each other.

The UN Guiding Principles appear as a direct product of such permeability as it shows aspects of both Public and Private international law. Moreover, the UN Guiding Principles show that such permeability between Public and Private international law has been used in a constructive way, showing that Public international law may contribute to the development of Private international law and vice-versa. More than ever in our inter-related world, our "Global Law" combines aspects of both Public international law and Private international law.

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The Private International Law Dimension of the Principles in Europe

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Table of contents

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This article is based on the July 2012 article "Corporate Human Rights Violations and Private International Law. The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: a Facilitating Role for PIL or PIL as a Complicating Factor?", published in *Human Rights & International Legal Discourse* 1, 2012. This article includes several updates. The PowerPoint presented at the Conference in Lausanne on 10th October 2014 is available at http://www.slideshare.net/vvde/lausanne10oktober201419septdefinitief.

In the reports on Business and Human Rights by John Ruggie, "access to remedies" cq "access to justice" appears to be a key element.

Rules of Private International Law (referred to as "PIL") can be seen as key factors in achieving access to remedies cq access to justice: PIL rules act like hinges that allow doors – granting access to a specific court and to a specific legal norm - to be opened or to be kept closed; thus, as PIL deals with issues of international jurisdiction and applicable law, PIL rules are of paramount importance in determining access to a specific court and access to a specific legal norm.

In his Guiding Principles, Ruggie addresses the responsibility of States for issuing suitable legislation and "access to remedies"; it can certainly be argued that PIL legislation (rules on jurisdiction and applicable law) and the interpretation of this legislation should also be examined in this context.

The focus of this article is the hypothesis that plaintiffs typically want to bring an action before a EU Member State court. When focusing on this hypothesis, one can observe that at least some PIL-aspects are covered by rules of PIL of European origin – the regulation of some other aspects is still left to the EU – Member States themselves. To what extent do these rules allow or deny access to remedies cq access to justice?

In this article, some rules and issues of mainly European PIL – both jurisdiction and applicable law – that deserve attention from this perspective will be highlighted in an introductory way.

1. Corporate Human Rights Violations and Private International Law

1.1. Ambition: Study of the Potential Role of Private International Law

1.1.1. A Self-Evident Rule that Should Apply in Full ...

It seems to go without saying that victims should be able[1] to hold those involved in a human rights violation liable for any damage or loss caused; setting out the legal arguments for this rule should be a mere formality:. this seems to be not only a *self-evident* rule but also one that should apply *in full*.

It is conceivable – and this is the central hypothesis of this contribution – that a non-European subsidiary of a European parent company will violate human rights outside Europe – in a conflict area[2] or otherwise – and that the European parent company will also be involved in that violation. The twofold fact that (a) the defendants (those causing the damage) are collectively a non-European subsidiary and its European parent company and (b) the plaintiffs (or claimants) are non-European victims who have sustained damage or loss outside Europe should be no reason to depart from the above-mentioned self-evident rule. But on closer scrutiny, it becomes apparent that several *hurdles* must be overcome in this specific situation. If these hurdles are not taken, there is a risk that plaintiffs will be deprived of compensation.

1.1.2. But the Road is Paved with Hurdles...

Some of the legal hurdles to be cleared by plaintiffs are found in the area of private international law ("PIL"), because damage/loss can only be recovered if two basic conditions are satisfied: first, that an action can be brought before a *competent* court and second, that the legal norms on which the plaintiffs rely *can be invoked before this court*. In PIL terminology, this concerns the *jurisdiction* of the court before which the action has been brought and the *law to be applied* by this court, respectively. PIL rules have, in fact, traditionally provided the answers to both these issues: in

[1] Possibly, in addition to criminal prosecution. As for some PIL aspects in relation to the interwovenness of civil and criminal liability, see *infra* Article 7(3) of the Brussels I Recast Regulation (former Article 5(4) of the Brussels I Regulation – see on the Brussels I Regulation and the Brussels I Recast Regulation *infra* n. 14) (concerning jurisdiction) as well as *infra* see n. 72, 86 and 88 (concerning applicable law).

[2] The fact that damage is caused in a *conflict zone* does not make any essential difference for the purposes of this contribution: the fact that damage is caused in a conflict zone does not give rise to a completely different PIL system. Even so, I will mention some special items to be addressed in the case of conflict situations.

private-law relationships with an international aspect, PIL rules determine what court has jurisdiction and what law has to be applied by that court.[3]

1.1.3. Recognition of PIL Hurdles Attached to the Hypothesis that Multinational Corporations Are Confronted with Liability Claims in their Home Countries for Violations Committed outside Europe...

The question now arises *what* PIL rules apply in cases where non-European plaintiffs want to bring civil proceedings against a European parent company and/or a non-European subsidiary of this European parent company. Suppose, in particular, that following a human rights violation a plaintiff wants to file a lawsuit in an *EU Member State court*[4] – the court of a jurisdiction that purports to attach great value to human rights. A European parent company and its non-European subsidiary must then account to a European court for the damage/loss caused by the subsidiary abroad. In cases of human rights violations, the question arises whether non-European victims have any opportunity to bring a lawsuit in a competent court in Europe and whether rules of applicable law automatically refer to the relevant human-rights norm. The question can also be defined in broader terms:[5] let us first assume that legal systems of non-European countries and those of European countries compete with each other in this area and that the rules of the one legal system are much more favourable to plaintiffs than the rules of the other legal system.[6] It is also important to recognize the dynamics of transnational business

[3] Please note, however, that PIL is *national* law, in principle: each country may, as a general rule, determine in what situations its own courts have international jurisdiction and what law they have to apply. However, PIL sources are sometimes supranational. Europe is currently undergoing a process of Europeanization or communitarization of PIL: the PIL of the EU Member States in increasingly European in origin, with national PIL sources losing ground all the time.

[4] The (European) "*home country*" of the European Parent company. On the subject of potential barriers to and disadvantages of litigation in the (non-European) "*host country*", see, *inter alia*, ENNEKING, Crossing the Atlantic, p. 4.

[5] "Broader" in the sense that attention is focussed not only on human rights violations but also on other types of unauthorized actions that are liable to sanctions.

[6] See, for example, ENNEKING, Crossing the Atlantic, p. 28, who takes the view that the substantive law of the home country is usually more favourable to the victim than the substantive law of the host country. In this article I do not assume that the substantive law of the home country is more favourable *by definition* than the law of the host country; rather, I address the question whether the law of the home country can be applied *if* this turns out to be advantageous to the victim. In this context, I will not discuss any substantive law itself and nor will I attempt to identify specific human rights.
On the contrary, I will confine myself to *PIL* mechanisms that permit or require the application of a specific rule, with a few comments on the possibility of invoking norms that are independent of PIL.

that could be relevant to this matter and realize that multinational corporations may very well try to manipulate the differences in legislation by focusing their operations in countries where norms less strict than in the "home country" apply.[7] Can we then conclude that *PIL rules* ensure that plaintiffs (victims) can invoke the substantive rules *most favourable* to them or, by contrast, are these PIL rules partly responsible for denying these plaintiffs – the "weaker parties"[8] – legal protection by subjecting them to the substantive legal norms that are *least favourable* to them? Even if plaintiffs can take their matter to a court in a European Member State, can they be denied access to the "highest norms" after all – usually the norms of the home country of the parent company or, as the case may be, the norms derived from international law – and are they systematically "pushed back" to the lower norms – usually those applicable in the host country where the subsidiary has operated its business? If so, this would amount to "giving with one hand and taking away with the other" and the plaintiffs have then been fobbed off with empty promises: even though they are formally granted access to a legal system of a European Member State, through the application of PIL rules concerning jurisdiction – specifically by enabling them to start an action before a court in Europe – the plaintiff's efforts come to nothing due to the application of substantive PIL rules concerning applicable law of the relevant European legal system:[9] in that case, the plaintiffs cannot invoke rules that offer a remedy but are referred to rules that are unfavourable to victims. In that case, PIL rules would by no means have any regulatory effect on the conduct of multinationals; on the contrary, PIL rules would then contribute to "liberalisation" dynamics.[10]

1.1.4. The Necessity of Exploring European PIL Hurdles in this Area

This contribution seeks to explore and analyse the PIL rules that are important in this area. Given the central hypothesis of this contribution – that plaintiffs want to bring an action before an EU Member State court – this exploration and analysis is based on the *European* PIL perspective. Where European PIL sources are available,

7 On these dynamics, see e.g. WRAY, Transnational Corporations.

8 On the inequality of the parties, see, *inter alia*, ENNEKING, Crossing the Atlantic, p. 33 and Leigh Day et al., "Proposal to change EU law would deny justice to multinationals' human rights victims", 13 January 2010 (available at http://www.leighday.co.uk/News/2010/January-2010/Proposal-to-change-EU-law-would-deny-justice-to-mu), p. 3 and p. 8.

9 Which are part of every legal system too. Where victims thought they could "use the legal system of a European country", the PIL rules of the legal order of that country – PIL rules that are therefore part of that legal system too – may prevent them access to all or some of the rules of *substantive law* of that legal system.

10 On the liberalising or regulatory role of PIL rules in dynamics triggered by competing legal norms, see also VAN DEN EECKHOUT, Competing norms. See also, more recently, i.a. BRIGHT, L'accès à la justice civile, GRUSIC, International Environment Litigation and VAN CALSTER, The Role of Private International Law.

these are discussed, including any processes for amending these rules. Indirectly, a substantive comparison with American PIL will be made occasionally and some differences with the American Alien Tort Claims Act (the "TCA") will be highlighted as well.

The PIL analysis will address both rules on jurisdiction and rules on applicable law, because plaintiffs must clear both PIL hurdles: in an argument, which resembles a two-stage rocket, the plaintiff must prove (a) that the EU Member State court seised of the matter has international jurisdiction and (b) that this court can apply the norm invoked. For this reason, PIL rules are of paramount importance in determining access to a specific court and to a specific legal norm. Thus, it turns out that PIL rules act like hinges that allow doors – granting access to a specific court and to a specific legal norm – to be opened or to be kept closed. PIL rules grant or deny "access".

1.2. Access to Justice as a Central Key Concept; Access to Justice and PIL

"Access to justice" happens to be a key concept in the debate on this issue: in the reports by John Ruggie[11], "access to justice" is a key element; various aspects of access to justice are highlighted in this context. It follows that PIL rules, too, are a key factor in achieving access to justice in this field. In his "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", Ruggie addresses the responsibility of States for issuing suitable legislation and "access to remedies" and it may be well argued that PIL legislation should be examined in this context, too.

Moreover, in recent years, the European institutions have defined access to justice to be one of the central objectives of the broader ongoing process of Europeanization[12] of PIL: PIL is defined as a policy instrument to achieve better access to justice and a true Area of Freedom, Security and Justice.[13]

In short, given the importance attached to access to justice in both Ruggie's reports and in PIL itself, it is appropriate to analyse the access to justice content of PIL rules

[11] Special Representative of the United Nations Secretary-General on Business and Human Rights. See Ruggie's "Protect, Respect and Remedy" Framework 2002. On 21 March 2011, the "Guiding Principles" were issued. See www.business-humanrights.org/SpecialRepPortal/Home.

[12] This concerns the process where an increasing number of PIL rules are determined at the European level (*cf. supra* n. 3).

[13] Incidentally, reference is often made to "access to justice of *Community* citizens" or "easing *European* citizens' daily lives". The question arises whether European PIL rules are also designed to ease the lives of non-European citizens who stay outside Europe and who have suffered any loss or damage there; or does PIL constitute a factor that makes their lives even harder?

in the context of corporate human rights violations. Below, the analysis of the access to justice content of PIL rules that are important in this context will be divided into two parts, based on the two classical PIL issues – two key stages relating to litigation: first (in Chapter 2), the issue of jurisdiction, and next, (in Chapter 3), the issue of applicable law.

2. Issues of Jurisdiction

2.1. PIL Sources: Brussels I Recast Regulation and National PIL

Bringing an action before an EU Member State court for the purpose of holding a European parent company and/or its non-European subsidiary liable is subject to the preliminary condition that one – or more – EU Member State court(s) have international jurisdiction. To determine whether an EU Member State court has jurisdiction, this court must assess the relevant facts by reference to the rules of the Brussels I Recast Regulation (former Brussels I Regulation)[14] or – if this regulation is found to be inapplicable – by reference to jurisdiction rules included in a national PIL source. The crucial factor in determining whether the Brussels I Recast Regulation or the national PIL source must be applied is the question whether or not the defendant is "domiciled" in a European Member State.

Under Article 4, in conjunction with Article 63 of the Brussels I Recast Regulation (former Article 2 in conjunction with Article 60 of the Brussels I Regulation), an action taken by non-European plaintiffs against a *European parent company* comes within the scope of application of the Brussels I Recast Regulation. Under Article 4 of the Brussels I Recast Regulation (former Article 2 of the Brussels I Regulation), an action may be started before the court of the country where the defendant is domiciled. Under Article 63 of the Brussels I Recast Regulation (former Article 60 of the Brussels I Regulation), this concerns the country where a company has its "statutory seat" *or* "central administration" *or* "principal place of business".[15]

[14] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), L351/1, OJ 20.12.2012 (former Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation")).

[15] For example, the jurisdiction of the Dutch court in the "*Shell* case" (pending in appeal) against the parent company was based on the fact that this parent company has its principal place of business in the Netherlands; the plaintiff could also have opted for an action before the English courts based on the fact that the parent company's registered office ("statutory seat", as it is known in the Brussels I Recast Regulation c.q. Brussels I Regulation) is located there. For the decisions of the District Court of 30 January 2013, see http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/

Accordingly, with the exception of cases where there is a choice of forum, jurisdiction is based on the general rule of Article 4 of the Brussels I Recast Regulation, even in actions where it is argued that human rights have been violated: the Brussels I Recast Regulation does not provide for a special legal ground for cases involving human rights violations.[16] Even so, one or more *additional* EU Member State courts may have jurisdiction under *Article 7* of the Brussels I Recast Regulation (former Article 5 of the Brussels I Regulation), subject to certain conditions. In this context, it is worth pointing to Article 7 *paragraph 3* of the Brussels I Recast Regulation (former Article 5(4) of the Brussels I Regulation), under which a court that has jurisdiction in criminal proceedings may also acquire jurisdiction in civil liability proceedings. Another option is to seek the application of Article 7, *paragraph 2* of the Brussels I Recast Regulation (former Article 5, *paragraph 3*, of the Brussels I Regulation), which confers jurisdiction on the EU Member State court of the "the place where the harmful event occurred or may occur". The case law of the European Court of Justice[17] shows that where there is any discrepancy between "the place where the event which gives rise to and is at the origin of the damage" (known as the *Handlungsort*) and "the place where the damage occurred" (known as the *Erfolgsort*), both the court of the *Handlungsort* and the court of the *Erfolgsort* have jurisdiction; thus, where "the event"/the *Erfolgsort*/the *Handlungsort* occurred or is situated in a European country, jurisdiction may be conferred on such EU Member State court(s) under Article 7(2) of the Brussels I Recast Regulation (former Article 5(3) of the Brussels I Regulation).

In the relevant legal literature,[18] the following comment was made on the interpretation of the *Handlungsort*: "It can be argued that the *Handlungsort* is the place where the parent company is seated, as this is where decisions were made that resulted in the harmful effect abroad". In this context, it is important to bear in mind that the court of the country where the parent company is seated will already have

Nieuws/Pages/DutchjudgementsonliabilityShell.aspx and https://milieudefensie.nl/shell-in-nigeria/rechtszaak/pers/juridische-documenten. On these decisions, see e.g. ENNEKING, The Future of Foreign Direct Liability.

16 On this subject, see also VAN HOEK, Transnational Corporate Social Responsibility. It follows from the foregoing that pursuant to the Brussels I Recast Regulation, an EU Member State court will have jurisdiction in any action against a European parent company – the court of the country where the company has its seat. If the defendant is not domiciled in a Member State, the Brussels I Recast Regulation is not applicable and another PIL regime must be resorted to.

17 Case 21/76, *Handelskwekerij GJ Bier BV v Mines de Polasse d' Alsace SA* [1976] ECR 1735. For a commentary on the recent *Öfab* case (ECJ, 18 July 2013, Case C-147/12 (Öfab) in which the Court ruled on Article 5(3) of the Brussels I Regulation, see A.A.H. van Hoek, Doorbraak van aansprakelijkheid in het ipr, noot bij HvJEU 18 juli 2013, zaak C-147/12 (ÖFAB) *Ars Aequi* 2013, p. 948-954.

18 See, in particular, JÄGERS & VAN DER HEIJDEN, Corporate Human Rights Violations, p. 846.

jurisdiction under Article 4 in conjunction with Article 63 Brussels I Regulation (former Article 2 in conjunction with Article 60 of the Brussels I Regulation). To ensure that Article 7(2) of the Brussels I Recast Regulation (former Article 5(3) of the Brussels I Regulation) provides for an *additional* ground of jurisdiction, it is required that this article should allow jurisdiction to be conferred on an EU Member State court other than the court(s) that already has/have jurisdiction under Article 4 in conjunction with Article 63 of the Brussels I Recast Regulation (former Article 2 in conjunction with Article 60 of the Brussels I Regulation) – for example, where decisions have been taken in a Member State other than the Member State where the company is seated and that country is regarded as the *Handlungsort*!?

If plaintiffs wish to summon a *non-European subsidiary* before any EU Member State court, the requirement of Article 4 of the Brussels I Recast Regulation (former Article 2 of the Brussels I Regulation) that the defendant must be "domiciled" in a Member State is clearly not satisfied. In that case, the question concerning the jurisdiction of this court may be resolved by reference to the national PIL rules of the country of this court.[19] Whether these national rules allow a plaintiff to start an action against the non-European subsidiary depends on the contents of the relevant national provisions, for example, concerning "related actions" or *forum necessitatis*. The precise possibilities may vary from country to country.[20] In the *Shell* case, which is currently pending in appeal in the Netherlands, the court based its jurisdiction with regard to Shell's Nigerian subsidiary on Article 7 of the Dutch Code of Civil Procedure, which deals with related actions;[21] the defendants later attempted to induce the Dutch court to stay the proceedings, because there was already an action pending in Nigeria. In doing so they invoked the *lis pendens* rule, as enshrined in Article 12 of the Dutch Code of Civil Procedure,[22] however the Dutch court decided to continue the proceedings.[23]

[19] Compare the distinction made in the *Shell* case in the consideration of the jurisdiction with regard to the European parent on the one hand and the non-European subsidiary on the other hand.

[20] For a comparative law survey, see NUYTS, A. et al., Study on Residual Jurisdiction', European Commission Study LS/C4/07-30-CE) 0040309/00-37, available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf

[21] See the judgment of the District Court of The Hague of 30 December 2009, JOR 2010/41, with a note by R.G.J. de Haan.

[22] Rather than the rules of *lis pendens* of the Brussels I Regulation, see also *infra* n. 33.

[23] See the decision by the District Court of The Hague, dated 1 December 2010.

2.2. Scrutinization of Former Proposals to Reform the Brussels I Regulation for their Impact on Access to Justice

2.2.1. Extension of the Scope of Application of the Brussels I Regulation to Non-European Defendants – Introduction of *Forum Necessitatis*

As the law stands at present under the regime of the Brussels I Recast Regulation – and as was already the case under the regime of the Brussels I Regulation -, cases involving non-European defendants are, in principle, subject to national PIL regimes; however during the preparation of the Brussels I Recast Regulation, a process for the revision of the Brussels I Regulation was under way,[24] which might have changed this: there were plans to extend the scope of application of the Brussels I Regulation to include non-European defendants.[25] It was conceivable therefore that after the revision of the Brussels I Regulation, questions concerning the jurisdiction of EU Member State courts in proceedings against non-European subsidiaries would have to be answered by reference to the (revised version of the) Brussels I Regulation as well. To enable plaintiffs to commence an action against a non-European defendant, it was proposed to include a *forum necessitatis* in the Brussels I Regulation[26] in an attempt to prevent *déni de justice* and ensure access to justice.[27] Incidentally, this *forum necessitatis* may well provide special possibilities in the event that in the non-European country where the subsidiary operates its business a *conflict situation* arises, rendering it difficult to litigate in this country.

[24] See the Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2009)0175 final, 21.04.2009. In September 2010, the European Parliament issued a resolution (European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)); in December 2010, the Commission presented a proposal (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, COM(2010)748 final, 14.12.2010). The proposals discussed in this chapter have *not* been performed as such in the final version of the recast of the Brussels I Regulation, the "Brussels I Recast Regulation." See however, on lis pendens, the new article 33 Brussels I Recast Regulation.

[25] See the proposed amendment to Article 4 of the Brussels I Regulation in the Commission's proposal, as well as Recital 16 of the proposed preamble that goes with it.

[26] See Article 26 of the Commission's Proposal.

[27] See the Green Paper COM (2009)175 final, 21 April 2009 and the Impact Assessment 24. On this subject, *see, inter alia*, KESSEDJIAN, Commentaire de la refonte, p. 1-14 and WEBER, Universal Jurisdiction, p. 17-18.

Apparently, Article 6 ECHR plays a role in the background. In *national* PIL regimes, incorporation of *forum necessitates* has indeed already quite often been inspired by Article 6 ECHR.[28]

To the extent that national PIL regimes already include a *forum necessitatis*, the fact that the jurisdiction issue would have been governed in the future by the ground of jurisdiction of the Brussels I Regulation, rather than any national ground of jurisdiction, cannot be considered a step forward or a step back on the road to achieving access to justice: the PIL source relied on will be different but the substantive outcome remains more or less the same. Yet, to the extent that specific national PIL regimes currently *do not* provide for any possibility of invoking *forum necessitatis*, the revision of the Brussels I Regulation seemed to be an improvement. In this context, the following point should however be made: including *forum necessitatis* in the Brussels I Regulation should have been assessed in the context of the *entire* revision process. The plans to revise the Brussels I Regulation left *no* room for invoking national grounds of jurisdiction against non-European defendants. This would have resulted in the disappearance of national grounds of jurisdiction *other than forum necessitatis* that are currently recognized in some EU countries and that provide alternatives in some cases – for example, national PIL provisions concerning related actions.[29] This means that *forum necessitates* might well have become the *only* option in proceedings against non-European defendants. If the scope of application of the Brussels I Regulation were extended and national jurisdiction rules were indeed abolished, it seemed reasonable to therefore amend Article 6 of the Brussels I Regulation, which deals with related actions, so as to include a ground of jurisdiction based on related actions with respect to non-European defendants. The Commission's proposal to revise the Brussels I Regulation did *not* provide for this amendment of Article 6.[30] Thus, an issue of

[28] As to the parliamentary history of Article 9 of the Dutch Code of Civil Procedure, see, e.g., *Kamerstuk* ["Parliamentary Paper"] 1999-2000 (House of Representatives), 26855, no. 3. The rationale of Article 6 ECHR is a relevant factor in the background, but it should be possible in any case to subject the precise conditions of *forum necessitas* to the *test* of Article 6 ECHR.

[29] See, in particular, the *Shell* case, in which it was found unnecessary in the action against the non-European subsidiary to turn to the "last resort" of *forum necessitatis* (Article 9 of the Dutch Code of Civil Procedure), because it was possible to invoke Article 7 of the Dutch Code of Civil Procedure concerning related actions.

[30] In the literature, some authors had advocated an extension of Article 6 in a general sense. See, for example, WEBER, Universal Jurisdiction, p. 8 and p. 23. Incidentally, amending Article 6 so as to include non-EU defendants would create possibilities for non-European victims especially if the present case law of the Court of Justice concerning a flexible approach of Article 6 of the Brussels I Regulation is also followed in situations where non-European defendants are involved too. In the decision of the District Court of The Hague concerning the application of Article 7 of the Dutch Code of Civil Procedure (see *supra* footnote 21), this case law was cited.

concern can be found here if one argues that the plans to revise the Brussels I Regulation should have been effectively "scrutinized for their impact on access to justice for third-country victims of human rights and environmental abuses by European parent corporations and/or their third-country subsidiaries."[31]

2.2.2. Amendment of the *lis pendens* Rule

The next issue to be addressed concerns the *lis pendens* rule. Under Article 34 of the Commission's proposal, the new version of the Brussels I Regulation would also have provided for a *lis pendens* rule in cases where there is an action in a *non-European* country – for the final version, see Article 33 of the Brussels I Recast Regulation. As matters stood at that point in time, the *lis pendens* rule applied only between EU Member States; in *lis pendens* situations involving non-EU Member States, the Member States' national PIL rules had to be resorted to.[32] Here, too, it seems at first sight that amending the Brussels I Regulation would have made hardly any difference, but again, a critical note is in order here, particularly if the case law of the Court of Justice concerning the refusal to sanction parties' abuse of jurisdiction rules is taken into consideration:[33] the risk existed that the party who expects to be summoned in an action before a non-European court deliberately initiates an action in the non-European country where the subsidiary is seated and subsequently relies on the *lis pendens* rule of the Brussels I Regulation. This point needed to be addressed. It should be borne in mind, however, that in the Commission's proposal, the EU Member State court had the opportunity – rather than the obligation – to stay the proceedings if another case is pending before a non-European court. It is also worth mentioning that the court's assessment may take account of considerations relating to the fact that the non-European country is facing a *conflict situation*.

[31] See the appeal to this effect in the Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union, University of Edinburgh, October 2010, available at http://www.law.ed.ac.uk/euenterpriseslf/ and VAN DEN EECKHOUT, The Liability of European Parent Companies.

[32] This is why, as stated above (see *supra* n. 22), the dispute concerning *lis pendens* in the *Shell* case centred on Article 12 of the Dutch Code of Civil Procedure rather than the *lis pendens* provision of the Brussels I Regulation.

[33] See, in particular, the judgment handed down by the ECJ in the *Gasser* case, Case C116/02, *Erich Gasser GmbH and MISAT Srl*, 9 December 2003, where the Court strictly adhered to *lis pendens* provisions. Even though the revision process of the Brussels I Regulation included plans to reverse this decision – and finally the Brussels I Recast Regultion *has* been amended on this particular point - , this relates only to cases where the parties have made a choice of forum and either party subsequently goes to another court all the same. In the actions discussed in this contribution, it is unlikely that the parties have selected a EU Member State court as the forum, as is shown by the frantic efforts made by the defendants in the *Shell* case to persuade the Dutch court to decline jurisdiction.

2.2.3. Introduction of *forum non conveniens*?

A revision of the Brussels I Regulation that would almost certainly have had an adverse effect on non-European defendants was an amendment permitting the courts of the EU Member States to invoke the doctrine of *forum non conveniens*: an EU Member State court that formally has jurisdiction under the jurisdiction rules of the Brussels I Regulation would then still be able to refuse to take jurisdiction because there is a more appropriate forum available to the parties. The risks that this entails for non-European defendants, particularly with regard to their "access to justice" – even the phase "denial of justice" is being used in this context – have been elaborated in response[34] to the English proposal to revise the Brussels I Regulation along these lines.[35] *Forum non conveniens* may be at odds with Article 6 ECHR.[36] What is more, it must be recognized that declining jurisdiction with respect to the European parent on the ground of *forum non conveniens* might also have had negative consequences for jurisdiction for the non-European subsidiary, because it would no longer be possible to invoke jurisdiction with regard to the non-European subsidiary on the ground that the action is related'[37] to the action against the parent. In brief, the consequences of the introduction of a *forum non conveniens* plea in the Brussels I Regulation could have been immense. Nevertheless, the resolution of the European Parliament included a proposal for a *forum non conveniens*.[38] And even

[34] See Leigh Day et al., "Proposal to change EU law would deny justice to multinationals' human rights victims" (*supra*, n. 8). See also the above-mentioned (*supra*, n. 31) Edinburgh study, which is also very critical on this subject.

[35] The earlier rejection of the use by English courts of this Anglo-American *forum non conveniens* (see the decision of the Court of Justice in the *Owusu* case, ECJ C-281/02, 1 March 2005) would then be reversed as a result of the amendment of this regulation. Incidentally, EU courts that never had the tradition of applying *forum non conveniens* could also start using it. This potential development already triggered the following comment: "A Phoenix rises from the ashes … and flies over all of Europe" (see http://conflictoflaws.net/2010/european-parliament-resolution-on-brussels-i/).

[36] See also the discussion by ENNEKING, Crossing the Atlantic, p. 18 *et seq*.

[37] Based on national PIL or, if an amendment extending Article 6 of the Brussels I Regulation would have been implemented, based, at that moment, on the Brussels I Regulation.

[38] In the resolution (no. 14), reference is made to the rules embodied in Article 15 of the Brussels II bis Regulation, which are already applicable, but in Brussels II bis, the relevant rules concern a situation between courts in Europe, whereas the resolution also concerns situations where a non-European court that is deemed better placed to hear the case – which may possibly mean that not a single court may have any jurisdiction left. Where at present litigants can be certain – under Article 4 in conjunction with Article 63 of the Brussels I Recast Regulation (former Article 2 in conjunction with Article 60 of the Brussels I Regulation) – that at all times some EU Member State court has jurisdiction and *must* take jurisdiction in an action against a European parent company, this certainty would be undermined if *forum non conveniens* is introduced. On this subject, see the critical comments by VAN DEN EECKHOUT, The Liability of European Parent Companies.

though the Commission's proposal did not contain any explicit *forum non conveniens* provision, the planned extension of the *lis pendens* rule of the Brussels I Regulation to include situations where actions are pending in a non-European country was sometimes represented as inspired by *forum non conveniens*.[39] Continued vigilance was – and is - called for. Should any *forum non conveniens* option have been included in the Brussels I Regulation, victims would lose a great advantage of the European rules compared to the American Aliens Tort Claims Act (ACTA),[40] because under the system of the ATCA, *forum non conveniens* may be invoked.

2.3. Acceptance of Jurisdiction of One or More EU Member State Court(s) as a Stepping Stone towards and a Preliminary Condition for Access to the Legal Standard Required

The application of the above jurisdiction rules result in a decision to allow or disallow a plaintiff to conduct proceedings before a specific EU Member State court. The effects of this decision can be significant for the continuation of the action. If an action is started before an EU Member State court, the rules of applicable law of the court seised must be applied. If an action is started before a non-European court, other rules of applicable law apply, which can easily lead to a very different result.[41]

Below (in Chapter 3), I will assume that one – or possible even more than one[42] – EU Member State court definitely has jurisdiction. In that case the court seised must apply a PIL regime concerning applicable law of European origin or – if the case is not governed by any PIL regime of European origin – its national PIL. At the outset, I would like to draw attention to the characterization of a question of law as being a question of applicable law concerning *torts/delicts*, concerning *company law* or concerning *contracts*.[43] Incidentally, it is conceivable that the characterization of

[39] See KESSEDJIAN, Commentaire de la refonte, as well as WEBER, Universal Jurisdiction, p. 14-15. Through *lis pendens* provisions, a disguised form of *forum non conveniens* plea could then have been entered, specifically in situations where proceedings are already pending in another country.

[40] See ENNEKING, Crossing the Atlantic, p. 16 as well as JÄGERS & VAN DER HEIDJEN, Corporate Human Rights Violations, p. 849.

[41] See also VAN DEN EECKHOUT, The Liability of European Parent Companies.

[42] See the above-mentioned alternatives offered by Article 63 of the Brussels I Recast Regulation (former Article 60 of the Brussels I Regulation) as well as Article 7(2) Brussels I Recast Regulation (former Article 5(3) of the Brussels I Regulation).

[43] As for the applicable law concerning contracts, see the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 2008 on the law applicable to contractual obligations ("Rome I Regulation"). Through the possibility of "accessory connection", as included in Article 4(3) of the Rome II Regulation, the rules of this PIL regime may be significant, too. It should also be borne in mind that parties to international contracts may invoke force majeure or hardship in the hypothesis of conflict zones.

specific legal relationships within Europe *differs* from court to court.[44] Any characterization as a question of applicable law concerning contracts or company law and the corresponding application of the relevant PIL regimes may offer plaintiffs new – possibly alternative[45] – possibilities, as well as create new hurdles.

In Chapter 3 the focus will be on the situation where the Rome II Regulation, which contains rules of applicable law concerning "torts/delicts", constitutes the applicable PIL regime. In analysing this regulation, I will endeavour to explore the extent to which the Rome II Regulation allows the application of a legal norm that is "favourable" to plaintiffs.

3. Issues of Applicable Law

3.1. Selection of the PIL Regime to Be Used – PIL Regimes of European and National Origin

The Rome II Regulation[46] has a very broad substantive scope and universal application. It is worth pointing out the restriction in the temporal scope of application, however:[47] If a case is excluded from the temporal scope of application of the Rome II Regulation, other sources of applicable law concerning torts/delicts must be resorted to: in that case, national regimes may be applicable after all.

It is difficult to give a general answer to the question whether the Rome II Regulation is an improvement compared to the national PIL rules of the EU Member States:[48] the national regimes differ. Earlier,[49] I pointed out that the European rule of applicable law concerning *environmental damage* is an improvement compared to the Dutch rules. But a more thorough analysis of the Rome II Regulation is necessary before it can be concluded that the regulation meets the needs of non-

[44] For a comparative law analysis of proceedings for "piercing the corporate veil", see VANDEKERCKHOVE, Piercing the corporate veil.

[45] On this subject, see VAN DEN EECKHOUT, International Environment Pollution. The importance of a PIL classification is also shown by the *Shell* case, for example, in relation to the question who may act as plaintiff and in the context of the application for disclosure.

[46] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation"). Denmark is *not* a Member State.

[47] The tort/delict must have been committed after a specific date. There was for some time some controversy about whether the relevant date is 11 January 2009 or another date; on this subject, see ECJ, 17 November 2011, Case C-412/10 (Homawoo). On issues of the temporal scope of the Rome II Regulation, see also DEN TANDT & VERHULST and VERHULST, The Temporal Scope of the Rome II Regulation after Homawoo.

[48] Cf. the question put by ENNEKING, Crossing the Atlantic, p. 30.

[49] VAN DEN EECKHOUT, Competing norms.

European victims who want to seek recourse against a European parent company and/or its non-European subsidiary.

3.2. The Hypothesis that the Rome II Regulation is the PIL Regime to Be Applied

3.2.1. Basic Rule and Exceptions to the Rome II Regulation

3.2.1.1. Basic Rule

Given the absence in Europe of a system like the American ATCA, as well as the absence of any unified European tort law[50] – by which aspects such as regulation of "complicity" and "negligence" are regulated differently within the Member State[51] – the rules of applicable tort law play a crucial role in Europe, as these rules determine what tort law has to be applied.

As for the question of what law *should be applicable* in a situation where non-European plaintiffs start an action against a European parent company and/or the non-European subsidiary, some have argued in favour of the application of the law of the country where the European parent company is seated: "Although the events took place thousands of miles away, it is right that this British company is made to account for its actions by the British courts and made to pay British levels of damages for what happened. A British company should act in Abidjan in exactly the same way as they would act in Abergavenny", according to an attorney in the *Trafigura* case.[52] The application of the basic rule of the Rome II Regulation, however, appears to have achieved exactly the opposite result: based on Article 4(1) of the Rome II Regulation, the *lex damni* is declared applicable, or "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur." Consequently, in situations where the *Handlungsort* and the *Erfolgsort* are different, the law of the *Erfolgsort* is declared applicable.

Regarding the choice to include this rule as the basic rule in the Rome II Regulation, the preamble[53] provides that in applying the *lex loci*, "a fair balance between the interests of the person claimed to be liable and the person sustaining damage" is achieved and that this is in line with "the modern approach to civil liability". It includes a negative assessment, however, of the *impact* of this rule *on the issues raised in this contribution*. The effects of adopting this "modern tort law vision"

[50] ENNEKING, Crossing the Atlantic, p. 20-21 and p. 25, points out that this is not expected to change in the near future.
[51] See VAN HOEK, Transnational Corporate Social Responsibility.
[52] Quoted by ENNEKING, Crossing the Atlantic, p. 28.
[53] Preamble 16.

would, in particular, be very *unfair* for non-European victims, who are considered "weaker parties".[54] This is because the application of Article 4(1) of the Rome II Regulation means that there is not much chance that a European legal system applies in situations of this kind, which is considered disadvantageous to the plaintiffs[55] and liable to increase the parties' inequality even further. Van Hoek[56] writes that "the torts arising out of violations of human rights – or out of crimes committed against the victim – *do not fit well* into this modern tort policy" and that "(…) conflicts rule may be *ill-adapted* to deal with serious human rights violations and other crimes."

Even if it is argued that in the case of complicity of European companies – through "negligence" or "failure of supervision" – the *Handlungsort* is situated at the company's European headquarters, this alone does not justify the conclusion that the law of a European country can be declared applicable: Article 4(1) of the Rome II Regulation does not attach significance to the *locus actus* (the *Handlungsor*t), rather to the *locus damni* (the *Erfolgsort*).

If it is assumed that the systematic application of non-European law has an adverse effect on non-European victims but if one nevertheless wishes to be loyal to the system of the Rome II Regulation, it is important, naturally, to ascertain whether the Rome II Regulation permits[57] *departures from* the basic rule. Various possibilities of making exceptions to the basic rule and/or making a reservation are discussed briefly[58] below.

3.2.1.2. Exceptions and Reservations. Exploration of the Various Avenues Allowed by the Rome II Regulation

First, it should be observed that the basic rule of Article 4(1) of the Rome II Regulation[59] applies without prejudice to Article 4(2) and Article 4(3). The

54 See *supra* n. 8.

55 In the words of WRAY (WRAY, Transnational Corporations, p. 26), this results in a failure to achieve "true access to justice for victims".

56 VAN HOEK, Transnational Corporate Social Responsibility.

57 Possibly as an *alternative*: because it is not inconceivable that the application of the basic rule is *favourable* to victims. Cf. *supra* n. 6.

58 In earlier studies, written in Dutch, I dwelled on some of these possibilities in much greater detail; see VAN DEN EECKHOUT, International Environment Pollution and VAN DEN EECKHOUT, The Liability of European Parent Companies. Each of these possibilities, which will be briefly dealt with below, turned out to have its own hurdles *and* chances.

59 As to the possibility of interpreting Article 4(1) of the Rome II Regulation in the case of an "offence of omission" such that reference is ultimately made to the law of the country where the parent company has its seat or the law of the country where the parent company should have taken decisions, de Boer's discussion of a Dutch decision (based on Dutch rules of applicable law) concerning an offence of omission might provide reference points, see the Dutch Supreme Court decision dated 2 October 2001, *NJ* 2002, 255, with a note by T. M. DE BOER, particularly where de Boer deals with various

requirements imposed by Article 4(2), particularly that both the victim and the perpetrator should have their habitual residence in the same country, being a country different from that where the damage occurred, will not be easily satisfied in cases to which the central hypothesis of this contribution applies.[60]

As it is based on a manifestly closer connection of the legal relationship with any law other than the law that would apply pursuant to Article 4(1) (or 4(2)), *Article 4(3)* – known as the "escape clause" – may provide a solution in more cases. Nevertheless, the Castermans report[61] observes somewhat cautiously that invoking this escape clause should be permitted only in exceptional cases, given the requirement of legal certainty; on the other hand, as the European legislator has *deliberately* opted for including this exception in the regulation, it should not be impossible to invoke it; incidentally, I could refer, *mutatis mutandis*, to the grounds taken by the Court of Justice in its judgment in the *Intercontainer* case[62] with respect to its position on how to deal with the escape clause of Article 4(5) of the Rome Convention: in its judgment, the Court of Justice dismissed too strict an interpretation of the escape clause embodied in the Rome Convention. In addition, it is remarkable that in the literature[63] the question had already been raised as to whether the legal system considered to be more closely connected could be the legal system of the *Handlungsort*: if so, the law of the *Handlungsort* could be declared applicable after all. Naturally, establishing the *Handlungsort* or *locus actus* is of paramount importance in this respect.

In applying the special reference rule of *Article 7* of the Rome II Regulation, which derogates from Article 4(1), a *locus actus* must be specified in any case: Article 7 of the Rome II Regulation includes a special rule in respect of environmental damage,

views on the "localisation" of an offence of omission, including the concurrence of act and harmful consequences in the place where action should have been taken; in line with this view, it should be argued in this context that the direct consequences of complicity occur in a European country, too.

60 See, however, the comments on the residence of parties in the *Shell* case in connection with the appearance of Friends of the Earth Netherlands (*Nederlandse Milieudefensie*) as co-plaintiff in this action and the question whether this could ultimately result in a decision concerning residence of the plaintiffs in the Netherlands.

61 CASTERMANS & VAN DER WEIDE, The Legal Liability, p. 5.

62 ECJ 6 October 2009, Case C-133/08 (*Intercontainer*). More recently, the Court also ruled on the escape-clause of *article 6 Rome Convention* in the Schlecker-case (ECJ 12 September 2013, Case C-64/12 (Schlecker); on the Schlecker-case and the possible implications of the Schlecker-case for issues of Corporate Social Responsibility discussed under Article 4(3) Rome II regualation, see VAN DEN EECKHOUT, The Escape-Clause and VAN DEN EECKHOUT, "Schlecker and beyond. New input in debates about international labour law and CSR?" posted 13th December 2013 on "Leiden Law Blog" (http://leidenlawblog.nl/articles/schlecker-and-beyond.-new-input-in-debates-about-international-labour-law-a).

63 See FENTIMAN, The Significance of Close Connection, p. 98-100.

where the victim is offered a unilateral right to choose between *lex damni* on the one hand and "the law of the country in which the event giving rise to the damage occurred" on the other hand (the law of the *Handlungsort*). This rationale behind this special rule is concern for environmental pollution.[64] To enable the victim to opt for the law of a European country might also require that the *Handlungsort* be interpreted as the law of the country where the parent company law is seated and/or the law of the country where the parent company takes policy decisions or where these should have been taken.[65]

The question whether, under specific circumstances, the *Handlungsort* can be in a European country may also arise in the context of the application of *Article 17* of the Rome II Regulation. Article 17 provides that "in assessing the conduct of the person claimed to be liable, account shall be taken (...) of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability". Accordingly, if Article 17 is interpreted to mean that "rules of safety and conduct" could be the rules of a European country, specific EU Member State rules could be applicable after all.

Article 16 of the Rome II Regulation may also[66] give rise to a possibility that, even though the law of a non-European country has been declared applicable in principle, specific EU Member State rules may be relevant all the same: Article 16 of the Rome II Regulation provides for the possibility that rules characterized as "overriding mandatory provisions" prevail over the law that is otherwise applicable. However, this concerns only overriding mandatory rules of the law of the court seised, or "foral" overriding mandatory rules.

Finally, *Article 26* of the Rome II Regulation provides for the possibility of invoking the plea of international public policy – of the forum – and setting aside the rules of the law that is otherwise applicable. As for the law that should then be applied, the explanatory memorandum to the Rome II Regulation proposal referred to the application of *lex fori* as "surrogate" law;[67] the Rome II Regulation itself does not refer to this. Remarkably, the national systems of the separate EU Member States *do not* systematically prescribe that the *lex fori* be applied after foreign law has been set aside by virtue of the plea of international public policy.[68] Incidentally, legal

[64] See the explanatory memorandum to the Rome II proposal (COM(2003)427 def).

[65] For a rejection of this interpretation, see the Castermans report, p. 53. On the other hand, see especially ENNEKING, Crossing the Atlantic, p. 23, as a supporter of this interpretation; see also VAN DEN EECKHOUT, International Environment Pollution, for the arguments for this interpretation.

[66] See on the importance of the articles 16 and 17 Rome II Regulation also, briefly, the report "Holding Companies Accountable. Lessons from transnational human rights litigation?", available on www.ecchr.de

[67] See page 32 of the explanatory memorandum to the Rome II proposal.

[68] See the national reports in ESPLUGUES, IGLESIAS & PALAO, Application of Foreign Law.

systems may also differ with respect to the required connection with their own legal order before the plea can be invoked.[69]

3.2.2. Potential Differences in Outcome Depending on the European Court Seised

The foregoing shows that, even though the Rome II Regulation is a *unified* PIL regime applicable within Europe, it is conceivable that the actual application of the Rome II Regulation may have different outcomes, depending on the EU Member State court in which the lawsuit has been filed: for example, the courts may deal with the plea of international public policy of Article 26 in different ways, particularly given the fact that Article 26 concerns the "public policy *of the forum*"; courts may apply a different surrogate system of law after the plea has been invoked; or different overriding mandatory rules may be applied given the fact that Article 16 refers to overriding mandatory rules "of the forum". Finally, if the *Handlungsort* of Article 7 of the Rome II Regulation is interpreted as "the country where the parent company is seated", differences could also arise from the fact that some EU countries apply the "statutory seat" doctrine, and others the "real seat" doctrine.

If several EU Member State courts are found to have jurisdiction, enabling plaintiffs to engage in "forum shopping", plaintiffs may recognise these potential differences in outcome and the latter may affect their decision to bring an action before a specific court. In fact, an awareness of these potential differences may also affect companies' decisions on where to establish the company: as Chapter II showed, elements such as the place where the company has its seat are relevant in determining jurisdiction; by taking account of these elements, companies may therefore exercise influence on the debate on jurisdiction as well as on the court(s) that will apply the Rome II Regulation.

If, however, a European/supranational plea of international public policy existed, if the rules of surrogate law were European/supranational,[70] or if the overriding mandatory rules were of European/supranational origin, *the same* outcome in all EU countries could be guaranteed. The question arises whether it is conceivable that *human rights* could constitute the basis for this plea and/or for the relevant

[69] See also, briefly, the Edinburgh Study, p. 73, as well as the special in NIPR 2011 issue 1 in connection with the Conference in Amsterdam by the name of "The impact of the European Convention on Human Rights on Private International Law."

[70] See BOELE-WOELKI, De toepassing van een surrogaatrecht, p. 3-12, concerning the possibilities of using "uniform law as laid down in international conventions and supranational rules" as well as "general legal principles to the extent these can be easily established" as surrogate law.

surrogate law, or for overriding mandatory rules or rules of safety and conduct? This calls for a closer look at the relationship between human rights and PIL

3.2.3. Place within or in Addition to this System of International Norms and/or Human Rights

International norms or human rights may be applicable *indirectly* through PIL rules: if the rule of applicable law refers to a legal system that incorporates human rights, the application of national law,[71] as designated by the rule of applicable law, can ensure that human rights are respected. But the question arises whether international norms may be applicable otherwise – that is, "directly" – either through specific PIL techniques or even separately from PIL. *Within* the system of PIL rules of the Rome II Regulation, it is particularly the plea of international public policy and the system of overriding mandatory rules that appear to be mechanisms that can enforce respect for human rights.[72] If respect for human rights is achieved *without* any rules of applicable law and/or special PIL mechanisms, it is enforced *independently of PIL rules*.[73]

Yet, it is a problem, as the law stands at this juncture, that there are only a handful of international norms in this field that are direct applicable because they satisfy conditions like "direct effect" and "horizontal effect".[74] Experiences gained in the

[71] In this context, it is conceivable that international norms may play a role in fleshing out "open norms" such as "proper social conduct", provided for in a specific system of substantive law. See NOLLKAEMPER, Public International Law.

[72] See, *inter alia*, VAN HOEK, Transnational Corporate Social Responsibility and NOLLKAEMPER, Public International Law. Incidentally, the comments made by both these authors about two other possibilities are worth mentioning too. See, first of all, VAN HOEK, where she writes about Article 4(3) of Rome II: "(...) one could argue that the escape clause in Article 4 could be used in cases of civil liability based on criminal complicity. That would mean that a closer connection is deemed to exist to any state which criminally sanctions the litigious behaviour", and, subsequently, NOLLKAEMPER, where he states the following: "(...) it might be argued that the *choice* of the applicable national law should be determined by public international law. (...) Should the court let the choice of law be determined by the question whether one of the possible systems of law is more or less acceptable in the light of public international law?"

[73] About establishing a "PIL for fundamental rights", see, e.g., LABRUSSE, Droit constitutionnel; see also the NIPR special of 2011, issue 1. Incidentally, another option could be the application of human rights as open norms of a kind that *manifest themselves* in PIL (see, briefly, V. Van Den Eeckhout "De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?", *Rechtskundig Weekblad* 1999-2000, p. 1249-1265), which is a procedure that is to be distinguished from the above-mentioned (*supra* n. 71) possibility of *fleshing out* open norms provided for by the law *declared applicable.* On the interrelationship between PIL and human rights in matters related to torts, see recently KIESTRA & PONTIER, The Role of Human Rights Law.

[74] See NOLLKAEMPER, Public International Law.

application of the ATCA also show that there are not many international norms that could be used as a basis.[75] The question arises whether Europe should not adopt in the future a policy oriented towards allowing more *human rights* to be invoked.

3.2.4. Confrontation with the Pretended Goals and Ambitions of Europe when Regulating PIL. Need to Revise/Amend the Rome II Regulation?

If the results of the current rules are compared to the goals and ambitions presented, such as ensuring "access to justice" or achieving an Area of Freedom, Security and Justice, striking "a fair balance", reflecting "modern tort policy" and fighting environmental pollution, the question arises whether Europe should not take some further action anyway. As the law stands at this juncture, the prevailing view is that the position of non-European victims in this area under the current version of the Rome II Regulation is not very good. For example, openings that PIL rules may offer are described as "last straws"[76] and more generally, PIL rules are represented as "a potential obstacle for victims who want to bring a lawsuit against a corporation."[77] I am of the opinion that the current version of the Rome II Regulation already has rather a great deal of potential,[78] even though non-European plaintiffs usually have to rely on exceptions and/or a "flexible" interpretation of the rules. The mere approval by the Court of Justice of these exceptions and options in favour of plaintiffs, particularly with regard to the central hypothesis of this contribution, might already guarantee a minimum degree of legal protection.

But even if this potential is recognized, there are restrictions, too, which should be recognised. This is why the question arises whether the system of the Rome II

[75] See ENNEKING, Crossing the Atlantic, p. 22-23. The violation of an international norm is a condition for applicability of the ATCA (As for the extent to which PIL rules are relevant to the assessment of complicity in the context of the application of the ATCA, see Enneking, Crossing the Atlantic, p. 14, footnote 64, and p. 25, footnote 124; on the assessment of complicity under the ATCA, see also Keitner, Conceptualizing Complicity). The application of the Rome II Regulation is not conditional upon the submission of an international norm. Accordingly, the outcome of discussions such as the current one in connection with the Kiobel decision dated 17 September 2010 about the (im)possibility of applying the ATCA in cases involving corporations (in respect of which specific international rules are said to be lacking) cannot simply be translated into the Rome II Regulation: the rules of the Rome II Regulation refer only to a specific legal system and in this context, the violation of domestic norms of due care is the initial question to be addressed, as these norms define who can be held liable etc. However, the question arises whether in the context of the application of the Rome II Regulation, submitting an international norm may provide additional possibilities.

[76] VAN DAM, Onderneming en mensenrechten, p. 35.

[77] JÄGERS & VAN DER HEIJDEN, Corporate Human Rights Violations, p. 843.

[78] See also all of my analyses in VAN DEN EECKHOUT, International Environment Pollution and VAN DEN EECKHOUT, The Liability of European Parent Companies.

Regulation requires amendments and/or whether it should be supplemented with a set of rules.

The special conflict of law rule of Article 7 of the Rome II Regulation may constitute a point of departure for a debate on the potential amendment of this Regulation: this rule, which offers the application of the basic rule of Article 4(1) as an *alternative in addition to* the application of the law of the *Handlungsort*, has been received well in the literature – at least, if *Handlungsort* can be interpreted such that there is chance that the legal system of an EU Member State may be applicable too.[79] But it remains true that in the current version of the Rome II Regulation Article 7 is an exception in a system that has essentially been set up quite differently.[80] For this reason, some have already advocated applying a conflict of law rule such as the one envisaged by Article 7 of the Rome II Regulation in cases other than environmental damage; it is argued that this way, rules of international tort law could have an effect on the conduct of multinationals.[81] With the exception of its Article 7, the current version of the Rome II Regulation has been criticized for its failure to produce an effect on conduct and to reflect modern ideas in PIL sufficiently.[82] In modern PIL trends, issues of *substantive law* are incorporated into PIL rules as well; in modern PIL trends, Von Savigny's reference system, which is traditionally indifferent to rules, has been departed from and PIL is given a more instrumental function. Really modern PIL rules[83] on this subject could be oriented on protecting the interests of tort victims a great deal more than is the case at present, particularly by issuing PIL rules aimed at a *substantive outcome favourable*[84] to the weaker party. By issuing PIL rules to this effect – and in line with modern PIL trends[85] – PIL may

[79] See *supra* n. 65. Incidentally, it was already clear that the discussion about the details of the *Handlungsort* can be relevant to the application of Article 17 as well – in addition, see also Article 23, which includes a reference to "the event giving rise to the damage"; see also the interpretation possibilities of Article 7(2) of the Brussels I Recast Regulation (former Article 5(3) of the Brussels I Regulation).

[80] See, for example, the critical comments on the basic system of the Rome II Regulation, also in comparison with American PIL developments, in SYMEONIDES, Rome II and Tort Conflicts, p. 173.

[81] ENNEKING, The Common Denominator, p. 310.

[82] See, for example, SYMEONIDES, Rome II and Tort Conflicts.

[83] Even though the drafters of the Rome II Regulation pretend, through the issue of Article 4(1) of the Rome II Regulation, that this regulation is in line with "modern tort law", I already made it clear above that this provision protects the interests of multinationals rather than those of victims.

[84] One should always be attentive for potential unexpected cq perverse effects – as to the concrete result - of certain ways of "protecting" a weak party through PIL if these ways are not focused on the substantive result, see mutatis mutandis in the area of international labour law VAN DEN EECKHOUT, The Escape-clause.

[85] Viewed from this perspective, no internal "resistance" is to be expected from the discipline of PIL against using PIL rules to lend a helping hand to structurally weaker parties. Hence, "modern" PIL may be a good "conductor" of human rights.

serve political policy objectives such as achieving access to justice for victims of human rights violations and/or regulating conduct of multinationals in international situations etc.

If modern PIL trends are followed, emphasizing the importance of the modern PIL mechanism of *overriding mandatory rules* may well be highly productive. It should be recognized that enforcing specific rules – of supranational, unified, or of national origin – as overriding mandatory rules[86] offers great potential in this area. In this context, EU Member States could consider issuing "home state requirements for corporate citizens to undertake human rights impact assessments, such as environmental assessments, before granting them an investment permit or similar instrument",[87] or rules concerning extraterritorial corporate responsibility for human rights violations,[88] if possible, focusing on situations where multinationals operate in *conflict situations*.

One way to ensure respect for such rules is codifying a uniform set of overriding mandatory rules at European level and issuing these as minimum rules and/or a lower limit to be heeded by all courts in Europe, in addition to the Rome II Regulation, analogous to the adoption of the Posting Directive.[89] Drawing a parallel with the regulation of international posting seems appropriate in this context: it was recognized that applying classical European PIL rules in the field of contract law to situations of international posting – where companies within Europe know how to take advantage of a situation of "competing norms" – may well have adverse effects on mobile workers;[90] accordingly, the European legislator decided on the unification of overriding mandatory rules in the Posting Directive. Does the European legislator have a similar role to play in the field discussed here?

[86] Or – an another option – as rules of safety and conduct within the meaning of Article 17 of the Rome II Regulation (in which context, rules on extraterritorial corporate criminal responsibility for human rights violations could be "taken into consideration") or as rules of surrogate law after the submission of the plea of international public policy as envisaged by Article 26 of the Rome II Regulation.

[87] See, e.g., briefly, WRAY, Transnational Corporations, p. 16.

[88] See, e.g., van Hoek's discussion (VAN HOEK, Transnational Corporate Social Responsibility) of Articles 16 and 17 of the Rome II Regulation, where she states that it could concern "statutes sometimes not only prescribing an extraterritorial duty of care, but also stipulating that violation of that duty will lead to civil liability towards the victim."

[89] One should however, at the same time, be attentive for the possible evolution of such an instrument from an instrument of minimum-protection into an instrument of maximum-protection, see mutatis mutandis the issues about the Posting Directive in the area of international labour law as creating either a "minimum" or a "maximum" level.

[90] See, *inter alia*, the recitals in the preamble on "guaranteeing respect for the rights of workers "as well as" a climate of fair competition".

Incidentally, it is conceivable that these overriding mandatory rules will be issued in the field of company law rather than tort law – as measures in *substantive* company law have been considered, too.[91] In any event, whatever measures in whatever domain are taken – tort law, company law, contract law – it is paramount to ensure that the provisions concerned will be applicable in *international* situations as well: if rules of substantive law are merely amended without considering the mechanisms that can ensure the application of such rules of substantive law in international situations, amending substantive law may well be futile. Accordingly, the system of PIL rules should include either a PIL "vehicle" enabling the preferred rules to be applied or a mechanism that allows PIL rules to be overridden.

A preceding condition is the granting of jurisdiction. Thus, issues of jurisdiction and issues of applicable law appear to be interwoven and interdependent. Remarkably, during the revision process of the Brussels I Regulation, some already underlined the importance of conferring jurisdiction on an *EU Member State court for the purposes of ensuring application of* "*mandatory secondary law*", particularly in order to protect weaker parties.[92] The same reasoning could be applied *mutatis mutandis* in this context.

4. Conclusion. Private International Law as a Tool for Enhancing Human Rights?

Clearly, PIL can play a key role in the efforts to offer victims of human rights violations a real possibility of recovering damage suffered by them in civil proceedings against those who were actually involved in this violation. PIL can open doors for victims, as PIL can also close doors for victims.

Care should be taken to ensure that PIL is not reduced to an instrument of power in the hands of the stronger party, who can use it in order to benefit even more from a situation of "competing norms". In the dynamics of a situation of competing norms, PIL should not lend itself to be used to the detriment of the structurally weaker party and close all doors for victims.

But PIL can also open doors. PIL does have the potential to facilitate rather than complicate access to justice for victims. If PIL effectively makes victims' lives easier in this way, it may act as a *conductor of human rights*, or as a "*tool for enhancing human rights*". If PIL functions this way, PIL will not be a legal obstacle for victims.

[91] For example, several legislative proposals of the MVOPlatform of 11 February 2010 (available at http://mvoplatform.nl/publications-nl/Publication_3416-nl), pertain to international company law.

[92] Impact assessment SEC(2010)1547, p. 21.

Invoking PIL rules will then form a solid part of the rigid technical substantiation of their arguments.

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Henry Saint Dahl †*

The Implementation of the UN Principles on Business and Human Rights in Private International Law: US Experiences

Table of contents

International business and human rights have, from time to time, a troubled co-existence. In *Kiobel,*[1] the U.S. Supreme Court has established a jurisdictional standard that some see as troubling and many perceive as amorphous. Eight subsequent decisions, issued by other American tribunals, have added some precision, but not as much as one would hope for. How does this legal landscape play out with the U.N. Principles on Business and Human Rights?

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1 Esther Kiobel, individually and on behalf of her late husband, Dr. Barinem Kiobel, et al., Petitioners v. Royal Dutch Petroleum Co. et al., 133 S.Ct. 1659 (2013). For the full text see: http://scholar.google.com/scholar_case?case=15509503170515180438&q=Kiobel+v.+Royal+Dutch+Petroleum+Co&hl=en&as_sdt=6,47 (01.09.2016).

We are standing before a fluid area of law where important changes are bound to happen. It is important to understand what is at stake and what positions the U.S. courts are presently holding.

For contrast and texture, the role of the Inter-American Human Rights Commission and the Inter-American Court of Human Rights, both organs of the Organization of American States, is explained.

1. Alien Tort Statute Litigation, post-*Kiobel* – A Bird's Eye View

The Alien Tort Statute[2] (referred to as "ATS") provides:

> *"The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."*

In *Kiobel,* the United States Supreme Court interpreted the extent to which the ATS could be applied. So did eight subsequent cases decided by other American courts. This set of nine decisions is examined below, from a bird's-eye view, stating the facts of each case and the main reasons supporting the finding for or against jurisdiction.

Of these nine cases, the following five reject U.S. jurisdiction: 1) Kiobel v. Royal Dutch; 2) Balintulo v. Daimler; 3) Jesner v. Arab Bank; 4) Bauman v. Daimler; and 5) Cardona v. Chiquita Brands. On the other hand, the following four cases admit U.S. jurisdiction: 1) Mwangi v. Bin Laden; 2) Sexual Minorities v. Lively; 3) Al Shimari v. CACI International; 4) Krishanti v. Rajaratnam.

The common thread running through the following nine cases is how closely (or remotely) the facts in question "touch and concern" the USA.

[2] 28 U.S. Code § 1350, Judiciary Act, 1789.

1.1. Kiobel v. Royal Dutch Petroleum Co.[3]

Facts of the case	Result	Reasons
"Nigerian nationals residing in the U.S., filed suit ... under the ATS, alleging that Respondents - certain Dutch, British, and Nigerian corporations - aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria."	Jurisdiction denied	The majority opinion relied on the following three tenets: • "The presumption against extraterritoriality applies to claims under the ATS and nothing in the statute rebuts it." • "The issue is whether a claim may reach conduct occurring in the territory of a foreign sovereign." • "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."

Within the next twelve months, *Kiobel* was followed by eight other decisions, four upholding and four rejecting U.S. jurisdiction. There is no present clear standard as to what exactly "*touch and concern*" with "*sufficient force*" actually means. Although one could determine extreme situations where jurisdiction would and would not be proper, a big undefined area remains in between.

Let's examine how the eight subsequent cases were decided.

1.2. Mwangi et al. v. Bin Laden and Al Qaeda[4]

Facts of the case	Result	Reasons
An attack on the U.S. embassy in Nairobi, in 1998	Jurisdiction upheld	ATS applicable and presumption against extraterritoriality displaced because of strong relationship to the U.S.

[3] Kiobel, op. cit. fn. 1.

[4] For the full text see: http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_99-cv-00125/pdf/USCOURTS-dcd-1_99-cv-00125-3.pdf (01.09.2016).

		• Events "directed at the U.S. government, with the intention of harming this country and its citizens." • "Attackers involved in an on-going conspiracy to attack the U.S., and overt acts in furtherance of that conspiracy took place within the United States."

Still, the court directed plaintiffs to submit the issue to the D.C. Court of Appeals, where the case was still pending at the time of drafting of this contribution.

1.3. Balintulo, et al. v. Daimler, et al.[5]

Facts of the case	**Result**	**Reasons**
The claim stated that U.S. companies aided and abetted the apartheid regime of South Africa. Plaintiffs specifically alleged that defendants had: "committed both direct and secondary violations of the law of nations by engaging in workplace discrimination that mimicked and enhanced apartheid, suppressing union activities, manufacturing military vehicles for the South African security forces in the face of worker protests, and assisting	Jurisdiction denied	Conduct occurred outside the U.S. ATS inapplicable

[5] 727 F.3d 174 (2013); For the full text see: http://caselaw.findlaw.com/us-2nd-circuit/1641692.html (01.09.2016).

security forces in identifying and torturing anti-apartheid leaders [. . .] provided the computer hardware, software, maintenance, and support necessary for the South African Government to carry out geographic segregation and denationalization."		

1.4. Sexual Minorities Uganda v. Lively[6]

Facts of the case	**Result**	**Reasons**
A US citizen, in conjunction with others, committed acts in the US and in Uganda, to generate "an atmosphere of harsh and frightening repression against LGBTI people in Uganda."	Jurisdiction upheld	Reasons for accepting jurisdiction: Enough conduct had taken place in the US to satisfy the "touch and concern" requirement under Kiobel: "[A]*n exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described by Kiobel."*

[6] 960 F.Supp.2d 304 (2013), For the full text see: http://scholar.google.com/scholar_case?case=16653553466893876211&q=Sexual+Minorities+Uganda+v.+Lively&hl=en&as_sdt=6,47 (01.09.2016).

1.5. Jesner et al. v. Arab Bank, PLC[7]

Facts of the case	Result	Reasons
Bank in Jordan distributed money to families of suicide bombers	Jurisdiction denied	Reasons for denying jurisdiction: The law of the Second Circuit prohibits plaintiffs from bringing claims against corporations under the ATS

This is a very short decision. No analysis of the "touch & concern" standard is offered.

1.6. Bauman et al v. Daimler Chrysler[8]

Facts of the case	Result	Reasons
Twenty-two Argentine residents filed a lawsuit under the ATS, for human rights violations allegedly committed by the Mercedes Benz / Daimler subsidiary in Argentina	Jurisdiction denied	Daimler (a foreign corporation) cannot be sued in California for injuries allegedly caused by conduct of its Argentine subsidiary when that conduct took place entirely outside of the United States

1.7. Al Shimari, et al. v. CACI[9]

Facts of the case	Result	Reasons
Claim brought under the ATS for acts of torture committed by a U.S. government contractor,	Jurisdiction upheld	Sufficient facts plead to as to overcome the presumption against extraterritoriality:

[7] Decided under the name Linde, et al. v. Arab Bank, PLC, and related cases, 944 F.Supp.2d 215 (2013). For the full text see: http://scholar.google.com/scholar_case?case=6198968885252681010&q=PLC,+06-CV-3869&hl=en&as_sdt=3,47 (01.09.2016).

[8] 571 U.S. 1 (2014). For the full text see: http://www.supremecourt.gov/opinions/13pdf/11-965_1qm2.pdf (01.09.2016).

[9] 758 F. 3d 516 (4th Cir. 2014).

on a foreign person, in the Abu Ghraib prison		• Contractor is a U.S. corporation; • The employees of contractor whose conduct is at issue in the case are U.S. citizens; • Contractor's contract was issued in the United States by the U.S. Department of Interior; • Contractor's employees were required to obtain security clearances from the U.S. Department of defense; and • Plaintiffs alleged that managers of the contractor based un the United states approved, encouraged, and/or attempted to cover up the alleged misconduct in Iraq.

The court articulated the following two very helpful explanations of what justified jurisdiction in this case:

> **Touch and concern standard.** *"Although the "touch and concern" language in Kiobel may be explained in greater detail in future Supreme Court decisions, we conclude that this language provides current guidance to federal courts when ATS claims involve substantial ties to United States territory. We have such a case before us now, and we cannot decline to consider the Supreme Court's guidance simply because it does not state a precise formula for our analysis."*
>
> **Five U.S. contacts.** *"We conclude that the plaintiffs' ATS claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on: (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad. Accordingly, we hold*

> *that the district court erred in concluding that it lacked subject matter jurisdiction under the ATS, and we vacate the district court's judgment dismissing the plaintiffs' ATS claims on that basis.*

This is probably the clearest, best articulated post-*Kiobel* decision.

1.8. Cardona v. Chiquita Brands International[10]

Facts of the case	**Result**	**Reasons**
Alleged that Chiquita paid money to a Colombian terrorist organization, for which Chiquita agreed to pay a fine to the US Government, of US$ 25,000,000.	Jurisdiction denied	Defendant in Kiobel was not a U.S. corporation, while Chiquita is a U.S. entity. Still: "the distinction between the corporations does not lead us to any indication of a congressional intent to make the [ATS] apply to extraterritorial torts."

Finding that the conduct happened outside the US, the court ruled that "*there is no jurisdiction*."

In contrast to the Fourth Circuit's fact-based analysis,[11] the Eleventh Circuit observed that "*our ultimate disposition is not dependent on specificity of fact*."[12]

The court conceded that past decisions have found that torture abroad was covered by the ATS, (*Filartiga v. Pena-Irala*[13] and the Fourth Circuit's decision in *Al Shimari*[14]).

Realistically, the court added, "*this is by no means a unanimous conclusion of the circuits*", citing the D.C. Circuit's pre-*Kiobel* decision in *Saleh v. Titan Corp.*[15]

The court decided that:

> "*we reiterate that the ATS does not apply extraterritorially … There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force*."

[10] 760 F.3d 1185 (2014). For the complete text see: http://scholar.google.com/scholar_case?case=4834346464080234O4&q=Cardona+v.+Chiquita+Brands+International+&hl=en&as_sdt=6,47 (01.09.2016).
[11] Al Shimari et al. v. CACI, 758 F. 3d 516 (4th Cir. 2014).
[12] 760 F.3d 1188 (2014).
[13] 630 F.2D 876 (2d Cir. 1980).
[14] 758 F. 3d 516 (4th Cir. 2014).
[15] 580 F.3d 1 (D.C. Cir., 2009).

Dissent by Judge Martin: "*[t]he* Kiobel *opinion offers little assistance about what kinds of domestic connections would be necessary to overcome the presumption against extraterritoriality*." In support of his dissent, Judge Martin noted:

- Key decisions regarding corporate conduct outside the United States were made in the United States, an issue not addressed by the majority opinion.
- This is different from a situation in which plaintiffs are seeking to hold "an American company vicariously liable for the unauthorized actions of its subsidiaries overseas."

1.9. Krishanti v. Rajaratnam[16]

Facts of the case	Result	Reasons
Claim against U.S. citizens who organized bombings in the US embassy in Sri Lanka. Claim filed by foreign nationals who were injured	Jurisdiction upheld	Jurisdiction lies against a corporation that raised funds in the U.S. to support a terrorist bombing in Sri Lanka

2. Does the U.S. Position Comply with the U.N. Guiding Principles on Business and Human Rights?

To begin with, it is hard to determine clearly what the U.S. position is since, as shown by the nine cases examined above, solutions vary widely for and against U.S. jurisdiction.

The U.N. Guiding Principles on Business and Human Rights (referred to as the "U.N. Principles") require the following:

[16] 2014 WL 1669873 (Dist. N.J.April 28, 2014) Not Reported in F.Supp.3d For the complete text see: http://scholar.google.com/scholar_case?case=14634816044643560123&q=Krishanti+v.+Rajaratnam&hl=en&as_sdt=6,47 (01.09.2016).

"A. Foundational principles

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."

It seems that the U.S. does comply with the above standard, which does not require countries to protect against human rights abuse in foreign (*i.e.* outside the U.S.) jurisdictions.

This is, of course, a low albeit legal bar. One would expect and hope that a powerful nation such as the U.S. would hold itself to a higher standard. As shown in the nine cases above, the U.S. sometimes –but not always- follows a high standard.

3. Impact of the Organization of American States (OAS)

At this point, for the sake of completion, one should mention the role of the Inter-American Commission of Human Rights (the "Commission"), headquartered in Washington, D.C. and its counterpart, the Inter-American Court of Human Rights (the "Court"), which sits in San José, Costa Rica. These two entities, operating under the Organization of American States, play an important role, particularly in some instances where the US judiciary is perceived as unwilling to take certain cases.

The following shows a few cases not widely known, where justice was rendered against the odds.

In harmony with the U.N. Principles noted above, the OAS Resolutions and Conferences 2002 / 03 /05 / 06 / 07 / 09 / 10 / 12 provide that enterprises are obligated "*to promote and respect the observance of human rights*" and "*respect the labor and environmental regulations*."

Jurisdiction was accepted in the following cases filed with the Commission and referred to the Court. Arguably, the Court and the Commission have shown more willingness to accept international jurisdiction than the U.S. judiciary. Some of these cases are:

Cases	
Kichwa of Sarayaku v. Ecuador[17]	Ecuador liable for permitting private corporations to violate indigenous rights in order to facilitate oil exploration
Xamok Kasek v. Paraguay[18]	Paraguay liable for interfering with the tribe's community rights (a few corporations included), restricting their free transit in that land, preventing fishing and collection of food
Pediatric Clinic v. Brazil[19]	State failed to inspect and evaluate the private clinic, which resulted in the death of 10 new-borns
Saramaka People v. Suriname[20]	By awarding logging concessions to private companies, the State violated covenants that protected the Saramaka people, such as the right to use and enjoy local natural resources. The concessions damaged the environment

[17] Application to the Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members against Ecuador (Case 12.465). For the complete text see: http://www.cidh.oas.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf (01.09.2016).

[18] Application to the Inter-American Court of Human Rights in the case of Xákmok Kásek Indigenous Community of the Enxet-Lengua People and Its Members against the Republic of Paraguay (Case 12,420). For the complete text see: http://www.cidh.oas.org/demandas/12.420%20Xakmok%20Kasek%20Paraguay%203jul09%20ENG.pdf (01.09.2016).

[19] Report nº 70/08, petition 12.242, Admissibility, Pediatric Clinic of the Region of Los Lagos admissibility, Brazil, October 16, 2008. For the complete text see: http://cidh.org/annualrep/2008eng/Brazil12242eng.htm (01.09.2016).

[20] For the complete text of rulings see: http://search.oas.org/en/iachr/default.aspx?k=Saramaka+People+v.+Suriname&s=CIDH. This decision is remarkable because of its extensive analysis of indigenous and tribal rights: Indigenous and tribal peoples' rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System. For a complete text of this section see: http://www.cidh.oas.org/countryrep/Indigenous-Lands09/Chap.VIII.htm (01.09.2016).

Legal Condition and Rights of Undocumented Migrants[21]	American States obligated to respect certain employment rights of migrant workers, e.g. the principle of equality and non-discrimination. The obligation flows from the government to private enterprises

One could argue that if the OAS Commission and the Court of Human Rights can entertain lawsuits against Latin American States, the U.S. Judiciary, with far greater resources, could easily do likewise against corporations, be they American or foreign.

4. Conclusions

The present US Supreme Court is not very welcoming to foreign human rights cases. The ensuing cases have been contradictory. At best, there is no clear line as to when international jurisdiction will be upheld or rejected.

It is true, as many commentators say, that foreign nations cannot and should not rely on U.S. courts to solve their human rights abuses.

The real solution to these problems will only arrive when Nations where human rights violations are committed finally enact and *apply* legislation that provides swift and effective punishment to the wrongdoers and indemnity to the victims. The modernization of international procedural law in each country plays a central role in this matter.

It is not hard for these countries to draft legislation that *effectively* punishes human rights abuses, which often double as torts. The difficulty for the leaders of these Nations resides in the necessity to have the clarity and the political will to enact these laws. Some countries have done this, for instance Panama, with Law 32 of 2006.[22]

[21] Report nº 78/08, Petition 478-05, Admissibility, Undocumented migrant, legal resident, and U.S. citizen victims of anti-immigrant vigilantes. United States, August 5, 2009. For the complete text see: https://www.cidh.oas.org/annualrep/2009eng/USA478-05eng.htm (01.09.2016).

[22] For the complete text in English see: http://boudreaudahl.com/en_panama_ley_32_texto (01.09.2016). For the statement of legislative intent in Spanish (Trámite Legislativo) see: http://boudreaudahl.com/pdf/sp_panama_tramite_legislativo.pdf (01.09.2016).

Part II

The UN Guiding Principles and Specific Aspects of Private International Law

Francisco Javier Zamora Cabot*

Extraterritoriality: Outstanding Aspects

Table of Contents

1. Introduction

For some time, the changing concept of extraterritoriality has been associated in a variety of ways with the international protection of Human Rights. It is, for example, linked to efforts to make the reparation mechanisms of the UN's Guiding Principles accessible.[1] Similarly, the notion is relevant to the States' formal Extraterritorial Obligations (ETOS), which pressure States to fulfil the framework established in the International Covenant on Economic, Social and Cultural Rights. In both cases, the volume and quality of the technical contributions that have been produced are remarkable and worth taking into consideration.[2]

* Chair Professor of Private International Law, Universitat Jaume I-Castellón- Spain. This paper has been conceived as part of the Proyecto Consolider-Ingenio 2010, HURI-AGE-The Age of Rights, CSD2008-0007, the Acción de Dinamización "Redes de Excelencia"-El Tiempo de los Derechos, DER2014-53503-REDT, and the EU Action Grant "Business and Human Rights Challenges for Cross-Border Litigation in the EU", 2014-2016.Translated by Sandra Kingery.

1 See, in general, ZERK, Corporate Liability, and GEORGE & LAPLANTE, Commentary on the Office of the High Commissioner.

2 In general, and regarding ETOS, see ZIEGLER, The Right to Food; GANESH, The Right to Food, p. 1233 *et seq*; COOMANS, The Extraterritorial Scope, p. 1 *et seq*; COOMANS & KAMMINGA, Cases and Concepts and LANGFORD *et al.,* Global Justice. See also, MARCHÁN, La Responsabilidad de los Estados, p. 79 *et seq*; SAURA ESTAPÁ, La Exigibilidad Jurídica, p. 53 *et seq*; MARKS, How International Human Rights Law Evolves, p. 173 *et seq*; VANDENHOLE, Extraterritorial Human Rights Obligations, p. 804 *et seq.* and ESCR-Net, Global Economy, Global Rights 2014, available at http://www.escr-net.org/node/365621 (17.12.2014). See also *General Comment Number 16 (2013) of the Committee on the Rights of the Child, regarding the State's obligations regarding the impact of business on the rights of the child,* particularly Section V.C., United Nations, CRC/c/gc/16 and, of great interest, DE BOER, Closing Legal Black Holes.

In the context of this contribution and its focus on private international law, I will however limit my remarks to this particular field. In Section I, I will address questions that are arising in the United States following the US Supreme Court's decision in the *Kiobel* case. Following that, in Section II, I will introduce a cross section of extraterritorial laws that particularly impact the fields under consideration here – corporations and human rights – before summing up with some concluding remarks.

At the outset, I would like to point out the need to analyze, based on the perspectives and techniques of private international law, how we should interpret the term "extraterritoriality". I believe that debating it within the field of human rights has relegated the Conflict of Laws focus to a secondary position, although this approach is completely indispensable when tackling this complex web of problems that constitutes one of the biggest issues within the sphere of international law. Fortunately however, Professor Anthony Colangelo (Southern Methodist University) has carried out this analysis in a particularly brilliant manner in a recently published article entitled: "What is Extraterritorial Jurisdiction?". I will follow his lead on this issue.[3]

2. *Kiobel's* "Touch and Concern" Imbroglio

In other forums, such as the AEPDIRI conference at the Universitat Pompeu Fabra in Barcelona (September 2013), I have had the opportunity to express strong criticism of the US Supreme Court's decision in the *Kiobel* case and then publish my opinion.[4] I also know that my esteemed friend Professor Henry Dahl will address this question here, with much greater success than I could hope to achieve. I will not, therefore, offer a general criticism of that decision at this point, focusing instead on what most affects the subject of my article, that is, the process of the "Touch and Concern" test. This test was sanctioned by the High Court as a way to regulate the general doctrine of the canon against the extraterritoriality of laws as well as the version updated in the *Morrison* precedent as applied to the Alien Tort Statute.[5] Let me point out that it leaves standing the possibility of litigating offenses that take place outside the US when multinational corporations are implicated. Let me now summarize how this test is reflected within the *Kiobel* ruling:

[3] Available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2363695 (17.12. 2014). See also COLANGELO, International Law in U.S. State Courts.

[4] See ZAMORA CABOT, Las Empresas Multinacionales y su Responsabilidad, p. 4-8.

[5] Commenting on a recent decision of interest in this matter, see, RICHMAN *et al.* United States: So Much for Bright-Line Tests. See also, PELL & HERSCHMAN, Loginovskaya v. Batratchenko. In general, see as well: CHILDRESS, Escaping Federal Law, p. 18 *et seq.*

> "*On these facts, all the relevant conduct took place outside the United States. And 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.*"[6]

Even those of us who only know the US legal system superficially can intuit that these few words afford enormous leeway regarding interpretation by the doctrine and, I dare say, with greater repercussions, in the practice of US District and Circuit Courts. In fact, despite the short time that has gone by since *Kiobel,* it is generating a doctrinal body of case law that is very relevant to the matters that concern us here. Contributions like the aforementioned article by Professor Colangelo stand out, along with others that are also of great interest, including articles by Paul Hoffman,[7] Sarah Cleveland,[8] Uta Kohl,[9] Susan Simpson,[10] Jennifer Green,[11] etc.

On the other hand, however, the cases that lead to the application of the "Touch and Concern" test are also already generating significant precedents, including a division among the federal courts, as recently took place in the decisions of the Fourth and Eleventh Circuit Courts of Appeals in the *Al Shimari*[12] and *Chiquita Brands Intl*[13] cases*,* respectively. In both cases and unlike in *Kiobel*, the defendants are American companies accused of serious human rights violations, related to the terrible events at Abu Ghraib. In both cases, the defendants are alleged to have provided material support to the group that calls itself the *United Self-Defense Forces of Colombia*, a terrorist organization, now disbanded, that has been shown to have been connected to thousands of crimes and victims.[14]

Notwithstanding the similar subject matter of the cases, the manner in which the two courts addressed the "Touch and Concern" test could not be more different and neither could the results they deduced from it.[15] Thus, in *Al Shimari*, the Fourth Circuit used an approach stating that *claims* should implicate United States territory, not *conduct*. Furthermore, upon evaluating the circumstances of the case in great detail, through an analysis of diverse factors, it deduced sufficient contact

6 133 S.Ct. 1669 (2013).
7 HOFFMAN, The Implications of *Kiobel*, p. 213 *et seq.*
8 CLEVELAND, After *Kiobel*, p. 551, *et seq.*
9 KOHL, Corporate Human Rights Accountability, p. 672 *et seq.*
10 SIMPSON, *Post-Kiobel.*
11 GREEN, The Rule of Law at a Crossroad, p. 1085 *et.seq.*
12 *Al Shimari v. Caci*, No. 13-1937, US Court of Appeals for the 4th Circuit. For comments on the decision of the District Court, see KATUSKA, Al Shimari v. CACI Int. Inc., p. 201 *et seq.*
13 *Cardona v. Chiquita*, No.12-14898, US Court of Appeals for the 11th Circuit.
14 See the antecedents of this case in ZAMORA CABOT, La Responsabilidad de las Empresas Multinacionales, p. 20-22.
15 See ALTSHULER, United States: Alien Tort Case Developments.

with the United States to deactivate the presumption against extraterritoriality and, therefore, retain jurisdiction on the basis of the ATS.[16]

In contrast, in *Chiquita Brands*, the Eleventh Circuit rejected the need to carry out a detailed analysis of the circumstances, focusing instead on the *foreign nature of the conduct*, which lead to the blanket application of the aforementioned presumption and, therefore, its denial of jurisdiction under ATS. It is also noteworthy, as Judge Martin wrote in her dissenting opinion, how the Court refused to consider the many components of the aforementioned conduct that could be associated with myriad decisions taken at Chiquita's principal headquarters in the US, as well as the fact that, in 2007, the company admitted to federal authorities that it had supported the aforementioned terrorist organization, agreeing to pay a 25 million dollar fine for that support.[17]

So debate about the aforementioned test has been established in relatively short order and in the high courts. This is not surprising because, from the beginning, placing the application of the ATS in the terrain of *extraterritoriality as a conflict* is forced, artificial, and can only generate sterile problems. The Supreme Court, skillfully pushed in this direction by the defense of the *Kiobel* defendants, agreed to unite two aspects of the ATS that should have remained differentiated: the *jurisdiction to adjudicate* and the *jurisdiction to prescribe*.[18] For that reason, the statutory presumption against extraterritoriality is not being applied truly, since the Alien Tort Statute is a *jurisdictional mechanism, not a substantive rule*. Furthermore, the lawsuits that are connected to it are based on *federal common law* rather than a specific legal text. What is being applied instead, according to the High Court, are the *principles underlying that canon*,[19] fundamentally the avoidance of conflicts with other nations. It makes no sense that conflicts would arise when it is a question of protecting the heart of *jus cogens* regarding human rights, something that should be imposed on all States. That is also why the US Supreme Court, based on a very weak position, found itself obliged to adjust its doctrine, allowing exceptions through the repeatedly cited test. But the High Court speaks, on the one hand, about *conduct*, and on the other about *claims*. Without firm guidelines, therefore, the lower courts can and do take opposite paths. It may be that everything is summed up by the acceptance or lack thereof of the idea that atrocious conducts may go unpunished, that access to justice may be restricted, that the Rule of Law may be forgotten. At

16 See also ALTSHULER, Alien Tort Development.

17 For comments on this case, see SIMPSON, The Presumption Against Extraterritoriality. Regarding this same Appellate Court, see their decision in the *Baloco v. Drummond Co.* case, No. 12-15268, 23.09.2014. See also ASSOCIATED PRESS, *Colombians Ask US Supreme Court.*

18 See, e. g., SIMPSON, The Trojan Horse in Kiobel; see also CLOPTON, *Kiobel* and the Law of Nations, e-1, to e-4.

19 133 S.Ct.1664 (2013).

some point, the US Supreme Court will have to review its doctrine. I hope they do so in the manner that is most favorable to the defense of Human Rights and not in the manner of the very broadly and effectively protected interests of multinational corporations.[20]

3. Examples of Extraterritorial Rules

The fact that extraterritoriality and the Alien Tort Statute are in dispute does not mean that extraterritorial norms for human rights cannot or even should not exist. I will offer a few brief examples here, in increasing order of robustness and interest for our current topic. I understand that the first two do not correspond to the idea of extraterritoriality as an *unequivocal affirmation of the normative power of the State in the face of other States, in the international realm.* But the doctrine tends to make mention of them, and they may help us place the issue in context.

The first type corresponds to State rules that establish certain obligations for companies derived from their activities abroad. Since they are not accompanied by robust mechanisms for monitoring and, when appropriate, sanction, these obligations are fundamentally located in the *voluntary* realm, although their effects may afford some degree of relief such as, for example, creating a certain *environment*, a particular *mentality*. Here, among other rules, we can cite what is called the Conflict Minerals Rule, which is found in the Dodd-Frank Financial

[20] I strongly recommend the well documented and lucid overview of STEPHENS, The Curious History, p. 1467 *et seq.*. I also find the contribution by Judge Scheindlin from the Southern District of New York very significant. She makes it clear that she found herself bound to dismiss the complaint in *South African Apartheid Litigation* because of the precedents of the US Supreme Court in *Kiobel* and by the Court of Appeals for the Second Circuit in *Balintulo;* see, Case 1:02-md-01499-SAS, 28.08. 2014. The prestigious Court of Appeals for the Ninth Circuit has already had the opportunity to establish their lack of enthusiasm for the "Touch and Concern" test, although from the characteristics of the case, it was not fully considered in their evaluation; see *John Doe I et al. v. Nestlé USA, Inc., et al.*, No. 10-56739, 04.09.2014, p. 28 and CONGIU, & MARCULEWITZ, Ninth Circuit; see also, *Mujica et.al. v. Airscan et. al.,*9th. Cir. Court of Appeals*,* No. 10-55515. Along similar lines, see the decision of the District Court for the District of Columbia in the *John Doe v. Exxon Mobil Corp.* case, Civil No. 01-1357 (RCL) and Civil No. 07-1022 (RCL), 23.09. 2014, pp. 21-26. Also related to the Ninth Circuit, see the decision of the District Court for the North District of California in *Doe et al v. Cisco Systems*, Case No. 5:11-CV-02449-EJD, 05.09.2014, and, in general, see as well BELLINGER, In Spate of New; BRABANT *et al.,* The Alien Tort Statute; ALFORD, Human Rights After *Kiobel*, p. 1089 *et seq.*; MOE, A Test By Any Other Name, p. 225 *et seq.*; CANTÚ RIVERA, Developments in Extraterritoriality and Soft Law, p. 723 *et seq;* SYMEONIDES, Choice of Law, p. 305 *et seq.*; BOOKMAN, Litigation Isolationism, and SPIELMAN, The Alien Tort Statute as Access to Justice, p 179 *et seq.*

Reform Act, Section 1502,[21] or its counterpart in the recent European Project of Due Diligence Guidance for Conflict Minerals.[22] Another example could be the well-known California Transparency in Supply Chains Act of 2010.[23] All in all, the difficulty of introducing, in certain sectors, criteria for administering businesses in agreement with Human Rights is emphasized, for example, in the appeal brought by three business associations regarding the aforementioned Conflict Minerals Rule, which was partially resolved in their favor, on the basis of what was called a violation of free speech, by the Court of Appeals, D.C. Circuit, in a decision released April 2014.[24]

The second type I will mention here refers to those regulations to which the State conditions its own response to Human Rights problems that arise abroad.[25] One well-known case is the US Consolidated Appropriations Act of 2014, signed into law on January 17 that year. In the terms of Section 7042 (d), it prohibits the use of US assistance to support any activity in the regions of lower Omo and Gambella, Ethiopia, that could *result* "*directly or indirectly*" in forced evictions of the population. The Act also demands that US Executive Directors of international financial institutions oppose the financing of such activities.[26] This positive text, framed within the fight against Land Grabs, honors the United States and is an example for the international community regarding an issue that is, because of its

[21] Regarding the implementation of this legal text, see ONSTAD, Conflict Minerals Law, and LITTENBERG & DAMANIA, Conflict Minerals Compliance. See also, DRIMMER & PHILLIPS, Sunlight for the Heart of Darkness, p. 131 *et seq*.

[22] See the commentary by BULZOMI, The EU Draft Law; see also AEFIN (Africa Europe Faith and Justice Network) *et al*, Ensuring Robust EU Legislation on Responsible Mineral Sourcing, available at http://business-humanrights.org/en/campaign-calls-on-eu-to-strengthen-conflict-minerals-regulation#c103774 (17.12.2014). Regarding the United Kingdom, see the statement of Publish What You Pay Coalition, available at http://business-humanrights.org/en/ uk-govt-announces-mining-gas-oil-companies-will-have-to-report-on-payments-they-make-to-governments-in-all-countries-they-operate-in-from-1-january-2015#c105004 (17.12.2014).

[23] On this issue, see MUÑOZ FERNÁNDEZ & SALES PALLARÉS, Leyes Internas Sobre Transparencia, p. 119 *et seq.* On a specific and important type of supply chains, see, MARTÍN-ORTEGA *et al*. Promoting Responsible Electronic Supply Chains.

[24] See LYNCH & HURLEY, U.S. Appeals Court and RICHMAN, Conflict Minerals. The Court, however, has announced (18.09.2014) a reconsideration of his conflict-minerals decision. See also, in general, DHOOGE, The First Amendment, p. 94 *et seq.*

[25] In terms similar to those raised by environmental protection laws, see NASH, The Curious Legal Landscape, p. 997 *et seq*.

[26] See MARIAM, The Race to Save Ethiopians. Regarding Liberia and OPIC see: Liberia: US Investigates Abuses, *accountability newsletter Summer 2014*, available at http://business-humanrights.org/en/liberia-opic-office-of-accountability-investigates-us-funded-project-after-it-receives-hundreds-of-complaints-of-human-rights-abuses (17.12.2014), p. 3.

centrality, one of the greatest, if not the greatest, problem in the area of Human Rights protection.[27]

Now I would like to mention some examples of the third type of laws I will present. I am referring to powerful regulations that, even if they do not specifically reference Human Rights, can influence their defense in an indirect fashion. These are laws that can provide criminal punishment and civil actions for damages; they are markedly extraterritorial and corporations are also subject to them. This is the case, for example, with the well-known Foreign Corrupt Practices Act[28] or the also familiar Racketeer Influenced and Corrupt Organizations (the RICO Act).[29] Regarding RICO, for example, the recent decision of the US Court of Appeals for the Second Circuit in *European Community v. Nabisco*, written by Judge Leval and issued in April 2014 is worth remembering. In it, the esteemed magistrate and his companions overturned the criteria upheld by the US District Court, allowing the application of the RICO Act and its civil remedies in the face of a global criminal network for drug trafficking and money laundering through legal companies.[30] The international community increasingly assumes the need to act in the face of all these kinds of conducts, and the very negative impact they can have on Human Rights is well known. Applying these powerful laws seems, therefore, opportune. Lastly, the same is true of the Anti-Terrorism Act (ATA),[31] whose civil remedies have also been activated, for example, against foreign financial institutions that have been accused of having provided material support to terrorist organizations, regarding conducts outside of the United States. One example of this is the decision of the US District Court, Southern District of New York in the *Wultz v. Bank of China* case, 2012.[32]

The fourth type of extraterritorial rules, with which I will conclude this part of my discussion before moving on to my conclusions, refers to those that actively address

[27] I had the occasion to study it; see ZAMORA CABOT, Acaparamiento de Tierras.

[28] 15 U.S.C.78dd-1, *et seq*. See on this topic the following blog: http://www.fcpablog.com/#. See also GORMAN, The Origins of the FCPA, and MANDELKER & CARABALLO-GARRISON, Alstom to Pay. Regarding the United Kingdom, see GREAVES, The Long Arm of British Anti-Corruption Laws; also the UK Government's Anti-Corruption Plan available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf (01.01.2015). With references to Canada, see also, ROBIDOUX *et al.,* Anti-Bribery Legislation and also LEIBOLD, Extraterritorial Application of the FCPA.

[29] 18 U.S.C.1961 *et seq.*

[30] See the commentaries on this sentence by BERGER & SUN, International Litigation Update and BAKER & MCKENZIE, Second Circuit Court of Appeals Finds. See also, in general, WALLACE *et al.,* Three Different Approaches to RICO Extraterritoriality.

[31] 18 U.S.C. 2333.

[32] 2012 WL 5378961 (S.D.N.Y. 2012). See the commentary by HALL & VOELKER, Courts Hear Suits. Also, on another case, see SMYTHE Trial Starts in U.S. and CLIFFORD, Arab Bank Liable. See also, commenting a lawsuit against European banks, PROTESS & CLIFFORD, Suit Accuses Banks.

the defense of human rights, subjecting multinational corporations as well. The most noteworthy example would surely be that of the Trafficking Victims Protection Reauthorization Act (TVPRA),[33] endowed with the means for criminal sanctions and civil remedies, as was the case regarding the RICO and Anti-Terrorism Acts referenced above. One example: on the basis of the TVPRA, the US District Court for the Southern District of Texas agreed to move to trial in its 2013 decision in the *Adhikari et al. v. KBR, Inc. et. al.* case.[34] This case concerned human trafficking of some Nepalese citizens who were recruited in their country to work in Jordan and ended up suffering gruelling conditions in a war zone in Iraq, where 12 of them lost their lives in a brutal fashion at the hands of a terrorist group from the cruel Ansar-Al Sunna Army.

We must point out that the TVPRA is just one part of a normative whole in which we could, for example, cite the Executive Order "*Strengthening Protections against Trafficking in Persons in Federal Contracts*,"[35] from September 25, 2012, or the *End Trafficking in Government Contracting Act*,[36] from 2013. These Acts reveal the current US Administration's commitment in the face of the heinous trafficking of human beings.[37] I would also like to point out how events like the catastrophe in Rana Plaza are motivating a growing number of legislative initiatives in the comparative arena, regarding Supply Chains[38] or, with its expressive title, the Modern Slavery Bill[39] of the United Kingdom. The international community's awareness of these and other questions related to Human Rights is ever increasing.[40] There are technical channels to confront them, and these diverse types

33 18 U.S.C.1595.

34 Civil Action No. 09-cv-1237.

35 Exec. Order No.13627, 77 Fed. Reg. 60,029 (Oct. 2, 2012).

36 22 U.S.C.7104 (g). Regarding this and the previous legal documents, see PRELOGAR *et al.*, United States: New Human Trafficking Laws; see also, in general, BUCKLEY SANDLER, FinCEN Offers Red Flags.

37 See, in general, FREEHILLS *et al*, Recent Developments.

38 In general on these, see PAGNATTARO, Labor Rights, p.1 *et seq.* Also of interest, are the series of *Global Horizons* lawsuits, *see* the summary and further documents available at http://business-humanrights.org/en/global-horizons-lawsuits-re-forced-labour (17.12.2014).

39 On this topic, see the presentation by the explanation of the United Kingdom Government, Modern Slavery Bill, available at https://www.gov.uk/government/news/modern-slavery-bill-published (17.12.2014).and the criticism by CORE, Modern Slavery Bill.

40 On the extraterritorial persecution of war crimes, for example, see the important Human Rights Watch study, The Long Arm of Justice, available at http://www.hrw.org/sites/default/files/reports/IJ0914ForUpload.pdf (17.12.2014). See also the Information by the Business and Human Rights Resource Centre on a Treaty with standards connected to business and human rights, available at http://business-humanrights.org/
en/binding-treaty (17.12.2014). See also the Press Release by the European Union:

of extraterritorial laws are good examples of them. The States on their own, or alongside international organizations, must determine *the manner and the intensity* with which these exterritorial laws should be utilized.[41]

4. Conclusions

The field of extraterritoriality can be favorable for the defense of Human Rights, but on its own terms, without distorting it as the US Supreme Court did in the *Kiobel* case, there producing a great weakening of the defense and, on another front, because of its decision in *Daimler*.[42] Until that time, federal courts had, on the basis on ATS, resolved cases of serious Human Rights violations perpetrated abroad as *special* torts. The specifics resided in the fact that the reservation of the courts' jurisdiction was activated for a restricted number of conducts contemplated by treaties and international consuetudinary law, as well as the fact that international law, through *federal common law*, or *a state law designed by rules of conflict,* would provide the substantive content that would determine the solution to the case.[43] Apart from that, it was a question of lawsuits submitted to the full protocol of normal questions and instruments, from the proof of the bases for personal jurisdiction, to the solution of problems related to the *Forum Non Conveniens, Sovereign Immunity*, the *Act of State Doctrine*, etc. Lawsuits that, on the one hand, could take a lot of time and be subject to every type of resource and guarantee, but that were an example for the rest of the world and for the international protection of Human Rights. They were also often the only means of reparation for victims of atrocious acts.

On this point, it is worth advocating for a system of bases of jurisdiction and norms for choosing the applicable law that allows most of the transnational lawsuits on Human Rights to be resolved in the civil order, just as torts are resolved, particularly those that correspond, for example, to environmental protections. Rome II, for example, affords a possible option for the victims of environmental damages that might be useful regarding the lawsuits in question here. Other very similar and

Force Labour: Commission Urges EU Contries to Implement New ILO Protocol, 11.09.2014, available at http://europa.eu/rapid/press-release_IP-14-995_en.html (17.12.2014) and, in general, STOYANOVA, Article 4 of the ECHR, p. 407 *et seq.*

41 It is worth pointing out that even the strong international sanctions laws could play a certain role in these matters; see, KRAULAND *et al.*, New US Sanctions Legislation. The "Venezuela Defense of Human Rights and Civil Society Act of 2014", S. 2142, 113th Cong. (2014), subjects foreign persons and *legal entities organized under the laws of the U.S.*

42 See ZAMORA CABOT, Decision of the Supreme Court of the United States. See also, in general, BORCHERS, The Twilight.

43 Regarding the questions raised in this area by what is called the *cause of action*, and its use in the case by the US Supreme Court, see COLANGELO, The Alien Tort Statute, p. 1342 *et seq.*

important questions would also have to be resolved, such as the possibility of filing class actions suits and lawsuits against parent companies for the actions of their subsidiaries abroad. Also of importance are proper regulations for litigation costs, and encouraging the involvement of civil society, etc. All of that will be addressed, for example, in the development of an Action Grant recently awarded by the European Union. The fourteen participating institutions from six countries are charged with the study, proposals for improvement and diffusion of the means of access for victims for reparations in the EU area of Human Rights violations perpetrated by corporations.[44]

In addition to all this, extraterritorial laws, which highlight a *will for special involvement* on the part of the States, can complement the entirety of means assigned to the international defense of Human Rights. Their creation and utilization will be even simpler when greater awareness exists in the international community about the concrete problem covered by laws. The case of initiatives that extend throughout the world regarding means of reparation, prevention and the punishment of human trafficking, forced labor, etc., are good examples to consider.[45]

I have spoken about extraterritoriality and extraterritorial laws, but also about jurisdiction, applicable law, various technical instruments, and about a lot of things that, in summary, are of interest from the perspective of private international law. I applaud and congratulate the Swiss Institute of Comparative Law, for their wisdom and the opportunity to realize the event that led to these pages, in such an important and groundbreaking arena.

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[44] Their website is available at: http://humanrightsinbusiness.eu/. For general information, see as well REQUEJO, Access to Remedy, p. 79 *et seq*.

[45] Illustrating an opening toward criminal liability, see the excellent article by STEWART, The Turn to Corporate Criminal Liability. See also, in general, STIGALL, International Law and Limitations, p. 323 *et seq*.

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Marta Requejo Isidro*

Effective Access to Remedy: The *Lago Agrio* Litigation as a Testing Field

Table of contents

1. Introduction

When considering the issue of civil proceedings before the courts of an EU Member State for human rights-related abuses committed elsewhere by branches or subsidiaries of European based companies, two possible scenarios come to mind. On

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the one hand, victims may lodge a fresh claim for compensation before the courts of a EU Member State; on the other, having been successful in proceedings instituted and conducted in another forum, they may come to Europe in order to have the foreign decision recognized and/or enforced against the defendant's assets in a Member State.

According to Guiding Principle 25 of the United Nations Guiding Principles on Business and Human Rights, "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy". The commentary issued in relation to Operational Principle 26 explains that effective judicial mechanisms are at the core of ensuring access to remedy and that States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy, or where alternative sources of effective remedy are unavailable. Scholarly analysis of these statements has mainly focused on the difficulties experienced by victims in accessing the courts. The possibility of recognition abroad of a judicial decision in view of its enforcement has attracted less (in fact almost no) attention, probably due to the very limited number of final decisions rendered to date. However, the issue is well worth considering in light of the Ecuadorian decision of February 2011 in *Aguinda v. Texaco* (also known as the *Lago Agrio* or the *Chevron/Ecuador* litigation)[1] and the subsequent juridical paraphernalia developed by Chevron Corp., the judgment debtor, to hinder the enforcement of the decision in the US or abroad. Indeed, since the defendant corporation had no assets in Ecuador, the judgment is *de facto* not enforceable in that country.[2] In 2012, the claimants sought the recognition and enforcement of the judgment in several locations: Canada, Brazil and Argentina. Separately, they have managed to obtain an Ecuadorian order for the seizure of assets of the company in Colombia. To the extent that Chevron Corp. conducts business all around the world, similar requests in other countries, including some in Europe, should not be ruled out.

A further argument can be put forward to justify addressing the recognition/enforcement perspective: Regulation (EU) n. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3] (Brussels I Recast), which repeals Regulation (EU) n. 44/2001 (Brussels I Regulation), is applicable from 10 January 2015. Under the new regime the exequatur proceedings have been banished from the system, i.e. enforcement of

1 *Aguinda v. Chevron Corp.*, Judgment of the Superior Court of Nueva Loja, 14.02.2011.
2 Although in October 2013 some fifty trademarks of Chevrons were seized in Ecuador.
3 OJ L 351, 21.12.2012.

foreign decisions has become automatic within the EU. However, that fact entails no real changes as far as the Ecuadorian decision is concerned: first, the Recast only applies to Member State decisions – third-State judgments remain subject to conventional[4] or national rules; second, the Recast provisions on recognition and enforcement would not in any event apply to the *Lago Agrio* decision, due to time limitations.[5]

In the present study we will analyze the hypothesis of an application for recognition/exequatur of the *Lago Agrio* decision before the court of an EU Member State. To the extent that, as we have just recalled, the rules applicable to the recognition of third countries' decisions are not (or not necessarily) shared, our remarks, albeit presumably common to most European systems, cannot but be of a general nature. As a preliminary step we will recall some data of the *Chevron/Ecuador* litigation, which will help us delimit the subject matter under study, restricting ourselves to an examination of the arguments that could most likely prevent the success of a request for recognition/exequatur.

2. Summary of Relevant Facts[6]

2.1. Litigation in Ecuador

The Ecuadorian decision of 14 February 2011 is unusual in the history of civil litigation for human rights and human rights-related (via environmental damages) violations. The initial claim was lodged against Texaco (predecessor of Chevron Corp.) in November 1993 under the *Alien Tort Claims Act*, with a federal court in New York as the place of central administration of the company's international operations – i.e., decisions concerning the oil exploitation in Ecuador were adopted there. In December 1993, Texaco sought the dismissal of the lawsuit on the basis of three arguments: *forum non conveniens*, international comity, and lack of standing. In November 1996, the district court declared that Ecuador would be a more convenient forum and ruled in favor of Texaco; the plaintiffs appealed. Back in the district court, the claim was rejected for a second time on 30 May 2001, again on grounds of *forum non conveniens*, with Texaco undertaking to submit to the jurisdiction of Ecuador and to the lifting of the statute of limitations in that forum. The decision was appealed by the applicants before the Court of Appeals for the Second Circuit, but on this occasion the court upheld the dismissal.

4 Multilateral or bilateral. Ecuador is part to some multilateral conventions on the recognition of foreign judgments on civil and commercial matters, the most relevant being the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (Montevideo Convention).

5 See Art. 66 Brussels I Recast, Transitional Provisions.

6 A detailed overview of the facts may be found in GÓMEZ The Global Chase.

The lawsuit was taken up in Ecuador in 2003. In February 2011, a judgment of almost 200 pages was rendered in which the court claimed to have found undeniable evidence of deliberate dumping of tons of toxic waste in the geographically specified area between 1964 and 1993, with severe consequences in terms of environmental damage and damage to health, and such an impact on the ecosystem that the very survival of the affected community was at stake.

The decision has actually fallen upon Chevron Corp. as Texaco ceased operating in Ecuador in 1992; in 2001 it was acquired by Chevron, the second largest energy company in the world. On the basis of considerations relating to the lifting of the corporate veil, the Ecuadorian decision dismissed Chevron Corp.'s allegations about the nature of its relationship with Texaco. The court awarded the claimants US$18 billion, half of this was calculated as punitive damages. Chevron Corp.'s appeal was unsuccessful: in January 2012 the Court of Appeal upheld the entire lower court's decision. In November 2013 the Ecuadorian Cassation Court reaffirmed the decision with regard to damages for remediation and costs, totaling US$9.51 billion, but allowed the appeal in relation to punitive damages.

2.2. Chevron's Counterattack: Litigation in the US

Two weeks before the Ecuadorian decision of 2011, Chevron Corp. began a process before the District Court for the Southern District of New York under the Racketeering and Corrupt Organizations Act (RICO), in which it requested an "anti-enforcement injunction" aimed at blocking the recognition and enforcement of the (at the time, still to be rendered) Ecuadorian decision on a worldwide basis. In deciding to grant the injunction, the district court analyzed the likelihood of a future Ecuadorian ruling being recognized in the US, emphasizing the corruption of Ecuador's judicial system and its seeming openness to political interference, particularly under the leadership of President Correa. The court concluded that recognition was not likely to be granted. The court relied heavily on documents drafted by the World Bank and the US State Department, the former giving Ecuador a low ranking in terms of respect of the rule of law, and the latter pointing out specific occasions where the determinations of Ecuadorian judges had been made under governmental influences.[7]

The anti-enforcement injunction was indeed granted, but voided by the Second Circuit Court of Appeals in January 2012, in a unanimous decision noting that Chevron Corp. could only challenge the judgment's validity defensively, i.e., once the Ecuadorian plaintiffs had actually tried enforcement. However, in a recent

[7] Scholars have been very critical of this "systematic approach in evaluating the court system of another country, which is based on guidance from the Executive Branch" and raised comity concerns as well as concerns relating to the judiciary trespassing the domain of the other branches. See LENTO, Will What Happened in Ecuador Stay in Ecuador.

ruling[8] the same US District Court for the Southern District of New York has held that the monetary judgment against Chevron Corp. was a product of bribery, fraud and racketeering perpetrated by Steven Donziger, the lawyer representing the plaintiffs. The decision upheld Chevron Corp.'s allegations of fraud and declared the Ecuadorean court judgment unenforceable in the US. Among other, the court found that the plaintiffs' US lawyer, Steven Donziger, together with his Ecuadorean co-counsels Hugo Camacho and Javier Piaguaje, had fabricated evidence, tried to bribe an Ecuadorean judge, colluded with a court-appointed expert and ghost-written much of the final judgment.

The March decision does not set aside the Ecuadorian judgment, nor does it enjoin foreign enforcement proceedings. It is addressed against Donziger and the Lago Agrio plaintiffs' representatives, and intends to prevent them from profiting from the Ecuadorian judgment[9] or seeking to enforce it in the US.

2.3. Investment Arbitration

In September 2009, against the backdrop of the on-going litigation in Ecuador, Chevron Corp. filed a claim against the State arguing the violation of an Ecuador-US BIT before the Permanent Court of Arbitration at The Hague.[10] The proceedings followed the UNCITRAL Arbitration Rules. Chevron Corp. claimed Ecuador had failed to "provide claimant's investment fair and equitable treatment, full protection and security, and treatment non less than that required by international law", and to warrant the investor "effective means of asserting claims and enforcing rights with respect to investment and investment agreements"; charges of discrimination were also made. Once the Ecuadorian decision had been rendered, Chevron Corp. added a claim for denial of justice consequent to a judgment vitiated by corruption, fraud and collusion between the Republic of Ecuador and the plaintiffs.

Up to February 2013 the arbitral tribunal adopted several interim orders in which it asked Ecuador to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and outside Ecuador of any judgment against Chevron Corp. By a Procedural Order dated 9 April 2012, the Tribunal divided the merits of the Parties' dispute into two parts, entitled "Track I" and "Track II". Only Track I has been addressed so far: it comprises preliminary legal issues arising from a 1995 Settlement Agreement between TexPet (a predecessor of Chevron Corp.) and Ecuador, namely its legal interpretation and legal effect, in particular whether or not Chevron Corp. is a "releasee" for the purposes of the agreement. In a First Partial Award of September 17, 2013, the tribunal concluded

8 04.03.2014, *Chevron v. Donziger*, 1:11-cv-00691 LAK-JCF 126.

9 The Court imposed a constructive trust for Chevron's benefit on Donziger's contractual and other rights to fees and other payments and upon his shares on a Gibraltar company created to collect the profits of the Ecuadorian decision's enforcement.

10 *Chevron Corp. v. República de Ecuador*, UNCITRAL Art., PCA case n. 2009-23.

that it is; also, that "The scope of the releases (…) does not extend to any environmental claim made by an individual for personal harm in respect of that individual's rights separate and different from the Respondent; but it does have legal effect under Ecuadorian law precluding any "diffuse" claim against the [Chevron Corp.] under Article 19-2 of the Constitution made by [Ecuador] and also made by any individual not claiming personal harm (…)".

To date [of writing], the PCA award is a partial one, of a purely declaratory character; the tribunal has made an express reservation "of the full powers and discretion" to decide on the formal relief claimed by each party in one or more later awards.[11]

3. The Application for Recognition and Enforcement in Canada

3.1. Preliminary Remarks

In the face of the lack of assets of Chevron in Ecuador the claimants are applying for the recognition of the Ecuadorian decision in other fora. So far, Canada is the place where their request seems most promising.[12]

Since Canada is a federal state, each province has authority to make laws that govern recognition of foreign judgments in that province. There is nevertheless similarity in the laws of the provinces and for all, Supreme Court (SC) case law is a fundamental source of common principles.

The leading Canadian case on recognition and enforcement of (monetary) foreign judgments is the SC decision *Beals v. Saldanha,*[13] where the majority held that the first condition to be met for the success of an application is a jurisdictional requirement, namely that the issuing court has properly asserted jurisdiction. Before *Beals*, and up to 1990, foreign judgments were enforceable in Canada only if

[11] Brackets and following remarks by the Editors: According to the Business and Human Rights Ressource Center, the Arbitration Tribunal held in March 2015 that the settlement between Chevron and Texaco did not preclude residents from suing in the future, and, in January 2016, it ruled "in favour of Chevron over Ecuador being bound by the US-Ecuador investment agreement. Ecuador said it will appeal the decision.", available athttps://www.business-humanrights.org/en/texacochevron-lawsuits-re-ecuador; see also the press release of Chevron on 22.01.2016 (not mentioning the 2015 decision), available at https://www.chevron.com/stories/chevron-corp-statement-on-dutch-court-decision-on-arbitral-awards.

[12] An application filed on 27.06.2012 in Brazil is still pending; on June 2013 the Argentinian Supreme Court revoked an embargo of the assets of Chevron's Argentinian subsidiaries.

[13] 2003 SCC 72. On the Canadian system see PRIBETIC, Recognition and Enforcement of Foreign Judgments in Canada; CAVANAGH & SNIDER, Canada.

the defendant had been present in the jurisdiction rendering the judgment at the onset of the litigation, or if he had consented to the court's jurisdiction. In 1990[14] the SC introduced the "real and substantial connection" test to assess the appropriateness of jurisdiction between the court and the conduct giving rise to the action. However, the SC did not decide whether this test would apply only to interprovincial judgments, or also to foreign judgments; nor did it elaborate on the meaning of "real and substantial connection". Eventually, in *Beals* it was decided that the "real and substantial connection" test extended to foreign decisions. In 2012 the SC addressed again the real and substantial connection test,[15] however it is still unclear whether the findings it made remain restricted to jurisdiction *simpliciter* cases, or whether it extends to applications for recognition and enforcement.

If the jurisdictional requirement is satisfied the debtor may still challenge recognition on the bases of one of the defenses available to him according to *Beals*: fraud, denial of natural justice or public policy.[16] Corruption or bias of the court of origin could be alleged under the coverage of the public policy exception, however the defendant would need to prove a specific corruption in the particular case – in other words, a general assertion of a reputation of systemic corruption is not enough.[17]

To resist the recognition of the *Lago Agrio* decision before the Superior Court of Ontario Chevron put forward the failure to comply with the first condition, i.e., the lack of jurisdiction: however, it did not claim the deficiency in relation to the original court but in relation to the Canadian one. Corruption was not argued.

3.2. The proceedings in Canada

3.2.1. Canada (I): The Superior Court's Decision

In 2012 the *Lago Agrio* plaintiffs filed an action in Ontario for the recognition and enforcement of the Ecuadorian ruling.[18] The application was addressed against Chevron Corp. and two Canadian subsidiaries (Chevron Canada Limited and

[14] *Morguard v DeSavoye*, [1990] 3 SCR 1077.

[15] *Van Breda v. Village Resorts Ltd*, [2012] 343 DLR (4th) 577.

[16] The court identified the defenses of fraud, public policy and denial of natural justice as the most recognisable situations in which injustice may arise, but noted that these were not exhaustive and that unusual situations may arise that might require the creation of a new defense.

[17] See the Ontario Court of Appeal decision *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No 2289 (CA), on the enforcement of a Singapore judgment.

[18] 2013 ONSC 2527.

Chevron Finance Canada Limited), which the plaintiffs claimed were wholly owned by Chevron Corp., and over which Chevron Corp. exerted absolute control.[19]

Chevron Corp. argued the lack of any contact with Ontario (residence, business activity or assets), as well as the absence of any direct links with the other corporations. In turn, these corporations based their defense on the fact that the process and the Ecuadorian decision were limited to the American company; consequently, they could not be considered debtors of the plaintiffs.

The Ontario Superior Court stayed the action in May 2013. Its reasoning focused on two points: firstly, the question of jurisdiction to rule on an application for recognition and enforcement – in other words, whether or not "some real or substantial connection to Ontario" was required in order to assume jurisdiction over the application. Second, the question of what practical effect a ruling in favor of the applicants for recognition/exequatur would have in Ontario. With regard to the former the court reviewed different viewpoints in both Canada and the USA and concluded that it was not "prepared to adopt (…) a blanket principle that an Ontario Court lacks jurisdiction to entertain a common law action to recognize and enforce a foreign judgment against an out-of-jurisdiction judgment debtor in the absence of showing that the defendant has some real or substantial connection to Ontario or currently possesses assets in Ontario".[20] As to the latter, the Canadian court made a detailed examination of the relationship between the defendants, and resolved that there was no direct relationship between them in the light of the doctrine of the piercing the corporate veil. It therefore decided that "Chevron does not possess any assets in this jurisdiction at this time". Adding that "the evidence also disclosed that no realistic prospect exists that Chevron will bring any assets into this jurisdiction in the foreseeable future", the court concluded that "any recognition of the Ecuadorian Judgment by this Court would have no practical effect whatsoever" – quite the contrary, it would lead to an unjustifiable waste of time, money, and judicial resources.[21]

The Ecuadorian plaintiffs appealed from the component of the motion's judge order imposing the stay. Chevron and Chevron Canada appealed from the component of the motion's judge order holding that an Ontario court has jurisdiction to consider the recognition and enforcement of the Ecuadorian judge's judgment.

3.2.2. Canada (II): the Decision on Appeal

In its decision rendered December 17, 2013,[22] the Ontario Court of Appeal acknowledged the necessity of a "real and substantial connection" between Ontario

[19] The claim against Chevron Finance Canada Limited was subsequently dropped.
[20] At para 85.
[21] See para. 110-111.
[22] 2013 ONCA 758.

and the subject matter of a controversy, but only in a case of first instance in order to respect comity and to ensure that the court's constitutional authority is not exceed. In other words, the test does not apply to claims on the recognition and the exequatur of a foreign decision. However, in relation to the Chevron/Ecuador litigation the court excluded Chevron Canada from that conclusion: the corporation had not been a party to the Ecuadorian litigation (only Chevron had), nor had it been found liable under the judgment (only Chevron had). Therefore, in order to establish Ontario's jurisdiction for the purposes of adjudicating the request of exequatur against Chevron Canada, relevant links must had to exist between the company and the territory, such as (as in the case at hand) a non-transitory place of business in Ontario. These links, in addition to the economically significant relationship between Chevron and Chevron Canada, led the court to affirm its jurisdiction, without prejudice to the right of Chevron Canada to dispute the eligibility of its assets to enforce the judgment debts of Chevron: the issue remained open to be considered at the pertinent stage of the proceedings –not at the jurisdictional stage.

The stay of the proceedings by the Superior Court was also subject to analysis. In this regard the Court of Appeal developed a line of arguments recalling the *nemini licet venire contra factum proprium* principle. Chevron and Chevron Canada had chosen not to consent to the jurisdiction of the Ontario court and had therefore consciously adopted a limited position and sought limited relief in their motion; this precluded them from requesting a discretionary stay on any basis other than jurisdiction. The court criticized the inferior judge in that he accorded the stay on his own motion, embarking "on a disguised, unrequested and premature Rule 20 [summary judgment] and/or Rule 21 motion [determination of an issue before trial]" to the detriment of the rights of the Ecuadorian claimants, who should be given the option to make legal arguments.[23]

3.2.3. The Request before the Supreme Court

In April 2014 the Canadian SC granted Chevron leave to appeal. The arguments were heard in December 2014; no decision has been rendered to date. The most relevant questions before the Court are whether the real and substantial connection test is a universal test for the jurisdiction *simpliciter* of the Canadian courts in any action and applies in a recognition and enforcement case; and whether the doctrine of comity dictates against the assertion of jurisdiction over foreign parties in an action when the adjudication of the issues will be academic, have no practical impact and serve no purpose. Other related questions include: whether the presence of assets is a pre-requisite to the recognition and enforcement of a foreign judgment; what is the proper test to determine whether a provincial superior court

[23] Para. 57-60.

has jurisdiction to recognize and enforce a foreign judgment against a non-party to the foreign judgment not domiciled in the province; whether carrying on business in the province from an office in the province that bears no relation to the subject matter of the action and having an "economically significant relationship" with the judgment debtor are sufficient for there to be such jurisdiction; to what extent must a court faced with a jurisdictional challenge conduct a threshold examination of the merits of an allegation essential to jurisdiction; if and in what circumstances can a court that does not have jurisdiction to entertain a recognition and enforcement action against the judgment debtor, have jurisdiction for recognition and enforcement of the judgment against a party which was not a party to the original action.

4. A European Regard

4.1. Preliminary Remarks

As mentioned at the beginning of this paper, the EU uniform regime for recognition and enforcement of foreign judgments in civil and commercial matters – the Brussels I Regulation, the Brussels I Recast – only applies only if two Member States are involved. Besides, the adagio *exequatur sur exequatur ne vaut* remains valid, meaning that a separate request for recognition of the original decision is needed in each country, and that each of them will assess it afresh, independently of the outcome reached by the other States concerned. The rules concerning decisions from third countries are to be found in multilateral or bilateral conventions, and finally in the residual national regimes.

In spite of the variety of sources, there is a high degree of coherence when it comes to the conditions an application for recognition/exequatur must meet, and to the obstacles that may hinder the granting of the request. In light of the facts described in the preceding pages we will only consider three of these obstacles: judicial corruption in the State of origin, irreconcilable decisions and the lack of connection between the requested State and the case at hand.

4.2. Corruption

4.2.1. General Remarks

Four out of five EU citizens regard corruption as a major problem in their State; corruption has been acknowledged as one of the biggest contemporary challenges. At the European level, the Commission has been given a political mandate to measure efforts in the fight against corruption and to develop a comprehensive EU anti-corruption policy, in close cooperation with the Council of Europe's Group of

States against Corruption (GRECO). A large number of European States have ratified the UN Convention against corruption, which entered into force in 2005.[24]

The commitment of European countries to the fight against corruption has so far produced no direct formal impact in the field of private international law. In this regard, the contrast with the US is striking.[25] Enforcement and recognition of foreign judgments in the US remains a question of state law. However, in an effort to unify the regime, a uniform statute was drafted by the National Conference of Commissioners on Uniform State Laws in 1962, which was adopted in almost two-thirds of states. In 2005, a new statute –the Uniform Foreign Country Money Judgments Recognition Act – was published, aiming to update and supersede the 1962 one. In the same vein, the works of the American Law Institute towards a federal statute that would pre-empt state law, deserve to be mentioned as well.[26] All the texts provide for the possibility to obtain recognition and exequatur, but also for exceptions allowing the courts to refuse to grant such a request. For the purposes of this study, the relevant rules are those related to the decision having been obtained by fraud (in the language of the 1962 statute), which currently, i.e. under the 2005 Uniform Act, embraces corruption.[27] The two pertinent 2005 provisions are para 4(c)(2), on "fraud that deprived the losing party of an adequate opportunity to present its case", and para 4(c)(7), which supplements the latter adding as a reason not to grant recognition the fact that the judgment "was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment".[28] In practice, case law shows that the courts are generally cautious in the face of alleged corruption.[29] Still, some recent decisions have denied recognition to foreign judgments, accepting the debtor's claim of

[24] However, not all EU Member States are part to the CoE Criminal Law Convention on Corruption, in force since 01.07.2002; neither to the Civil Law Convention on Corruption, in force since 01.10.2003.

[25] See WHYTOCK, Faith and Skepticism in Private International Law, p. 116-117, comparing the EU and the US. The analysis is restricted to the Brussels system, but the conclusions are valid regarding national law. As the author points out, the Commission had expressly mentioned corruption of the judiciary as a reason to refrain from extending the Brussels regimen of recognition/enforcement to third States' judgments.

[26] The 2005 ALI (Proposed) Federal Statute on the Recognition Federal Statute on the Recognition and Enforcement of Foreign Judgments.

[27] Under the 1962 Uniform Act the courts had developed a two-tier distinction between extrinsic fraud, comprising bribery or corruption of court officials inducing them to grant a decision in favor of the winning party; and intrinsic fraud, meaning the use of perjured testimony or foreign documents to obtain judgment. With time only the former remained an obstacle to recognition; the foreign court was presumed to be capable to deal with the latter and produce a fair decision in spite of the fraudulent party's behavior. See NELSON, Down in Flames, p. 901-902.

[28] Similarly, para 5(a)(ii) of the ALI (Proposed) Federal Statute.

[29] Matching the academic proposals: see TRAYNOR, The Corruption Defense.

fraud, meaning that sufficient evidence was given of corruption in the particular case with an impact on the judgment.[30] Courts have also, albeit more rarely, denied recognition on the basis of overall assertions, i.e., accepting that a foreign judicial system in its entirety is flawed and does not comport with due process. [31] The Ecuadorian decision in the Chevron litigation seems to combine ingredients of both approaches.

The lack of a specific provision on corruption as an obstacle to recognition/ enforcement in Europe does not mean that this will not constitute a ground for rejecting an application: it certainly can, either embedded in the public policy exception, or in terms of violation of the right to due process, which is likely to be impaired as a consequence of corruption. To date, however, recognition has been rejected in Europe on very few occasions on the basis of corruption.[32] The only really renowned case is *Yukos v. Rosnef,* in the Netherlands and in England. [33]

In the *Yukos Capital v Rosneft* case,[34] the Amsterdam Court of Appeal granted Yukos leave for enforcement of arbitral awards that had been set aside by the Russian courts. Yukos shareholders requested the enforcement of the arbitral awards, alleging that the annulment by the Russian court was the result of a trial tainted by corruption. According to the Court of Appeal, 'it is so likely that the judgments of the Russian civil court setting aside the arbitral awards are the result of legal proceedings that must be qualified as partial and dependent that these judgments cannot be recognized in the Netherlands.' [35] Yukos also asked for the enforcement of the void arbitral awards in the UK, claiming that the trial in Russia resulting in

30 *De Manez Lopez v. Ford*, 470 F.Supp. 2d 917; *Transportes Aereos Pegaso SA v. Bell Helicopter Textron*, 623 F. Supp. 2d 518. Actually, in the latter case the court refused recognition because the absence of fraud had *not* been sufficiently proven.

31 Another example is *Brigdway Corp. v. Citibank*, 201 F.3d. 134, refusing to enforce a Liberian judgment. Paraguay and Nicaragua are countries under suspicion too.

32 Deploring it, KRAMER, Private International Law Responses to Corruption, p. 99. The author refers to some cases where corruption was used as an argument in the context of the *forum necessitatis* (see sec. 3.2). ANDREWS, Judging the Independence and Integrity, fn. 28, recalls the argument within *forum non conveniens* motions.

33 The plea of corruption was rejected by the Constitutional Court (Spain) on 17.06.1991, in a *recurso de amparo* against an *Auto* granting exequatur in spite of the allegations of judiciary corruption by the opposing party. On 30.01.2013, the French Court de Cassation rejected to annul the decision of the inferior court and its assessment of compatibility of the foreign decision with the *ordre public*, which the appellants contested in terms of lack of independence and impartiality of the Russian judiciary.

34 Amsterdam Court of Appeal, 28.04.2009, case No. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5. Recently the Dutch courts have been asked to recognize a Russian arbitral awards that had been set aside in Russia in *Maksimov v. Novolipetsy Steel Mill (NLMK).* The claimant has argued along the same lines as Yukos – i.e., that the Russian annulment judgments were tainted by dependence, bias, corruption and other procedural irregularities.

35 Sec. 3.5.

the annulment was partial and a 'travesty of justice'; the application was successful.[36]

Notwithstanding that the Dutch and English courts concurred in the final outcome, the issue of corruption seems to have been assessed differently by each of them.[37] In fact, when asked whether "the Defendant is issue estopped by the judgment of the Amsterdam Court of Appeal dated 28th April 2009 from denying that the judgments of the Russian civil courts annulling the arbitral awards which are the subject of these claims were the result, or likely to be the result, of a partial and dependent judicial process", the English Court of Appeal answered negatively, arguing that 'it makes a great deal of difference whether the issue is being determined by reference to Dutch public order or English public order which is (or may well be) different'. In our opinion, at first sight the assertion is correct: what pertains to public policy remains a national issue; this is so even within the European uniform regime, where only the limits of the concept are a matter of interpretation by the CJUE.[38] However, as highlighted by other scholars,[39] it is difficult to imagine that the contents of the public policy exception can differ widely when it comes to corruption. It is much more likely that any divergences derive from the approach taken to the corruption defense – are general assumptions of corruption in the foreign courts sufficient to justify denial of recognition, or does it have to occur in these specific proceedings? –, and to the evidence required – meaning the standards of proof. Regarding the first point, as mentioned previously, the US uniform rules foresee both possibilities. In our view, a refusal to recognize or enforce a foreign decision on the basis of systemic corruption is unlikely to occur in a European country (even if it would be useful to condemn corruption in a large way). Indeed, the idea of a global assessment of a legal system for the purposes of recognition is known in the old continent among the EU Member States, but it only operates in a positive way, i.e. in favor of easing recognition via the mantra of mutual trust. Cases are otherwise examined singularly. The same prevails in the wider context of the Hague Conference on Private International Law. In The Hague Choice of Court Convention recognition may be refused if the judgment was obtained by fraud in connection with a matter of procedure, which according to the Explanatory Report includes the situation in which 'either party seeks to corrupt a judge, juror or witness':[40] the relevant corruption is thus the one in the case at hand.

[36] *Yukos Capital Sarl v. OJSC Rosneft Oil Company*, [2012] EWCA Civ 855. In a more recent case, *VTB Capital plc v. Nutritek International Corp and others*, [2013] UKSC 5, the Russian forum was deemed to have offered a fair trial.

[37] KRAMER, Private International Law Responses to Corruption, Sec. 4.3.2.

[38] Case C-7/98, 28.3.2000, ECLI:EU:C:2000:164.

[39] In this sense ANDREWS, Judging the Independence and Integrity, p. 76-77.

[40] Explanatory Report, No. 188.

The second factor possibly accounting for the divergent attitudes in the face of the allegations of corruption in European countries is, as mentioned previously, the standard of proof required. Corruption is difficult to prove since, on the one hand it seldom leaves a trace; on the other hand, there is a common understanding in the sense that corruption demands a high standard of proof.[41] However, in practice it is unclear what this means – a difficult point being whether evidence should be measured in terms of a test of "balance of probabilities" or of the "inner conviction" of the adjudicator. Agreement exists in the sense that inferences and presumptions should only be bestowed a limited evidential value; however, what value should be accorded to other means of proof, such as, for instance, the findings of corruption by other courts? As we have seen in the Yukos cases before the English courts, one possible answer is to refuse the issue estoppel defence. The question would be of a particular interest in case of an application for recognition of the Ecuadorian *Lago Agrio* decision in Europe.

4.2.2. Regarding the *Lago Agrio* Decision

The *Lago Agrio* case was riddled with mutual accusations of professional misconduct and corruption, both in Ecuador and subsequently in the US. Chevron's allegations targeted the experts, the counsel for the plaintiffs as well as the judges, and led to the US judgment of March 4, 2014.[42] In a decision of almost 500 pages and after a trial of several weeks, Judge Kaplan of the District Court for the Southern District of New York deemed corruption to have been sufficiently proven. It is worth adding that in January, 2013, Judge Alberto Guerra, who had presided over the Ecuadorian court between 2003 and 2004, submitted an affidavit to the above mentioned US court whereby he admitted the allegations of corruption against him, the plaintiff's counsel, and his successor Nicolás Zambrano. Although Judge Kaplan made clear his skepticism concerning Guerra's testimony, he has also asserted the court's entitlement to believe (as it did) part or even most of the testimony even of one who deliberately has lied under oath as to other particulars. Eventually, Guerra was a key witness in Chevron's case.

Should the Ecuadorian *Lago Agrio* decision come before a court of a European country, the question would arise of the value to be accorded to the findings of the American court, as well as to the confession made by former judge Guerra about his own implication in the deeds. In this regard it is worth recalling that as a general rule foreign judgments are accorded the evidential value inherent to public documents, which is actually a privileged one: however the scope of the privilege is usually limited to aspects such as the existence of the judgment itself, the date it was rendered, or the identity of the parties. In other words, it does not extend to facts

[41] This is why it would be difficult to reach a decision similar to the one referred to above, fn. 30.

[42] See above, fn. 8.

determined to exist by the foreign judge; the foreign judge's conviction will be considered only as an element among others to be taken into account by the court to form its own conviction.[43]

The sensitivity of the subject matter under discussion –a ruling asserting corruption of a foreign judiciary or of a particular judge – is unlikely to be well received in the affected country; it is most likely to trigger political and diplomatic reactions. This also points toward each court where recognition is requested forming afresh its own independent view in light of the arguments and evidence of the parties. This viewpoint has received academic support,[44] and as we have just mentioned is precisely what happened in the *Yukos* case before the English courts. On the other hand, a *de facto* bestowing an increased force of persuasion to the foreign judge's conclusions, especially in cases of countries with a record of judicial corruption, cannot (realistically) be excluded.[45]

4.3. Irreconcilability

4.3.1. Preliminary Remarks

Conflicting decisions cannot coexist within the same legal order; this is why irreconcilability is usually included among the grounds for refusal of recognition/exequatur a foreign judgment.

The difficulty of this self-explaining principle lies with the definition of "irreconcilable decisions".[46] Lack of clarity is the predominant feature of this issue, even within the framework of uniform regimes such as the Brussels I System. To a certain extent, this is not surprising. Irreconcilability is invoked as something to be avoided in a number of scenarios: preventively, i.e. as a risk, in cases of connected claims against several defendants, and also in parallel proceedings and related actions before different jurisdictions; and once conflicting decisions have already been rendered by different courts. While there is a common understanding in the sense that the

[43] This is the situation under the Spanish system and the like. We would like to recall the caveat we made in the introductory words to this paper in the sense that to the extent that rules applicable to the recognition of third countries' decisions are not (or not necessarily) common, our remarks, albeit presumably shared by most European systems, cannot be anything but general in nature, and obviously they might not correspond to a particular system.

[44] ANDREWS, Judging the Independence and Integrity, p. 75-76.

[45] More formalistic, ANDREWS Judging the Independence and Integrity, p. 88, proposes that "foreign determinations (...) might have some slight persuasive effect" that should nevertheless not be raised to the level of presumptive force.

[46] Even what constitutes a "decision" can be debated: because of their contractual nature settlements have been excluded from art. 34(3) Brussels I Regulation: Case C- 414/92, 02.06.1994, ECLI: EU:C:1994:221. No ruling has been made so far on arbitral awards; the general view is that they deserve to be considered equivalent to court judgments.

approach to irreconcilability should be flexible for the situations mentioned in the first place,[47] it is still disputed whether the same notion applies to all included therein. As for the second setting – i.e. actual contradictory decisions – it is not unusual to resort to the *res iudicata* doctrine in order to determine the elements of irreconcilability; this actually implies that the divergent conceptions and uncertainties surrounding *res iudicata* impregnate the latter notion as well.[48]

One of Chevron Corp.'s key strategies in the *Chevron/Ecuador* litigation appears to have been to exploit the fragmented nature of the controversy: while discussions are finally taking place, these are occurring before courts of different jurisdictions (including international ones)[49] and those courts even vary in their nature. The disagreements among the actors in the game (courts, arbitral tribunal) are seriously threatening the expectations of the Lago Agrio claimants to collect the judgment. It is legitimate to fear, for instance, that the PCA arbitral award would work as an obstacle to the recognition of the Ecuadorian decision in a third State. The possibility is not just a theoretical one: Chevron Corp. has already opposed enforcement in Ecuador, relying on an interim measure issued by the arbitral tribunal requesting Ecuador "to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [the First Claimant] in the Lago Agrio Case".[50]

Should Chevron try to block recognition of the *Lago Agrio* judgment in a third State, it could resort to the First Partial award on Track I rendered September 17, 2013, and argue irreconcilability between them.[51] Several scenarios can be conceived: first, the "competition" between the arbitral award and the foreign judgment may start without any of them having been yet recognized in the forum – the attempt to have one recognized triggers the reaction of opposing the other. Second, the "competition" may occur between a national decision and a foreign one, the latter being the object of the request for recognition/enforcement. We will only address

47 Meaning the notion should be a broad one.

48 In a cross-border scenario doubts also arise from the hesitations in respect to the effects to be accorded to a foreign decision (the ones it has in the State of origin; those accorded to similar judgments in the State of recognition; common ones).

49 On February 2009, the *Lago Agrio* plaintiffs asked the Inter-American Commission on Human Rights to adopt measures against Ecuador aiming to prevent the execution of arbitral interim orders (that in turn compelled Ecuador to take all the steps necessary to avoid the enforcement of the *Lago Agrio* judgment).

50 PCA Case No. 2009-23. Order for Interim Measures, 9 February 2011, available at http://www.italaw.com/sites/default/files/case-documents/ita0167.pdf.

51 The American decision of March 4, 2014, could of course be helpful for the same defensive purpose. We have chosen to address the hypothesis of irreconcilability with the arbitral award in light of the (generally predominant) pro-enforcement bias towards this kind of decisions – even more in the framework of investment arbitration. The recognition of the American decision in a European country in order to use is as a means to oppose the *Lago Agrio* judgment seems to us less certain.

here the second setting.[52] In this regard, in order for the arbitral award rendered at The Hague to be considered as a national decision, it needs to be recognized itself; the assessment of its compatibility or incompatibility with the Ecuadorian decision would come at a subsequent stage.

4.3.2. The Recognition of the Award

The *Chevron v. Ecuador* litigation at The Hague is an investment arbitration proceeding instituted under the UNCITRAL arbitration rules, pursuant to Article VI(3)(a) of the bilateral Treaty between United States of America and the Republic of Ecuador concerning the Protection of lnvestments. A request for recognition of the award would therefore fall within the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 1958 (NYC). Art. V NYC enumerates several grounds that may hinder recognition: some only if put forward by the interested party, others to be assessed by the requested court on its own motion. In light of the pro-enforcement bias of the Convention and of the award itself it is difficult to see why it should not be recognized. The fact that it is partial,[53] therefore it only resolves some of the (substantive) issues in dispute between the parties, should not be an obstacle, as it has been conceived as final: art. 34(I) UNCITRAL rules provide expressly for such a possibility ("The arbitral tribunal may make separate awards on different issues at different times"). In addition, under Art. V(1)(e) NYC the award has to be binding on the parties: the condition is usually understood as meaning that there is no way of bringing an appeal on the merits – for the sake of the argument we will take this condition as satisfied. In fact, the only reason why one could imagine doubts interfering in the swift recognition of the award would be placed under art. V(1)(b) NYC, i.e. lack of fairness in the process, in view of Ecuador's attempt of October 24, 2014, to challenge the arbitrators for failure to act on the country's request;[54] the State accused all three arbitrators of not acting impartially, fairly and equitably. In November 2014 the PCA Secretary-General dismissed the challenge.

4.3.3. Irreconcilability with the Arbitral Award

Once the arbitral award has been recognized, the probability that it hinders the recognition of the *Lago Agrio* judgment, even if not extremely high, should not be underestimated. In terms of what could be viewed as "issue estoppel", there is an

[52] For the purposes of the present study, the question would have been the same under the first setting: whether each decision reciprocally bars the recognition of the other on grounds of mutual contradiction. If they do, both of them being foreign from the point of view of the forum the usual solution is in favor of the decision first rendered (*prior in tempore* rule).

[53] A finality requirement as such does not appear in the conventional text, however there does not appear to be any doubt that it is compulsory.

[54] In particular, failure to make a site visit requested by the state for over three years.

obvious contradiction: the issue is the interpretation of a Settlement Agreement between the Texaco, predecessor of Chevron, and the Republic of Ecuador, releasing Texaco of its contractual obligations regarding the oil concession. In Chevron's view the agreement had been made in the name and on behalf of all the citizens, as a governmental act. The trial court concluded otherwise, i.e., in the sense that Ecuador's release could not be binding on third parties who had not taken part in the negotiations; the release only affected government agencies.[55] In turn, as we saw under II.3, the arbitral tribunal arrived at a different outcome: "The scope of the releases in Article 5 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release made by [Ecuador] to [Chevron Corp.] does not extend to any environmental claim made by an individual for personal harm in respect of that individual's rights separate and different from [Ecuador]; but it does have legal effect under Ecuadorian law precluding any *diffuse* claim against [Chevron Corp.] under Article 19-2 of the Constitution made by the [Ecuador]and also made by any individual not claiming personal harm (actual or threatened)." The award does not (and can not) directly impose any restriction on the Ecuadorian citizens. However, a logical consequence of the arbitrators' interpretation would be the lack of standing of the claimants in the *Lago Agrio* litigation – which actually would also entail lack of standing as regards the application for recognition. The non-identity of the parties involved in each process could of course be resorted to in order to object the previous assertion; but irreconcilability is not necessarily conditional upon this fact. What really matters is whether all the litigants have had the opportunity to discuss the issue at stake. To the extent that the arguments before the different tribunals coincide, it could be contended that all of them had such opportunity in the case under exam, albeit in separate scenarios.

As mentioned previously, the 2013 PCA award is a partial one, of a purely declaratory character; the tribunal has made an express reservation "of the full powers and discretion" to decide on the formal relief claimed by each party in one or more later awards. In this respect, Chevron has asked for injunctive relief; among other things, for an order that Ecuador use all measures necessary to prevent the *Lago Agrio* Judgment from becoming final, conclusive, or enforceable in Ecuador or in any other country. If the order is granted, it would be for Ecuador to implement the adequate measures to comply; should it fail –meaning the *Lago Agrio* decision is actually enforced against Chevron, in Ecuador or else, in spite of the arbitral injunction – the obligation on Chevron would become one of compensation. As such, the injunction would not be incompatible with the *Lago Agrio* decision; therefore, even if it (the order) is recognized in a third country prior to any attempt to have the Ecuadorian decision enforced there, it would not constitute an obstacle to the enforcement request. However, considering who would finally bear the costs

[55] *Aguinda v. Chevron Corp.*, Judgment of the Superior Court of Nueva Loja, 14.02.2011, p. 34-35.

of compensating Chevron in such setting,[56] the final outcome does not make much sense from an economic perspective.

4.4. Lack of Jurisdiction

Chevron's main argument before the Canadian courts lies with the absence of a real and substantial connection between the case and Canada. The reasoning is not groundbreaking in the context of strategies to resist enforcement: in fact, there are numerous case law examples relating to the recognition of foreign arbitral awards, but also of foreign judgments.[57] The debate seems nevertheless to be perceived as more of an issue in common law countries. As we have highlighted elsewhere,[58] the usual starting point is rather the theoretical freedom of the creditor to seek a declaration of enforceability based on a foreign resolution wherever he wishes. It is assumed, however, that in practice a risk of "enforcement shopping" does not exist, because no rational creditor will invest his time and money in an application for enforcement in a place where the judgment debtor has no assets. As a result, the issue is largely a self-regulating one.

At the same time, the need for some kind of connection is embedded in all national rules on recognition/exequatur. By way of example, Art. 955 of the Spanish *Ley de Enjuiciamiento Civil*, 1881[59] establishes venue and there is a common understanding that the reasons underlying venue (i.e., territorial competence) are different from those explaining the grounds for international jurisdiction: the criteria on territorial competence do presume a link between the application for recognition/exequatur and the national jurisdiction where it is lodged. The question is how narrowly (or widely) this requirement should be interpreted; also, the relevant standard of proof required for the elements constituting grounds of jurisdiction in the framework of recognition/exequatur proceedings.

[56] In one way or another the final payment would be made by the people of Ecuador.

[57] See *Glencore Grain Rotterdam BV. v. Shivnath Rai Harnarain Co,* 284 F.3d 1114; *Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminium Factory"*, 283 F.3d 2008, both in relation to the enforcement of arbitral awards; also in England, interpreting the condition of sufficient connection, *Cruz City 1 Mauritius Holdings* [2014] EWHC 3131 (Comm). *Parada Jimenez v. Mobil Oil Co. de Venezuela*, SA., 1991 WL 64186, provides an example in relation to a foreign country judgment.

[58] REQUEJO ISIDRO, The Last Struggle for Redress, p. 71.

[59] "Without prejudice to the provisions of treaties and other international conventions, the jurisdiction to hear applications for recognition and enforcement of judgments and other foreign decisions and foreign mediation agreements, corresponds to the Courts of first Instance of the domicile or place of residence of the party against whom recognition or execution is sought (...); alternatively, jurisdiction shall be determined by the place of enforcement, or by the place where those decisions should produce their effects."

In our view, international jurisdiction to recognize and to declare the enforceability of a foreign resolution should not be excluded even if the judgment debtor has neither domicile nor assets in the territory of the requested State at the moment the application is filed, provided that the applicant demonstrates that he/she still has a legitimate interest in that place. For instance, defendants that do not presently have assets in the jurisdiction may nevertheless have them in the future: claimants should be given the opportunity to pursue the enforcement steps *in futuro*.[60] It thus seems reasonable to support a broad understanding of the criteria of connection:[61] for the purposes of the declaration of enforceability, the "place of enforcement" may be every place where the debtor has *potentially* enforceable assets (including portions of an estate, or claims against third parties). A place that a creditor reasonably anticipates as a "place of enforcement" may also be an acceptable jurisdiction, even though at the time of the application for a declaration of enforceability this may not be obvious. There are several reasons in favor of this proposal, starting with purely operational ones, namely the limited nature of the procedure for recognition/ exequatur. Indeed, the applicant may be required to indicate at the time of application the property upon which he intends to carry out the execution; however, other activities related to the identification of this property (such as an injunction to force the debtor to declare or exhibit his property; or to compel third parties to do so) do not fit within the narrow context of the procedure for recognition/exequatur.

In addition, it should not be ruled out that the plaintiff, even if able to claim that the debtor possesses local property within the forum, may find it difficult to identify specific assets at the time of the filing the application for recognition.[62] In such a situation, the only limit to the application should be abuse of process. Furthermore, the absence of property or of the domicile/residence of the judgment debtor should not automatically remove the legitimacy of a request for recognition/exequatur. On the one hand, time is often of the outmost importance in enforcement proceedings: to require the creditor to wait for the arrival of any assets of the debtor before applying for the recognition and declaration of enforceability may well affect his ability to collect, given the ease with which assets currently move. Again, as in the previous setting, the only limit should be the abuse of process. On the other hand, being granted recognition/exequatur in a foreign country may prove to have an

[60] As stated in *Lenchyshyn v. Pelki Electric Inc.,* 723 N.Y.S.2d 285.

[61] In as far as the elasticity of the concept allows it. For instance, the notion of "domicile" may not be seen as particularly easy to interpret in a broad way –although allegedly it could also mean residence, center of interests, center of principal activities.

[62] Being at the same time compelled to do so in order to avoid losing the opportunity, for instance because the action for recognition/exequatur is subject to a prescription of "x" years after the date of the judgment.

added value besides the typical one: it provides applicant with an additional argument in support of their rights on the merits.

5. Conclusion

In its decision on appeal from the Superior Court of Ontario the Court reflected on the asymmetry of powers between the claimants and the plaintiffs. It refers to Chevron and Chevron Canada as "sophisticated parties with excellent legal representation", while the Ecuadorian plaintiffs are described as "poor and vulnerable foreign residents".[63] The Court subsequently recalls the overall attitude of Chevron during the whole, lengthy proceedings that resulted in the award of 2011 before the Sucumbíos Court: the acceptance of the conditions, the promises and undertakings given in exchange for the dismissal of the claim before the Southern District Court of New York court, and how all this was later forgotten, with Chevron asking for (and obtaining, albeit briefly) an injunction from a New York court in order to bar the enforcement of the Ecuadorian judgment in any country in the world.[64] Eventually, the Canadian Court of Appeal built upon all these reasons to reach a conclusion in favor of the plaintiffs: they should at least be given the opportunity of a fair process on the merits of their request for recognition and exequatur. In the words of the court itself, "this case cries out for assistance, not for unsolicited and premature barriers."

The assertions of the Ontario Court of Appeal have found favour within academic circles. Regarding the efficacity of another decision pertaining to the same saga, the American decision of March 4, 2014, Prof. Muir Watt says:

> *"On se doute en tout cas que la position plus ou moins accueillante au fond des pays tiers à l'égard de l'efficacité substantielle du jugement américain, dépendra de (…) et, peut-être, de la sympathie qu'ils éprouvent à l'égard de la cause de fond des victimes de Lago Agrio" (emphasis added).65*

Realistically, Prof. Muir Watt is probably correct. However, that the fate of any judicial decision could be dependent upon the personal preferences is inacceptable from a legal point of view; within the framework of the UN Guiding Principles on Business and Human Rights, particularly Guiding Principle 25 and 26, it is simply offensive. On the other hand, what remains true with regard the *Lago Agrio* decision is the essential role played by third States; their willingness to be considered as countries where the assets of Chevron Corp. may be found and enforcement attempted, and how they assess the interplay and mutual influences among the all the decisions at stake, will be crucial.

63 See para. 45, 53.
64 Para. 65-69.
65 MUIR-WATT, Revenus provenant de l'exécution du jugement de l'exequatur, p. 397.

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Part III

Implementing the UN Guiding Principles in Private International Law: The Future

Gregor Geisser* / Alexandre Müller**

Transnational Civil Human Rights Litigation against Corporations - Swiss Perspectives in Private International Law

Table of contents

1. Introduction

The subject presented here is of great relevance for Switzerland as the host state of many major transnational corporations that also operate in countries with challenging human rights environments. In spite of its relevance, the subject of

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"Transnational Human Rights Litigation" has not yet entered the daily debate of legal discussions in Switzerland.[1] The Swiss Federal Supreme Court has noted this fact:

> *"[…] la jurisprudence et la doctrine n'apportent guère d'enseignement pour ce qui est d'une action en responsabilité civile pour la réparation des dommages consécutifs à des crimes contre l'humanité […] et l'intégrité corporelle, commis à l'étranger […]."*[2]

This essay seeks to encourage discussion on Transnational Civil Human Rights Litigation against Corporations in the context of Swiss Private International Law. Within the scope of this paper, arguments are presented in the form of theses. For further deliberations and reference, please refer to my dissertation.[3]

Given that the existing law in this field is as yet untested in practice, the study focuses on considerations *de lege lata*. Suggestions *de lege ferenda* are given only on the basis of a brief overview.

The study begins with a short overview of public international law as a framework. Based on this, the subsequent chapters focus on Swiss private international law.

2. Public International Law as a Framework

The human rights liability of transnationally operating companies derives from the framework of international law. This raises two key issues: the horizontal effect and the extraterritorial effect of human rights.

2.1. Indirect Horizontal Effect

This title considers the question of how human rights may act *between* individuals, meaning between companies and those individuals affected by human rights violations. The UN Special Representative on business and human rights John Ruggie has thoroughly addressed this question in relation to businesses. He developed the UN Guiding Principles on Business and Human Rights (UNGPs)[4], an internationally accepted framework for states and corporations. The provisions in

[1] The only notable case is *"Gypsy International Recognition and Compensation Action v. IBM"*: DSC 131 II 153 *et seq.*; DSC 132 III 661 *et seq.* (for a critical appraisal see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 586 *et seq.*).

[2] Decision of the Swiss Federal Supreme Court, 22.05.2007, 4C.379/2006, consideration 3.4.

[3] GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten.

[4] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 21.03.2011.

question derive in part from *hard law* and partly from *soft law*; they are based on three pillars:

1) *State duty to protect:* States must protect against human rights abuses by third parties, including business enterprises (Princ. 1 *et seq*.).

2) *Corporate responsibility to respect:* Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address any adverse human rights impacts in which they are involved (Princ. 11 *et seq*.).

3) *Access to remedies; reparation:* States must take appropriate steps to ensure that when abuses occur those affected have access to effective remedies and appropriate reparation (Princ. 25 *et seq*.).

The state has a duty to develop and interpret national laws to protect individuals from human rights violations by other private entities. This understanding of an indirect horizontal effect of human rights between individuals is recognized internationally; Switzerland has incorporated its obligations in *Art. 35 of the Swiss Federal Constitution*. The Swiss Federal Supreme Court particularly recognizes soft law as a guideline to interpreting national law.[5]

In the event that abuses already have occurred, in Switzerland as in other countries, the law of non-contractual obligations is used to implement the duty to protect. In the situation of transnational cases, private international law is also essential. The non-contractual obligations law protects rights such as life, liberty, physical and mental integrity or property and awards the victims adequate reparation.[6]

2.2. Extraterritorial Effect

In the cases at hand, the human rights violations typically occurred outside Switzerland. As a result, the question arises to what extent a Swiss court may and should exercise jurisdiction.

The answer lies within an international conceptual framework that is located at the intersection of private and public international law.[7] This co-ordination framework is founded on two principles of justice:

[5] See *et al.* DSC 122 IV 349, consideration 4c.

[6] For reference see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 138 *et seq.*

[7] For a basic understanding see MILLS, The Confluence of Public and Private International Law, *passim* (*et al.* terminology: "conflicts justice" and "material justice"); LEIBLE & RUFFERT, Einführung, p. 19 *et seq.*; GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 178 *et seq.* with further references.

1) Firstly, *conflicts of law justice*: "fair" in PIL means first and foremost the application of the territorially appropriate legal order (Principle of the closest connection). On the one hand, this principle stands in the interest of certainty and predictability of legal and economic relations between private individuals.[8] On the other hand, it stands for the interest for a most appropriate and conflict free allocation of the legal competence to regulate national authority.[9]

2) Secondly, *substantive justice*: material judgments in PIL serve a complementary and corrective function. Internationally recognized human rights are an example of such a common interest.

On the basis of this conceptual framework, human rights lead to the following responsibilities: State X, in which the abuses have occurred, is bound by an actual *dut*y to protect. The supplementary *responsibility* of Switzerland to protect, as the country of the court seized, to a large extent has no legally binding nature.

Duty to protect of State X in which the human rights violation has occurred	Corporate responsibility to respect
Responsibility to protect of Switzerland in the case of a filed lawsuit[10]	

Switzerland's responsibility to protect must be balanced against the conflicts of law justice of territorial adequacy of the applicable law. The primacy of human rights law before other legally protected rights, such as that of state sovereignty, is thus one on the basis of value. These principles have to be taken into account by Swiss courts in their exercise of discretion.[11]

[8] Cf. DUBINSKY, Human Rights Law meets Private Law Harmonization, p. 212 *et seq.*, p. 234 and 237 *et seq.*; BLECKMANN, Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts, p. 34.

[9] See MILLS, The Confluence of Public and Private International Law, p. 228 *et seq.*; MANSEL, Staatlichkeit des Internationalen Privatrechts und Völkerrecht, p. 119 *et seq.*

[10] Inspired by the UN principle "R2P" (UN-Resolution 60/1, "2005 World Summit Outcome", UN Doc. A/Res/60/1, 24.10.2005, N 138).

[11] Cf. DSC 123 II 595 *et seq.* (consideration 7c); in the present context see: *Khulumani v. Barclay National Bank Ltd.et al.,* 504 F.3d 254, 263 (C.A. 2nd Cir. 2007); DE SCHUTTER, The Accountability of Multinationals for Human Rights Violations in European Law, p. 49; MILLS, The Confluence of Public and Private International Law, p. 110; ZERK, Multinationals and Corporate Social Responsibility, p. 136 *et seq.*

Based on this framework of international law, we now turn to the key issues of Swiss private international law, i.e. the international jurisdiction of Swiss courts and the applicable law.

3. International Jurisdiction of Swiss Courts

3.1. General Grounds of Jurisdiction (Overview)

The facts of a case are typically to be understood as claims based on the law of non-contractual obligations (tort law);[12] the jurisdiction rules which apply to such claims are included either in the Lugano Convention (LugC; SR 0.275.12) or in Switzerland's Federal Code on Private International Law (CPIL; SR 291) depending on their respective territorial scope. Switzerland grants victims of violations that have taken place abroad a certain scope of possible jurisdictions. These include jurisdiction:[13]

- at the *defendant's place of domicile* (see Art. 2 [1] and Art. 60 [1] LugC),
- at the place of its *domestic branch* (see Art. 5 [5] LugC and Art. 129 par. 1 CPIL),
- Switzerland as a place *where a tortious act was committed* (see Art. 5 [3] LugC and Art. 129 par. 1 CPIL); and
- as *exorbitant* jurisdiction the *forum arresti* (see Art. 4 CPIL).

From a comparative law perspective, these possible jurisdictions are far from comprehensive.

For example, there is a significant gap in the case of a multinational corporation: in a case where alleged human rights violations have occurred at the seat of a subsidiary, the claimants may reasonably wish to sue the parent corporation at its seat in Switzerland and the foreign subsidiary based on the same facts and legal grounds. The jurisdiction of Swiss courts to assess claims against the parent corporation is confirmed by the Lugano Convention (see Art. 2 [1] LugC).

However, according to the relevant case-law and prevailing doctrine, a lawsuit against the parent corporation *and* its subsidiary is only possible if the subsidiary is domiciled in a member state of the LugC (see Art. 6 [1] LugC).[14] Swiss private

[12] For differentiations see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 27.

[13] For further information see c.l. above, N 270 *et seq.*

[14] For the parallel agreement [Regulation (EC) No 44/2001] see Judgment of the ECJ of 11.04.2013 in the case C-645/11, *Ellen Mirjam Sapir et al.,* N 49 *et seq.* [55]: "[...] in order to sue a co-defendant before the courts of a Member State on the basis of Article 6.1 of Regulation No 44/2001, it is necessary that that person should be domiciled in

international law fails to provide for international jurisdiction over a defendant to be joined to the proceedings in Switzerland for a closely connected claim (see Art. 8a par. 1 CPIL *e contrario*). If the subsidiary is domiciled in a non-Lugano Convention State (non-European State), Swiss courts generally do not have any jurisdiction over the subsidiary. Compared to other states[15] this constitutes a major limitation on jurisdiction.

3.2. Forum of Necessity Exception

3.2.1. Theory

To close such gaps in jurisdiction in the existing law, the forum of necessity needs to be considered.

Art. 3 CPIL states: "If this Code [= CPIL] does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial […] authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction."

Applicants can therefore rely on the forum of necessity in the event that:

1) there is no other international jurisdiction in Switzerland;
2) proceedings abroad are impossible or unreasonable; and
3) the facts of the case are sufficiently connected to Switzerland.

The forum of necessity in this sense takes the two principles of international law in PIL into account (see above section 2.2): conflicts of law and substantive justice. On the one hand, it serves the right to *effective remedy* (see the above third pillar of the UN Guiding Principles). Art. 3 CPIL seeks to avoid an international *denial of justice*. As a result, this provision emphasizes the protection of international human rights. On the other hand, the forum of necessity requires the exhaustion of legal remedies with a close connection to the facts of the case *("local remedy rule")* as well as a certain connection between the litigation and Switzerland. In this regard, conflicts of law justice is also respected. With this kind of balance, Art. 3 CPIL is a model for functional comparable jurisdiction to other states.[16]

another Member State." For Swiss doctrine see e.g. GEIER, Die Streitgenossenschaft im internationalen Verhältnis, p. 77 *et seq.*

15 For the Netherlands see e.g. Judgment of the Rechtbank of Den Haag, 30.12.2009, HA ZA 09-579, *Oguru et al. v. Royal Dutch Shell and Shell Nigeria*.

16 For reference see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 365 *et seq.*, N 371 *et seq.*, N 400 *et seq.*; ARROYO, compétence exorbitante, p. 73 *et seq.*; Art. 18 par. 3 of the "Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters 2001 "available at http://www.cptech.org/ecom/jurisdiction/

As a general clause, Art. 3 CPIL provides Swiss courts with a broad flexibility to interpret the provision as they see fit. The decisive factor is therefore that the judiciary exercises its discretion in individual cases in a just and equitable manner. To establish an equitable balance between substantive and conflicts-of-law justice principles, I suggest that Art. 3 CPIL is interpreted as follows:

> *The question, whether or not it is "impossible or unreasonable" to file a lawsuit in State X, should be answered, first and foremost, in considering human rights guarantees binding not only on Switzerland but also on State X, where the "violation" occurred.*

State X therefore cannot invoke its sovereignty, if Switzerland provides an emergency jurisdiction to protect universal human rights. And the defendant company will be estopped from arguing that the application of such international standards was not foreseeable. In this regard, the connection factor provided for in Art. 3 CPIL loses its significance and needs only to be observed for effective decision-making and enforcement efficiency.[17] Under this approach, not only the protection of international human rights law, but also the principles of conflicts-of-law of PIL are duly taken into account.

3.2.2. Practice

By way of example, we can apply this abstract knowledge to the previously mentioned case: consider that the parent corporation has its seat in Switzerland. The subsidiary is based in a LugC-third-country. As mentioned, the Swiss courts may not have any general ground of jurisdiction over the foreign subsidiary. The exorbitant jurisdiction of Art. 3 CPIL remains to be considered.

Assuming that State X, in which the human rights violation occurred and where the subsidiary has its domicile, does not have a functioning rule of law capable of ensuring sufficient legal protection for the evaluation of a claim against the subsidiary. Thus there is no legal remedy with a genuine possibility of being successfully invoked. State X has failed in its duty to protect as it has not adequately protected individuals against human rights abuse by third parties; it has not ensured that when abuses occur those affected have access to effective remedy and appropriate reparation. This fundamental duty is based on *customary international law*, therefore these guarantees are binding on all states, including State X.[18] In

hague.html (09.09.2015); the Canadian PIL adopted Art. 3 of the Swiss CPIL; in the present context see INTERNATIONAL LAW ASSOCIATION, Princ. 2.3 (p. 32 *et seq.*).

[17] Cf. GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 377.

[18] With regard to public international law see reference, l.c. above, N 126 *et seq.* and N 379; BERTI &DROESE, in: BSK IPRG, Art. 3 N 9; SCHÜTZE, Die Notzuständigkeit, p. 572; UITERWAAL, Extraterritorial Civil Jurisdiction with Respect to Violations of Fundamental Human Rights, p. 86; from a comparative law perspective see *Mushikiwabo et al. v. Barayagwiza,* No. 96 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, 5 (S.D.N.Y. 1996).

these circumstances, it should not surprise a corporation if Switzerland accepts a case with a view to avoiding an international denial of justice. This is even more likely where there is sufficient connection with the Swiss jurisdiction through the seat of the parent corporation. The assessment of related claims in one place also serves the conflict of laws justice, specifically for an effective decision-making; in such a case submissions only need to be drafted once and evidence is only gathered once. Moreover, this approach avoids the risk of irreconcilable judgments resulting from separate proceedings in different countries.[19] Based on the views taken here, Swiss courts may consider jurisdiction against the *foreign subsidiary* based on Art. 3 CPIL.

Unfortunately, this proposed solution to the interpretation of Art. 3 CPIL seems like to be an arduous journey given the rather restrictive jurisprudence of the Swiss Federal Supreme Court.[20]

4. Applicable Law ("*lex causae*")

This section considers which substantive law applies to the facts of the case considered.

4.1. General Choice of Law Rules (Overview)

As a matter of principle, the CPIL typically refers tortious claims to the law of the place where the parties have their common habitual residence or, where there is no such place, to the law of the place where the injury occurred (see Art. 133 CPIL). As a result, Swiss private international law generally refers to applying the foreign law of State X.

The reference to foreign substantive law appears adequate from a conflict of law perspective; accordingly it is widespread internationally. Thus the connecting factor of a joint habitual residence of the parties corresponds to an embedding of the tortious act in their legal and social surroundings.[21] Also, the place where the

[19] In the context of business and human rights see Judgment of the Rechtbank of Den Haag, 30.12.2009, HA ZA 09-579, *Oguru et al. v. Royal Dutch Shell and Shell Nigeria.,* consideration 3; House of Lords' Judgment, 20.07.2000, *Lubbe et al. v. Cape Plc.,* [2000] UKHL 41, N 20.

[20] See e.g. Decision of the Swiss Federal Supreme Court, 22.05.2007, 4C.379/2006. For a critical appraisal cf. GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 403.

[21] See "Botschaft zum IPRG vom 10.11.1982", BBl 1983 I 424 *et seq.*; DSC 99 II 315 *et seq.* At the European level see Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11.07.2007 on the law applicable to non-contractual obligations (Rome II), Art. 4 par. 2 and 3.

injury occurred represents a close territorial connection of the case to the law of the respective state.[22]

However, the application of the foreign substantive law can, from a human rights perspective, lead to an unacceptable result in individual cases. For example, this is the case when the applicable law of State X does not provide any compensation for the committed human rights violation. The correction in such a case is mainly an issue of *substantive justice*. For this, the existing Swiss private international law primarily relies on the public policy clause of Art. 17 CPIL.

4.2. Public Policy Clause

4.2.1. Theory

The public policy provision in existing law is the crucial gateway for human rights into PIL.[23]

Art. 17 CPIL states: "The application of provisions of foreign law shall be precluded if it would produce a result which is incompatible with Swiss public policy."

The Court should therefore, as an exception, correct the reference to foreign law, if this would lead to a result which Switzerland considers contrary to its basic values.

The public policy clause has – as does the forum of necessity – the potential to establish an equitable balance between both basic principles in PIL, the conflict-of-law substantive and justice. This is particularly true with regard to increased reference to international guarantees for the concretization of the public policy clause: with more universally accepted human rights as barriers to foreign domestic law, there is less which allows Art. 17 CPIL to interrupt the sound operation of an internationally consistent legal system.[24]

[22] For the case, where place of the act and place of the effect diverge, see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 448.

[23] To mention in a footnote are furthermore mandatory rules of the forum pursuant to Art. 18 CPIL: "This Code is subject to those mandatory provisions of Swiss law which, by reason of their particular purpose, are applicable regardless of the law designated by this Code." In the present context see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 518 *et seq*.

[24] See MILLS, The Confluence of Public and Private International Law, p. 275 *et seq.*; VOLTZ, Menschenrechte und ordre public im Internationalen Privatrecht, p. 2 *et seq.*, 285 *et seq.* and 312; KOKOTT, Grund- und Menschenrechte als Inhalt eines internationalen ordre public, p. 99 *et seq.*; Judgment of the ECJ of 28.03.2000, *Krombach*, in the case of C-7/98; GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 469 *et seq.*

To establish an equitable balance between substantive and conflicts justice, I suggest that[25] Art. 17 CPIL is interpreted as follows:

> *The "Public Policy" should be, first and foremost, determined based on human rights guarantees, binding not only on Switzerland but also on State X, where the "violation" occurred.*

Under this interpretation of Art. 17 CPIL, with an emphasis on public international law, Switzerland fulfils its state *responsibility* to protect (see above section 2.2). There could even be seen to be a *duty*, based on *Art. 16 ILC/Responsibility of States for Internationally Wrongful Acts,*[26] to deny the application of foreign law.[27] At the same time, the principles of the conflicts of law justice remain untouched. The corporation carries a minimal responsibility to respect the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, coupled with the principles concerning fundamental rights in the *eight ILO core conventions* as set out in the *Declaration on Fundamental Principles and Rights at Work* (see UNGPs, Princ. 12). As a result, it may not surprise a corporation if Swiss courts consider human rights standards for the interpretation of Art. 17

[25] There is an ongoing discussion in doctrine, whether national or international values should firstly be considered for interpretation of Art. 17 CPIL. *(A)* See on the one hand: e.g. MÄCHLER-ERNE & WOLF-METTIER, in: BSK IPRG, Art. 17 N 12 and 18; GIRSBERGER & MRAZ, Sittenwidrigkeit der Finanzierung von internationalen Waffengeschäften, p. 549; DSC 103 Ia 204 *et seq.,* consideration 4; in the present context see Decision of the Swiss Federal Supreme Court 4C.172/2000, 28.03.2001 – better, according to the view represented here, see "Urteil des Zürcher Handelsgerichts", 05.04.2000, ZR 100 (2001), p. 166 *et seq.* – for a critical appraisal see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 516. *(B)* See on the other hand: KOKOTT, Grund- und Menschenrechte als Inhalt eines internationalen ordre public, p. 104 *et seq.*; DANNEMANN, Die ungewollte Diskriminierung in der internationalen Rechtsanwendung, p. 350; MILLS, The Confluence of Public and Private International Law, p. 274 *et seq.*; VOLTZ, Menschen–rechte und ordre public im Internationalen Privatrecht, p. 312 *et seq.* (314); SCHWANDER, Einführung in das internationale Privatrecht, N 476; KREN KOSTKIEWICZ, Grundriss des schweizerischen Internationalen Privatrechts, N 941 *et seq.*; SCHWENZER & HOSANG, Menschen-rechtsverletzungen - Schadenersatz vor Schweizer Gerichten, p. 289.

[26] Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12.12.2001, and corrected by document A/56/49(Vol. I)/Corr.4.

[27] Art. 16 ILC says: "A state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State." For a respective Swiss duty to protect in order to refuse the application of foreign law, which contradicts guarantees binding on Switzerland as the forum state *and* State X, where the violation occurred, see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 475 with further reference.

CPIL, that are relevant for the *lex causae*, even if the particular regulation is contradictory to the international guarantees.[28]

The *OECD Guidelines for Multinational Enterprises (2011)* clarify that: "A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations […] *does not diminish the expectation* that enterprises respect human rights."[29]

4.2.2. Practice

An impressive example of this consideration is found in the earlier decisions of the Swiss Federal Supreme Court, namely the case *"Elkan v. Rentenanstalt"* (DSC 79 II 193 *et seq*.). This case concerned an insurance agreement between a Jewish person and an insurance company domiciled in Switzerland with a branch in Germany. The former Nazi-Regime requested the insurance corporation to pay the insurance sum of Jewish insurance holders directly to the German state. The Swiss insurance complied with the request. The insured person later sued the insurance company in Swiss courts for payment of the insured capital.

According to the Swiss Federal Supreme Court, German law was applicable, including the so-called *"racial laws"*. A correction employing the public policy clause was denied by the court. The reasons given were firstly, that such an intrusion into the law, which was realized by using the applicable territorial law, could not be reversed. Accordingly, the public policy clause was not applicable. From the perspective of the private parties, the court secondly took the point of view that the insurance had expired by payment of the insurance sum to the Nazi-Regime. An obligation for a second payment would lead to a "deprivation of rights" for the company. This deprivation could not be justified by the harm done to the victims. It would not matter if the applicant was compensated by relevant compensation funds or not. Lastly, the court held that the German branch was under no obligation to oppose the request of the German authorities.

[28] See l.c. above, N 498 *et seq.*; KINSCH, Droits de l'homme, droits fondamentaux et droit international privé, p. 257 *et seq.*; MILLS, The Confluence of Public and Private International Law, p. 286; BAADE, The Legal Effects of Codes of Conduct for Multinational Enterprises, p. 18 *et seq.* and 40 *et seq.*; OHCHR, Human Rights Translated - A Business Reference Guide, p. 6 (e.g. with regard to UN-Declaration on the Rights of Indigenous Peoples); NOLLKAEMPER, Public International Law in Transnational Litigation Against Multinational Corporations, p. 274 *et seq.*

[29] L.c, chapter "Human Rights", N 38 (emphasis added). See above chapter 2.1 *Soft Law* as a guideline to interpret domestic law.

This judgment has, in my view correctly, been criticized by the doctrine.[30] The simple statement that the legal intrusions (i.e. expropriation) that were realized abroad had to be accepted by the Swiss forum as a legal fact is not convincing in light of today's understanding of international law.[31] Swiss courts dealing with transnational issues with specific ties to Switzerland have it at their disposal to protect individual rights over foreign sovereign rights.[32] Expropriation based on a systematic racial discrimination belongs to a narrow circle of *ius cogens* violations. These core elements of international law are binding on all states, including Switzerland and Germany, without limitation or reservation.[33] Under these circumstances Switzerland carries, as discussed,[34] a responsibility or even a *duty to protect,* and to refuse the application of foreign law. In view of the thereby prevented injustice, it would have been reasonable for a corporation domiciled in Switzerland to either not pay the insurance sum to the Nazi-Regime or take the risk of a double payment. Such a *responsibility to respect* human rights (i.e. to make no allowance in any way to aid or assist in systematic racial discrimination) does not overstretch the areas of responsibility of transnational corporations.[35] According to the view taken here, the public policy clause should have been applied in this case.

An example of the unconditional validity of such human rights by comparative law is found in the case *"Oppenheimer v. Cattermole"* (Judgment of the House of Lords on 13 December 1973).[36] This ruling also dealt with the public policy clause regarding German racial laws. Lord Cross plausibly held:

[30] VISCHER, Das nationalsozialistische Recht im Spiegel einiger Entscheidungen schweizerischer Gerichte, p. 459 *et seq.* (463); see also ruling to the contrary by the previous instance ("Zürcher Obergericht", 27.05.1952").

[31] With regard to the abandonment of positivism in public international law see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 176 *et seq.* and 241 *et seq.* with further reference; VISCHER, Das nationalsozialistische Recht im Spiegel einiger Entscheidungen schweizerischer Gerichte, p. 462: «Ich würde aus heutiger Sicht dem radikalen, fast naturrechtlichen Standpunkt des Zürcher Obergerichts [= Vorinstanz] den Vorzug geben». See also the change in doctrine in TOMUSCHAT, Die Vertreibung der Sudetendeutschen, p. 19 *et seq.* (22); SPICKHOFF, Der völkerrechtsbezogene ordre public, p. 288 *et seq.* and MILLS, The Confluence of Public and Private International Law, p. 281 *et seq.*

[32] See SPICKHOFF, Der völkerrechtsbezogene ordre public, p. 290; VISCHER, Das nationalsozialistische Recht im Spiegel einiger Entscheidungen schweizerischer Gerichte, p. 462; *Oppenheimer v. Cattermole [1976]* A.C. 249, 277 *et seq.*

[33] Vgl. SPICKHOFF, Der völkerrechtsbezogene ordre public, p. 278. For discriminatory infringments of the property guarantee see also MRA, *Simunek et al. v. Czech Republic*, 516/1992 (1995), N 11.3.

[34] See section 2.2 and 4.2.1 above.

[35] For the same result see VISCHER, Das nationalsozialistische Recht im Spiegel einiger Entscheidungen schweizerischer Gerichte, p. 463.

[36] [1976] A.C. 249.

> "*Whether […] legislation of a particular type is contrary to international law because it is 'confiscatory' is a question upon which there may well be wide differences of opinion between communist and capitalist countries. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country [= United Kingdom] ought to refuse to recognise it as a law at all.*"[37]

The legal situation is less clear however, if the fundamental principles or values in question are *only binding on Switzerland but not on State X*. An example would be if, in order to correct the outcome under a foreign law, a Swiss court chooses to apply its own liability standards which go beyond the internationally recognized guarantees (such as the provisions of the Swiss labour law, which are above the ILO guarantees, or certain strict liabilities such as product liability).[38] In this case, the principles of legal certainty of the conflicts justice between private and sovereign rights are challenged. Courts need to tactfully deal with the question of whether to apply foreign law to an individual case or not. In order to rationalize their decision-making, the courts could, based on the aforementioned international conceptual framework, consider the following criteria:[39]

- *forum connection of the case:* the closer the facts of the case are connected to Switzerland, the more a correction is called for;
- *territorial scope of the guarantee in question:*[40] it is necessary to distinguish if for instance a guarantee based on European Human Rights Convention or [simply] one on the Swiss Federal Constitution is in question;

[37] L.c., 278 (emphasis added); BYERS, English Courts and Serious Human Rights Violations Abroad, p. 246; DE SCHUTTER, The Accountability of Multinationals for Human Rights Violations in European Law, p. 274; KINSCH, Droits de l'homme, droits fondamentaux et droit international privé, p. 224.

[38] From a comparative law perspective see *Filartiga v. Pena-Irala,* 577 F.Supp. 860, 864 *et seq.* (D.C.N.Y. 1984): "punitive damages" see also Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and The United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 23 and 25.

[39] See GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 506 *et seq.*

[40] See VOLTZ, Menschenrechte und ordre public im Internationalen Privatrecht, p. 299; BUCHER, L'ordre public et le but social des lois en droit international privé, p. 55; COESTER-WALTJEN, Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsberührung, p. 28; in the context of transnational civil human rights litigation see HALFMEIER, Menschenrechte und Internationales Privatrecht im Kontext der Globalisierung, p. 680; FISCHER, Schadenersatzansprüche wegen Menschenrechtsverletzungen im Internationalen Privat- und Prozessrecht, p. 454 *et seq.*;

– *gravity of the violation and the harm suffered:* it depends whether a core value of a certain right is touched or not;

– *conduct of State X:* Has the state, for instance, implemented specific justice procedures and mechanisms to deal with certain violations or not? An amnesty law with a compensation fund may serve as a specific conflict resolution. In such a case, State X would view a jurisdiction by Switzerland rather as an intervention into its sovereignty, rather than if State X would remain passive towards human rights violations by a corporation.[41]

Depending on the answers to these questions, a correction of the applicable law from a supranational point of view is more or less evident.

With respect to the above-mentioned example, the following distinction may be important for the criteria of the connection factor: a domestic act of a *Swiss parent corporation* (i.e. the instruction to increase the production of hazardous resources) would rather point towards correcting foreign law in favor of Swiss strict liability than the foreign actions of a *subsidiary domiciled in State X*. With this insight, the soft law standards would be taken into account. These call for more attention by Switzerland *to regulate foreign activities of corporations that are based here* (see UN Guiding Principles, Princ. 2).[42]

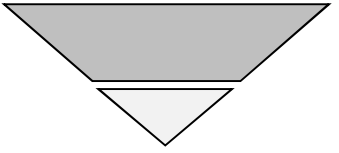
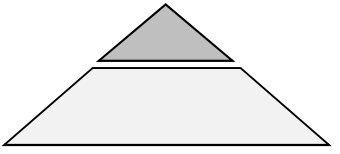
5. Overview – Guidelines to Interpret the Forum of Necessity Exception and Public Policy Exception

Considered human rights standards	*Consideration of conflicts of law justice principles*
to substantiate „impossibility or unacceptability“ of a lawsuit abroad; or “public policy” respectively	to substantiate the „sufficient connection to the forum“ of the facts of the case to Switzerland

AUGENSTEIN, European Enterprises Operating Outside the European Union, N 225 *in fine*, with reference to *Oppenheimer v. Cattermole* [1976] A.C. 249, 277.

41 From a comparative law perspective see *Khulumani v. Barclay National Bank Ltd.et al.* (504 F.3d 254, C.A. 2nd Cir. 2007); see South Africa's objection: "[T]he United States would interfere with the foreign sovereign's effort to address matters in which [South Africa] has the predominant interest."

42 See furthermore Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, UN Doc. E/C.12/2000/4, 11.08.2000, N 39; *General Comment No. 19*, UN Doc. E/C.12/GC/19, 04.02.2008, N 54.

General Rule: The broader the agreement of a human rights guarantee within the international community of states is, the weaker the forum connection can be in order to exercise emergency jurisdiction or to apply the public policy exception.	
	
Authoritative human rights standards also in State X where the human rights violation occurred (1) ius cogens (2) customary international law (3) human rights treaties (binding on State X)	Legal certainty and predictability is not affected, because the relevant human rights of jurisdiction X, with a close connection to the facts of the case, are taken into account and therefore could be predicted by the parties. The sovereign rights of State X virtually remain untouched, as the relevant human rights for this state are taken into account.
Authoritative human rights standards only for Switzerland as place of jurisdiction (but in the case in question not for State X) (5) "quasi" universal level (e.g. ICCPR) (6) regional level (e.g EHCR) (7) as a solely national fundamental right	Legal certainty and predictability is affected where consideration of the specific guarantees could not be predicted by the parties. The predictability depends on the respective territorial scope of the guarantee in question. The sovereign rights of State X are affected, because only Standards of the Swiss jurisdiction and not of State X with a close connection to the facts of the case are taken into account. Possible criteria for the exercise of the jurisdiction: (1) forum connection of the case; (2) territorial scope of the guarantee in question; (3) value of the guarantee for the forum; (4) gravity of the violation and the harm suffered; (5) conduct of State X.

6. Conclusion

6.1. Chances "*de lege lata*"

The existing law of Switzerland (and other countries) certainly has a certain potential to do justice in transnational civil human rights litigation. However, this depends largely on the jurisdiction and the applicable law. Legal and practical barriers in civil procedure remain, which may cause difficulties for claimants. These may include the high costs of litigation or the burden of proof of the injured party.

In must also be stressed that the generally restrictive "catch-all" clause of the "forum of necessity" and the "public policy exception" in current law bear the major burden for the implementation of the UN Guiding Principles. The courts should apply the provisions in a just and equitable manner, which certainly requires a less restrictive approach that we have seen to date. It follows that, as is articulated in this essay, a dialogue between private and public international law is essential. With this approach, state practice on one hand acts as creator of international law, either with the development of general principles of international law or with further solidifying of customary international law up to the conclusion of treaties. On the other hand, state practice functions as an implementer of already existing international law requirements in national law (so-called *«dédoublement fonctionnel»*).[43] There must be a strong focus on the difficult translation work between private and public international law which inevitibly lies ahead:[44] For example, there is the question of how far individuals may have the right to protection from certain human rights regarding their relation to a corporation.

6.2. Challenges "*de lege lata*"

A case-by-case approach brings certain challenges, including the juxtaposition of individual justice with legal certainty. Particularly in the interpretation of general clauses, the court is not spared from exercising its discretion on the basis of values. With regard to case law, it is crucial that the doctrine develops guidelines for a more predicable jurisprudence *(so-called „topoi")*[45]. These can be found in *norms* of public

[43] This concept dates back to SCELLE, G., Précis de droit des gens, Bd. I, Paris 1932, cited from VITZTHUM, W., in *idem* (ed.), *Völkerrecht*, 4 ed. [!], Berlin 2007, p. 29. See furthermore WÜGER, Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht, p. 55. In the context of PIL see MILLS, p. 92, 226 and 230; MANSEL, Staatlichkeit des Internationalen Privatrechts und Völkerrecht, p. 99; MORAN, The Tort of Torture and Cosmopolitan Private Law, p. 680; SCOTT, Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms, p. 61; ZERK, Multinationals and Corporate Social Responsibility, p. 116. BLECKMANN, Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts, p. 6 *et seq.*

[44] See ZUMBANSEN, Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation, *passim*.

[45] PIL is not unterstood as a consistent system, but as a "Collage" of partly coordinated, partly conflicting domestic legal orders (see MAKAROV, Internationales Privatrecht und Völkerrecht, p. 130; MILLS, The Confluence of Public and Private International Law, p. 234 and 308; BÄR, Extraterritoriale Wirkung von Gesetzen, p. 11; FLESSNER, Interessenjurisprudenz im internationalen Privatrecht, p. 51; INTERNATIONAL BAR ASSOCIATION, Report of the Task Force on Extraterritorial Jurisdiction, p. 130). Therefore, there are limits for systemic thinking from an international perspective. That is why convincing doctrine stipulates, that the "topic thinking" ("topisches Denken") should given more attention (see SCHWANDER, Einführung in das internationale Privatrecht, N 56; HYLAND, International Human Rights Law and the Tort of Torture, p. 434 *et seq.*; MORAN, The Tort of Torture and Cosmopolitan Private Law,

international law, *general principles* of international law, *soft law* or *comparative law analysis*. Of great importance at this point are comparative analyses and recommendations of internationally recognised think tanks, such as the "Ruggie-Principles",[46] specific civil law papers from the International Commission of Jurists[47] and specifically for PIL-issues, the relevant principles of the International Law Association.[48]

6.3. Prospects of Legislative Measures

This investigation has confined itself to seeking out opportunities in existing legislation. Nevertheless, a provisional assessment may be permitted regarding possible legal measures. Specifically with regard to human rights litigation, an introduction of a human rights statute with specific rules with regard to the applicable law could be envisaged. Another possibility could be to create a mandatory rule of the forum within the meaning of Art. 18 CPIL.[49] Within a stricter legal framework regulating human rights complaints, less judicial discretion would apply. With a higher degree of predictability comes a higher level of democratic legitimacy. It therefore makes sense to consider a revision of private international law. However, any special provision for human rights violations would have to be very careful to not treat all violations in the same way. It would have to leave enough room for differentiated solutions depending on the nature of the right in question and the severity of violation. Otherwise, justice would not be achieved in international human rights protection. Moreover, an overly general approach would result in "favor laesi" being inadequately reflected. A special Swiss provision, which categorically would impose itself on the international level, could eventually be viewed as an insensitive export of its own social and liability standards.

p. 683: "The task of the advocate, the judge, and the law-maker no longer seems adequately captured – if it ever was – by the notion of discrete mutually exclusive spheres of binding law, conjoined through a set of rules premised on conflict and choice. And indeed, what the [transnational civil human rights litigation cases] show is a subtle, yet distinct, move away from this model and towards a more multi-faceted integrative understanding of sources and a broader persuasive approach to authority.").

46 See the UN Guiding Principles and furthermore the preliminary work in the form of various reports, available at http://www.ohchr.org/EN/Issues/Transnational Corporations/Pages/Reports.aspx (11.02.2015).

47 INTERNATIONAL COMMISSION OF JURISTS, Report of the Expert Legal Panel on Corporate Complicity in International Crimes (2008), Vol. 3, Civil Remedies.

48 INTERNATIONAL LAW ASSOCIATION, *Final Conference Report Sofia - International Civil Litigation for Human Rights Violations (2012)*; further reports are available at http://www.ila-hq.org/en/committees/index.cfm/cid/1021 (11.02.2015).

49 With regard to the mandatory rules in existing law and the connection to the public policy exception in the present context see GEISSER, Ausservertragliche Haftung privat tätiger Unternehmen für Menschenrechtsverletzungen bei internationalen Sachverhalten, N 518 *et seq.*

Consequently for example, a regulation would seem to general when it provides the same limitation periods for compensation claims for a simple corporate intrusion into a property guarantee, as for corporate intrusions which are based on systematic racial discrimination. In this sense, every legislative initiative requires either further human rights typification or must remain sufficiently open to allow adequate room for the judiciary to exercise its discretion on a case-by-case basis.

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Catherine Kessedjian*

Implementing the UN Principles on Business and Human Rights in Private International Law: European Perspectives

Table of contents

European perspectives on the implementation of the UN Principles on Business and Human Rights in Private International Law may be a non-topic, at least for private international issues and at least for some time.

Indeed, if one considers the audition of Commissioner for Justice Vera Jourovà before the European Parliament (in the fall of 2014), there was not a single word about civil actions for Human Rights violations, whether in her speech or in the questions asked by the Members of the European Parliament. This was probably a missed opportunity, particularly in view of the study commissioned by the European Parliament on the future of Private International Law in the European Union[1] that contains a suggestion that some work should be done on the Private International Law aspects of civil actions for Human Rights violations.

In fact, if one wants to take cognizance of the policy of the European Commission on these topics, the *amicus* brief it filed before the Supreme Court of the United States in the *Kiobel* case may be a good starting point. It looks like the European

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1 Study undertaken under the direction of X. KRAMER, A European Framework for Private International law: current gaps and future perspectives, 2012.

Commission is of the opinion that International Law has nothing to do with private actors, a somewhat outdated position.[2] Coupled with the statement found in the introduction to the Corporate Social Responsibility ('CSR') public consultation,[3] according to which "the Commission's approach to CSR follows the assumption that the development of the CSR should be led by enterprises themselves", there may be some incoherence in the position of the Commission on these issues.[4]

The second reason why the topic may not be a promising one in European Law has to do with the fact that Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (referred to as "Brussels I (recast) Regulation"),[5] which is applicable as of 10 January 2015, has already been modified once to adapt it to the European patent reform[6] and is unlikely to be reopened, even if one concludes that it is not entirely adapted to those specific actions (this remains to be demonstrated – see below).

Third, it has been a very long and difficult process to adapt the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters to the EC Regulation 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (referred to as "Brussels I Regulation") and it is unclear whether negotiations will resume soon on the new

2 Some judges in some Member States have the same opinion. See the decisions rendered by French jurisdictions in the case Tramway of Jerusalem: TGI Nanterre, 30 May 2011, R.G. 10/02629; Court of Appeals of Versailles, 22 March 2013, R.G. 11/05331; Court of cassation, 25 June 2014.

3 Communication of the European Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 0681 final.

4 The Commission further explains: "Public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and to ensure corporate accountability" (see n. 3). It is clear that, during the period 2011-2014, the Commission has essentially followed the self-regulation route, apart from the adoption of the Directive on disclosure of non-financial information (Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, OJEU, 15 Nov. 2014, L330, p.1.).

5 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJEU 20 Dec. 2012, L351, p.1.

6 Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, OJEU 29 May 2014, L163, p.1.

adaptation needed as a result of the Brussels I (recast) Regulation. So, it is improbable that the exercise, even if opened, will consider this type of actions. This is particularly true because Switzerland has already adopted some rules in the field, as shown in other contributions in this book.

Finally, it is also very unlikely that Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (referred to as "Rome II Regulation" or "Rome II")[7] will be reopened any time soon. If one considers the long period of time that has been necessary to adopt the directive on private enforcement in competition matters,[8] it seems very unlikely that we will have soon the equivalent for human rights violations. But if this somehow eventuates, then it must be assessed whether we need to incorporate it in legislation.

Do we need to reform European Law?

I am not going to deal with substantive law, rather just note that several communications by the Commission have tackled issues of Corporate Social Responsibility that may be a step forward. A new Communication is awaited and was prepared in February 2015 by a multi-stakeholder meeting in Brussels. In addition, several Member States are preparing action plans to put in place measures to implement the U.N. Guiding Principles on Business and Human Rights (referred to as the "Ruggie Principles").[9] In addition, some Member States have legislation pending in their Parliament attempting to deal with a parent company's responsibility for actions of its direct or indirect subsidiaries, or a company's liability for acts perpetrated by their sub-contractors or other companies under their influence.[10] It is always difficult to know when is the appropriate time to develop

[7] Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (JO L 199 31 July 2007, p. 40-49). We mention Rome II Regulation only because it is undisputed that civil actions for Human Rights violations are tort actions. It is still open whether we need a special category of tort actions with adapted rules. It is the assumption of this paper that European Law does offer already many possibilities and that, before contemplating special rules, European rules should be used to their maximum effect.

[8] Directive 2014/104/UE of the European Parliament and the Council, of 26 November 2014 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, OJEU L349/1, 5 December 2014. In any case, the "model" of Directive 2014/104 may not be entirely pertinent in the area of Business and Human Rights because the regulation which forms the basis for the right to compensation is not, for the time being, a uniform European regulation, in contrast to competition law.

[9] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 21 March 2011.

[10] See, for example, the bill (n°1524) proposed before the French National Assembly in 2014, which was withdrawn and replaced by Bill n°2578 on 11 February 2015 available at http://www.assemblee-nationale.fr/14/propositions/pion2578.asp (01.09.2016). The

rules at the European level when so much is happening at the international and the national levels.

Let's see what European Private International Law does offer and what is needed. We will look first at jurisdiction and then at applicable law.

1. Jurisdiction

In terms of jurisdiction, we need to look at two sets of rules. The first set is for "European Companies" defendants, i.e. any company registered under the laws of one of the Member States of the European Union (referred to as "EU") that comport with the criteria of Article 54 of the Treaty on the Functioning of the EU (referred to as "TFEU") and hence are "domiciled" in the EU in the jargon of Brussels I Regulation / Brussels I (recast) Regulation (jointly referred to as "Brussels I").[11] The second set deal with companies defendants domiciled in a third State.

1.1. Actions against European Companies

The most frequent scenario consists of victims located outside the EU, sometimes in ill-functioning States, where the direct causal event occurred and the damages have been suffered in that country. There may be cases where some activity may have taken place within Europe, because the company in the foreign country, whose acts have caused the damages suffered by the victims, is a subsidiary or a branch of the European company, or a company "within its influence".[12]

In such a scenario, the company being located in the EU, the victims have the choice of suing that Company at home. Indeed, this is the easiest option since the domicile of the defendant is the one strong principle of European Law on International jurisdiction (art 2 of Regulation Brussels I). The theory of *forum non conveniens* being unavailable under European law,[13] the victims may not be thrown away from

bill has been adopted by the National Assembly in March 2015 but voted against by the Senate.

11 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

12 The present debate follows two lines: (1) whether the right criterion is the "control" by one company over another company, or is the "sphere of influence"; (2) what is the definition of the two concepts "control" and "sphere of influence". It is probably better to say that the two criteria are not mutually exclusive and may be used either alternatively or in complementarity one with the other. It is also clear that the present doctrine of "piercing the corporate veil" is not useful in that discussion. Finally, it would be useful to develop a number of practical and concrete scenario to help courts to apply these concepts.

13 ECJ, C-281/02, *Owusu,* 1st March 2005.

the defendant's forum under the pretext that all the events occurred in a foreign country and that it would be more convenient to try the dispute outside the defendant's forum.

The availability of the defendant's forum is recognized as conforming with the Ruggie Principles and the duty of States to protect and offer remedies (first and third pillars). This was recognized also by the International Law Association (ILA), as may be seen in the resolution adopted in Sofia in 2012.[14] This is also conform with the home country control principle under which a State may not tolerate that a company registered under its laws act on a foreign territory in a manner that would be forbidden if the acts were taking place on its own territory.

Now, very often, the company registered in State A, may not have acted directly but via a joint venture locally registered in State B (where the events and damages occurred), or via a subsidiary or another establishment. Currently, under art 6-1 of Brussels I Regulation (article 8-1 under Brussels I (recast) Regulation), it is possible to join several defendants who are located in the EU before the court of the domicile of one of them. This rule may not be entirely satisfactory because, in most cases of human rights abuses, the mother company or the *donneur d'ordre* may be located in Europe, but the subsidiary or sub-contractor is located in a third State. Art. 6.1/8.1 is not applicable *per se* in such cases.[15] Some Member States do have the same rule in their Private International Law body of norms. France is one of them and it would be good to amend Brussels I to allow the joinder of defendants whether established within or outside the EU.

The second issue concerning the application of art 6.1/8.1 of Brussels I is that of *connexité*, i.e. that not all claims may be suited for joinder of several defendants in the same suit. The claims must be linked, at least factually, so that if they were tried separately there would be a risk of contradictory decisions. It is our opinion that, in cases of human rights violations, the link may be appreciated with more tolerance than in classic civil or commercial litigation. The ILA Sofia 2012 Resolution showed the kind of link that may be accepted in order to try several defendants before the same court. It is worth repeating here the rule the ILA Committee has included in the resolution.

Article 2.2. provides:

> "Connected claims
>
> 2.2(1) The courts of the State where one of a number of defendants is domiciled shall have jurisdiction over all of the defendants in respect of closely connected claims.

[14] ILA, Resolution n°2, Report of the Seventy-Fifth Conference of the International Law Association, 2012, p.23, and the accompanying report, p.321. The author of this paper was the chair of the Committee which prepared the resolution and the report.

[15] ECJ, C-51/97, *La Réunion européenne,* 27 Oct. 1998.

2.2(2) Claims are closely connected in the sense of paragraph 2.2(1) if:

(a) it is efficient to hear and determine them together; and

(b) the defendants are related.

2.2(3) Defendants are related in the sense of paragraph 2.2(2)(b), in particular if at the time the cause of action arose:

(a) they formed part of the same corporate group;

(b) one defendant controlled another defendant;

(c) one defendant directed the litigious acts of another defendant; or

(d) they took part in a concerted manner in the activity giving rise to the cause of action.".[16]

It is clear, therefore, that there is no need to go through the route of piercing the corporate veil that is always a very difficult matter to do, particularly for victims that are exterior to the corporate structure. It is enough for the victim to prove one of the links enumerated in paragraph 2.2(3) of the ILA Sofia 2012 Resolution mentioned above. For example, the fact that the defendants are members of the same group is enough, *per se*, to trigger the application of the provision. And it is a bit easier to prove that fact for third parties exterior to the group.

The situation of the *donneur d'ordre* and its sub-contractors is solved by sub paragraphs (b) (c) or (d) of proposed article 2.2(3), depending on the factual circumstances of each case. The court will have to enter into some analysis before it can confirm its jurisdiction. The Committee considered that if none of the three alternative facts was present in a given case, it meant that the co-defendants were not close enough one with the other and could not be tried together under the most common due process principles.

Whether the civil action is a stand-alone law suit or is an "annex" to a criminal action does not matter, since Brussels I allows, if the law of the court seized of the matter allows it, to join a civil action to a criminal action.[17] This may be efficient when using universal criminal jurisdiction.[18] A court located in a Member State of the European Union may decide to open proceedings on the basis of universal criminal jurisdiction. The victims may then attach their civil action for compensation to the criminal proceedings. The judgment rendered will circulate under Brussels I and

[16] ILA, Resolution n°2, Report of the Seventy-Fifth Conference of the International Law Association, 2012, p.23.

[17] Article 5.4 of Brussels I Regulation / Article 7.3 of Brussels I (recast) Regulation provides: "as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.".

[18] On universal jurisdiction: BUCHER, La compétence universelle civile en matière de réparation pour crimes internationaux; BUCHER, La compétence universelle civile.

victims may enforce the civil part of the judgment rendered in all the other 27 Member States of the European Union.

1.2. Actions against Companies Located in Third States

When discussions started to reform Brussels I Regulation, the Commission attempted to "internationalize" the regulation i.e. to make it applicable to defendants located outside the EU. If that attempt had been successful, the new rules would have prevented Member States to keep two sets of jurisdictional rules,[19] one for European defendants and the other one for non-EU defendants. The attempt by the Commission to "internationalize" Brussels I Regulation[20] failed, therefore, Brussels I does not apply to defendants located outside the EU. Hence, if a company registered in a third State committed the Human Rights violation, Brussels I does not apply but each Member State will apply its own rules on international jurisdiction.

As discussed above, we need an art 6.1Brussels I Regulation / art. 8.1 Brussels I (recast) Regulation applicable across Europe for co-defendants domiciled outside Europe.

As a result of the fact that these types of offenses are often committed in a dysfunctional State, it may be necessary to apply a kind of *forum necessitatis*. This rule, known by a number of Member States,[21] is very useful to fight against a denial of justice. It would be preferable to have a uniform European rule on *forum necessitatis,* which is not currently the case. It was proposed by the European Commission when the discussions on the recast of Brussels I Regulation started, but was considered dependent upon the internationalization of the Regulation and therefore was deleted from Brussels I (recast) Regulation. It has been proposed by the ILA in the same resolution mentioned above as follows:

[19] The Commission had limited its proposal to jurisdiction and did not include foreign judgments. The European Group of Private International Law (referred to as "EGPIL"), on the contrary, without deciding on the policy of the extension, proposed rules for both jurisdiction and judgments (See: Resolutions of the EGPIL, list of documents from the Group, Hamburg 2007 and Bergen 2008, available at http://www.gedip-egpil.eu/gedip_documents.html (01.09.2016).

[20] This move proposed by the European Commission was voted down by the Member States, possibly in an attempt to keep their own jurisdictional policy towards third States.

[21] Ten Member States of the European Union (Austria, Belgium, Estonia, France, Germany, Luxembourg, the Netherlands, Poland, Portugal and Romania) have a rule of *forum necessitatis* either statutory based or organised by case law (Nuyts, Study on residual jurisdiction, p.64-66).

"2.3 Forum of necessity

2.3(1) The courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice.

2.3(2) A denial of justice in the sense of paragraph 2.3(1) occurs if the court concludes upon hearing all interested parties, and after taking into account of reliable public sources of information, that:

(a) no other court is available; or

(b) the claimant cannot reasonably be expected to seize another court.

2.3(3) A sufficient connection in the sense of paragraph 2.3(1) consists in particular in:

(a) the presence of the claimant;

(b) the nationality of claimant or the defendant;

(c) the presence of assets of the defendant;

(d) some activity of the defendant; or

(e) a civil claim based on an act giving rise to criminal proceedings in the court seized of those proceedings, to the extent that the court has jurisdiction available under its own law to entertain civil proceedings.".[22]

The explanatory report states: "the Committee unanimously considered that a forum of necessity was essential to the effectiveness of civil actions for human rights violations"[23]. The report further explains the balance that the Committee aimed at striking between the interests of the victims to get compensation and that of the defendant not to be sued in a court completely unrelated with the matter. This is why the rule requires some link between the parties, the case and the State in which is located the court seized of the matter under the rule of forum of necessity. The link need not be very strong,[24] but must be satisfied before the court is allowed to exercise jurisdiction. This rule is believed to protect victims from a dysfunctional court system in the State where the events occurred.

2. Applicable Law

For applicable law, as is well known by the readers of this book, there is only one set of rules in the European Member States, since Rome II[25] is of "universal application"

[22] ILA, Resolution n°2, Report of the Seventy-Fifth Conference of the International Law Association, 2012, p.23.

[23] ILA, Report of the Seventy-fifth conference, Sofia, 2012, p.363.

[24] Ibidem, p.365.

[25] There is no doubt that cases brought by victims of human rights violations are characterized as "tort" cases. This is not to say that some actions may not take place

(art. 2). This means that Member States had to repeal their own conflict of laws rules in tort for all cases covered by Rome II whether they are "purely European" or whether they include litigants located outside Europe. The debate for applicable law is really twofold: 1) Should we create a specific rule for civil actions for human rights violations or are the present rules satisfactory? 2) Independent of the answer given to the first question, are the rules on mandatory norms, *lois de police* and the public policy exception sufficient for this area of the law?

2.1. Appraisal of the *lex loci delicti* and the Special Rules under Rome II

We will not spend time discussing party autonomy, although there is room for choice of law in Rome II, since it is very unlikely that victims of human rights violations will be able to agree with the tortfeasor(s) on the law to be applied to the case.

Therefore, the analysis starts with article 4.1 of Rome II, which leads to the application of the *lex loci delicti*, in the most narrow meaning of the expression, since art. 4.1. provides:

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

Because the examples we know of human rights violations show that, most of the time, the damage occurs in a State with weak laws, it is necessary to adapt Rome II and allow the plaintiff/victim to choose what law is more favorable to its compensation between the *lex loci delicti*, that of the causal event and that of the defendant, meaning the law under which the perpetrator is established. This is why a reform of Rome II would be preferable.

There are already some alternative rules in Rome II. For example, art. 7 for environmental damages provides:

> *"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".*

However, we would propose to go one step further for human rights violations and allow the application of the law of the tortfeasor. Indeed, if a link can be proven between the event and the parent company, applying the law of the parent company

within the contractual realm, for example when a sub-contractor has violated contractually imposed CSR rules, but these are not the focus of this paper.

may be much better for the victims than applying the law of the damage or even of the causal event that may have been perpetrated also in the host State. By providing an alternative with the law of the defendant, we make sure that the home country control principle applies. The defendant cannot complain for the application of the law of the country where it is located since it must be knowledgeable of that law, which should come as no surprise to him. It is indeed the law that should have framed the defendant's activities. Let's imagine that the French bill n°2578 becomes law and that victims prove that the mother company has not established a due diligence plan or that its due diligence plan is faulty or incomplete. By applying French law to the tort case brought against that company, it can hardly pretend not to be aware of the obligations of French law in that respect. This is also conform with the substantive principles which are emerging from both international and European law: the obligation of due diligence and of prevention of the harm; the principle "comply or explain"; the presumption of liability of a mother company for the acts of its subsidiaries or sub-contractors, to list only a few.

The following rules in Rome II are harmful for our topic and should be neutralized:

a) Article 4.2 provides: "*However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply*". It is well known that the harmful event is typically perpetrated by a separate company located in the host State, where the victims are themselves also located. If applied literally, art. 4.2. leads to the application of the *lex loci delicti,* without the possibility to demonstrate a better link with another law. Hence, contrary to what may be the case in usual torts, 4.2. won't give the victim an extra and easiest choice, which is the purpose of the rule.

b) Article 17 which, under the title "Rules of safety and conduct" provides: "*In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*". As already stated, most host countries have deficient rules of safety and conduct; as a result, article 17 should not be activated in cases of human rights violations.

2.2. Mandatory Rules, *Loi de police* and the Public Policy Exception

Since these matters deal with human rights or fundamental rights, the issues related to this area of the law may easily fall within either one of the three possibilities which exist in private international law to oblige companies to respect these norms. They may be falling under mandatory rules, which cannot be departed from even if some foreign law may be held applicable to the dispute. In other words, they may be considered as a minimum standard, which must be respected no matter what and

even if a foreign law is held applicable. Mandatory norms "displace" the normally applicable norm and are applicable in lieu of the rules normally applicable. This is also the function of the public policy exception, notably art. 26 of Rome II Regulation, although under the public policy exception only the public policy of the forum State may be upheld. It may be relevant to note that the public policy applicable under this provision may stem from international law even if not fully integrated in the law of the forum State. This would not apply if the forum State is more advanced on CSR rules than what international law requires.

An even stronger norm is that of *loi de police* or, now in the jargon of European private international law, the overriding mandatory rules (art. 16 of Rome II). If the French Parliament finally adopts the proposed bill n°2578 on the liability of mother companies for the acts of its subsidiary or sub-contractor,[26] it could be considered as a *loi de police* which curtails the using of the conflict of laws rules and hence the potential application of a foreign law. This is certainly more favourable to victims of human rights violations if applied correctly by judges. However, it does not cover all the possible cases which may give rise to litigation in practice.

3. Conclusion

To conclude, I would like to stress three of the biggest challenges faced by the European Union and its Member States. The first is the strengthening of civil society and the rule of law in countries outside the EU which are fragile and where human rights violations are more likely to occur. The second one is the training of judges in courts located within the European Union. The first one is a difficult goal; it will take time and a lot of effort. The second one is urgent and easy to achieve. The European Union already has the organization to fulfil this goal, namely the Academy of European Law (ERA) in Trier. The Union should urgently finance a cycle of training on CSR/Human Rights issues (both substantive and private international law aspects) for judges across the Union. This is not a very expensive exercise, but it is one without which the third pillar of the Ruggie Principles will remain a dead letter. We should not see again in court decisions declarations to the

[26] Bill n°2578 applies to companies that are present on the French territory or outside; for companies which are only present on the French territory, the threshold is at least 5000 employees (which is a very high threshold); for companies which are present both in France and in foreign countries, the threshold is at least 10000 employees. They must prevent damages to occur by due diligence. They must issue a due diligence plan and make it publicly available. Any interested person may act to force companies to issue a plan and take corrective and precautionary measure. The pecuniary sanction in form of a civil penalty may go up to 10 million euros. In addition, publication and dissemination of the decision rendered may be ordered by the judge.

effect that Public International Law does not deal with private parties and that unilateral codes of conduct published by companies do not carry legal effects.

Finally, the third challenge turns around the question whether there is a place for alternative dispute resolution (referred to as "ADR") in CSR matters. The challenge is particularly difficult since what works today in CSR is the reputational risk for companies. Companies seem to be more concerned about their image than by legal risks and potential financial sanctions. If that is correct, then using ADR defeats the only usefulness of disputes resolution since ADR mechanisms are confidential. Therefore, if ADR has a future in CSR matters, the rule of confidentiality may have to be lifted. In any case, this topic needs further study and consideration.

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Epilogue

Throughout this book we have had the chance to face various and interesting aspects of the problems linked to the impact on Human Rights of the activities carried out in practice by multinational corporations. The Guiding Principles on Business and Human Rights sponsored by the United Nations illustrate an increased awareness of those setbacks on a global basis.

But evidently we have not been able to develop many other aspects that of course require an in-depth analysis. Among them, we may cite: the definite impact of corruption as well as the necessary measures to tackle it; the control of supply chains and the fight against modern slavery, with a relevant supportive legislative framework, and, for instance, the hopeful Canadian precedent related to the *Nevsun* case; the degree of concern of Human Rights because of climate change and the role played by corporations in this process, with the significant public initiative recently launched to this respect by the Commission on Human Rights (CHR) of the Philippines; environmental pollution, in general, interwoven with business activities; the incidence of measures of privatization over the enjoyment of public goods; the corporate concentration operations brought into line in key sectors such as seeds and fertilizers, serving as an example the recent corporate takeover on Monsanto by Bayer; the central core of issues in connection with land and water grabbings, a real and relevant concern that could give rise to persecution requests according to the position taken and announced by the International Criminal Court (ICC) or, in the same regard, by the initiative operated by Amnesty International and the International Corporate Accountability Roundtable (ICAR) based on a recent and extensive document entitled "The Corporate Crimes Principles"; or, finally, the search for ways of alternative dispute resolutions and the improvements of the judicial mechanisms in the different legal systems, etc.

And all this not forgetting other similar points of interest in relation to the above mentioned increased awareness illustrated by the establishment of a legally binding legislative framework currently under discussion in the United Nations, or the interplay of the problems examined here concerning Sustainable Development aims derived from the truly universal International Organization, or the pressing need for protection of Human Rights defenders and indigenous peoples, a task also assumed by the UN through different means of implementation.

In spite of the fact that this agenda is not exhaustive it reveals the size of the challenge we face. It is the real future commitment of Humanity and, of course, I believe it is worthy of a great and continuous effort on the side of the international community as well as on the part of players and stakeholders.

Castellón, 15.10.2016

Francisco Javier Zamora Cabot

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