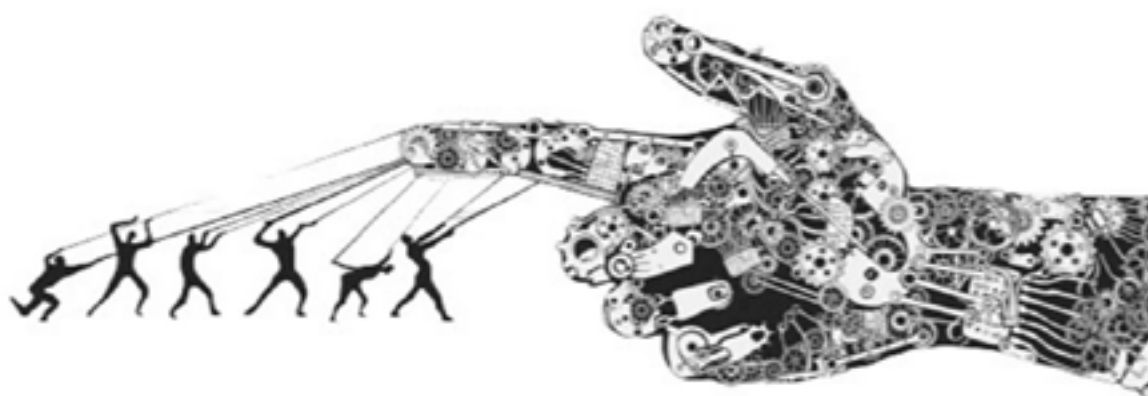


Business and Human Rights: Access to Justice and Effective Remedies

(with input from the EU Agency for Fundamental Rights, FRA)

Report of the European Law Institute





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Rights, FRA)

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The European Law Institute

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Executive Summary

Whilst the European Union (EU) has put in place an increasingly sophisticated regulatory and policy framework aimed at the promotion of human rights, the 2020 comparative study 'Business and human rights – access to remedy' by the EU Agency for Fundamental Rights (FRA) confirms the persistence of practical and legal barriers to access to remedy in the European context for victims of business-related human rights abuses. Many of the challenges identified could be addressed through targeted policy and regulatory interventions at Member State level, but also through harmonisation of the interventions on the part of the EU. It is therefore essential to find ways of alleviating the burden on individual claimants and facilitating redress of their grievances.

The aim of this Report is to identify a range of possible regulatory and/or soft-law options, both at Member State and at the EU level, intended to increase access to remedy in the EU and ensure corporate human rights compliance. The Report refers to 'rights' in a broad sense so as to encompass all internationally recognised human rights, including those sanctioned in international human rights treaties as well as in regional instruments such as the European Convention on Human Rights and the EU Charter of Fundamental Rights. The relevant impacts include all types of business-related human rights violations. When not otherwise stated, the Report refers to undertakings of any size and sector based in the EU, as well as to undertakings established in non-EU countries that operate in the internal market of the EU selling goods or providing services.

The Report does not set out to address the full range of regulatory and policy measures relevant to the business and human rights debate, but rather focuses on a set of ideas that the authors deem central to the Report's aim. In particular, the Project Team addresses several issues that it considers key to reducing the persisting barriers that hinder access to justice and effective remedies for business-related human rights violations. These include appropriate legal procedural rules, availability of judicial collective redress procedures and of effective non-judicial mechanisms, access to information, private international law jurisdictional rules and applicable law regimes, as well as the link between human rights due diligence and remedies.

The Report presents desk-based analyses of the main issues, in five thematic chapters, and formulates recommendations as to how EU and Member State action could address the persisting obstacles. The final recommendations also take stock of the research conducted by the FRA in its 2020 comparative study, which collected evidence on access to remedy in EU Member States in relation to business-related human rights abuses.

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Introduction

Background

Multinational corporations can exercise economic and social influence that sometimes rivals that of nation States, being capable of having a positive or a negative impact on human rights, and, in a European Union (EU) or constitutional context, on fundamental rights. EU citizens, consumers and corporate entities expect that businesses which are active and compete within the EU internal market respect human rights standards when it comes to their global activities – irrespective as to whether or not they are multinational companies. Where their impact amounts to an abuse of human rights, effective remedies should be made available to victims to avoid rendering human rights nugatory. Whereas access to remedy constitutes a human right and one of the three pillars of the polycentric governance system articulated by the UN Guiding Principles on Business and Human Rights (UNGPs),¹ it is, in fact, often hindered by a number of factors, partly inherent in the imbalance of power between victims of human rights abuse and large companies.

The 2020 comparative study ‘Business and human rights – access to remedy’ by the European Union Agency for Fundamental Rights (FRA)² presents the findings of fieldwork research which confirm the persistence of practical and legal barriers to access to remedy in the European context. It is therefore essential to find ways of alleviating the burden on individual claimants and facilitating redress of their grievances.

The UNGPs make it plain that State-based judicial and non-judicial grievance mechanisms should constitute the foundation of a wider system of remedies within which operational-level grievance mechanisms can provide early-stage recourse and resolution.³ Clearly, State-based mechanisms play a prominent role and, in many cases, remain the only effective avenues for

redress. For certain human rights violations, ensuring access to the courts is the only acceptable form of remedy under international human rights law and a specific State obligation.⁴ However, the UNGPs’ third pillar has often been described as the ‘forgotten pillar’, owing to the reluctance or inability of States to adopt the necessary reforms and overcome the inherent limitations of their institutional and judicial frameworks.⁵ Indeed, access to a judicial remedy for business-related human rights abuses in EU Member States is often hindered by factors such as the cost of litigation, unfavourable procedural rules, the inability to bring collective claims and the limited *locus standi* for civil society organisations together with the jurisdictional challenges connected with the cross-border liability of EU-based companies. In turn, non-judicial grievance mechanisms, which could usefully complement and even strengthen judicial remedies, are often unavailable, under-resourced, unknown to the rights-holders or incompatible with the effectiveness criteria set forth in Guiding Principle 31 of the UNGPs. The FRA 2020 report draws attention to the general lack of information about available remedies, *a fortiori* where the victims of abuses are located in countries outside the EU.⁶ Many of the challenges identified could be addressed through targeted policy and regulatory interventions at Member State level, but also through harmonising interventions on the part of the EU. The 2017 FRA Legal Opinion on improving access to remedy in the field of business and human rights called upon the EU actively to stimulate greater harmonisation across Member States in some crucial domains, for instance in relation to claimants’ access to information, application of *forum necessitatis*, collective redress, legal standing for non-profit bodies, minimum standards on legal aid for non-resident third-country nationals, minimum standards for

¹ United Nations High Commissioner for Human Rights, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (June 2011) UN Doc A/HRC/17/L.17/31.

² FRA, ‘Business and Human Rights – Access to Remedy Comparative Report’, 2020, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf>.

³ ‘UN Guiding Principles on Business and Human Rights’, UN Doc A/HRC/17/31, 21 March 2011, GP 25, Commentary.

⁴ CESCR, General Comment No 9 (1998), paras 3 and 9.

⁵ Sarah McGrath, ‘Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses’, IHRB, 2015, 15 <<https://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and>>.

⁶ FRA (n 2) Section 3.5.

the effectiveness of the Organisation for Economic Co-operation and Development (OECD) National Contact Points, National Action Plans on Business and Human Rights (NAPs),⁷ human rights due diligence, etc.⁸ Nevertheless, so far EU action with regard to the third pillar has been limited, leaving many key issues fundamentally unaddressed. However, the European Commission and the European External Action Service have recently taken the step of publishing 'Guidance on due diligence for EU businesses to address the risk of forced labour in their operations and supply chains'.⁹ This non-binding document, which reiterates the Commission's undertaking in its 2021 Work Programme to present a legislative proposal on Sustainable Corporate Governance, is designed to give EU businesses practical guidance to implement effective human rights due diligence practices to address the risk of forced labour in their supply chains. It does not cover due diligence for other supply chain risks. Using the OECD due diligence framework as a reference, it sets out the policies and management systems which should be tailored to the risk of forced labour and the relevant risk factors (red flags). It further specifies in particular considerations when carrying out in-depth assessments of specific high-risk suppliers or supply chain segments, when taking action to address risks of forced labour, when dealing with risks of State-sponsored forced labour and for responsible disengagement. On the subject of remediation, the document states as follows: '[w]hen an enterprise identifies that it has caused or contributed to actual adverse impacts, it should address such impacts by providing for or cooperating in their remediation.' In addition, it should '[s]eek to restore the affected person or persons to the situation they would be in had the adverse impact not occurred (where possi-

ble) and enable remediation that is proportionate to the significance and scale of the adverse impact.' The enterprise should also '[c]onsult and engage with impacted rights-holders and their representatives in the determination of the appropriate remedy.' Lastly, the document points out that '[f]orced labour is a crime [and] companies should put in place a system to report crimes to local authorities. Where they have caused or contributed to forced labour, companies should cooperate with local authorities to help provide appropriate forms of remedy.'

It is important to observe that respect for human rights and the commitment to sustainable development are among the objectives of the EU External Action and inform the Common Commercial Policy.¹⁰ Internally to the EU, fundamental rights are not only part of the founding values¹¹ and guiding principles,¹² but also part of the legal obligations that are binding on the EU institutions in all their actions, as well as the actions of Member States when acting within the scope of EU law.¹³ Whilst the EU has put in place an increasingly sophisticated regulatory and policy framework aimed at the promotion of human rights, it has fallen short of making incisive interventions in the field of remedies for business-related human rights abuses. Existing EU instruments implementing some dimensions of human rights due diligence (eg, the Timber Regulation, the Conflict Minerals Regulation or the Non-Financial Reporting Directive),¹⁴ albeit constituting welcome developments, are not linked to a system of remedies for victims of business-related abuses. Grievances targeting the conduct of European companies sometimes have a collective dimension, but judicial collective redress procedures are not always available in Europe and there is no harmonised approach to their design.¹⁵ Moreover, in the ab-

⁷ See Chapter 5 below.

⁸ FRA, 'Legal Opinion on Improving Access to Remedy in the Area of Business and Human Rights at the EU Level', 1/2017, 2017.

⁹ European Commission, 'Guidance on Due Diligence for EU Business to Address The Risk of Forced Labour in Their Operations and Supply Chains' <https://trade.ec.europa.eu/doclib/docs/2021/july/tradoc_159709.pdf>.

¹⁰ Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU), Art 21(3); Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), Art 207. See also: European Commission, 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy', 18 February 2021, COM(2021) 66 final.

¹¹ Art 2 TEU.

¹² Art 21 TEU.

¹³ Charter of Fundamental Rights of the European Union (2000) 2000/C 364/01, Art 51(1).

¹⁴ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130; 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) [2014] OJ L330.

¹⁵ See Chapter 2 below.

sence of a clear duty of care placed on EU-based companies, it can be exceptionally difficult to hold parent companies liable before European courts for the acts of their affiliates.¹⁶ Whilst it is true that EU action with respect to the third pillar has so far been unsatisfactory, progress at Member State level has also been slow and uneven. Although some Member States have adopted relatively general commitments in their NAPs to exploring avenues to improve access to remedy, only some have taken concrete steps in this direction.

Governance gaps at the Member State and EU level result in unacceptable obstacles to access to effective remedies in Europe for victims of human rights and environmental impacts caused by EU-based corporations outside of the EU. This, in turn, undermines the effective protection of fundamental rights in the EU, potentially putting both the Member States and the EU itself in a position of non-compliance with their own obligations under EU law and international human rights law. In recent years, some Member States have started working towards the adoption of human rights due diligence legislation with potential implications for corporate liability and access to courts for non-EU rights-holders. In particular, the adoption of the French law on the *devoir de vigilance*, in conjunction with a power of injunction for the judge and civil liability mechanism, has revived an important debate about the link between human rights due diligence and remedies. This debate is also gaining traction at EU level in view of the upcoming EU legislation on mandatory human rights and environmental due diligence announced in the first half of 2020 by the European Commissioner for Justice, Didier Reynders.¹⁷ The proposal, which was initially expected to be tabled in the first half of 2021 as part of the European Green Deal and the European Recovery Plan, is now awaited for 2022.¹⁸ While this instrument, if optimally designed, could contribute to improving access to remedy for victims of business-related violations, it must be recalled, as pointed out by John Ruggie twelve years ago, that there is no silver bullet solution

for the full, effective implementation of the third pillar.¹⁹ This can be achieved only through a smart mix of measures adopted at Member State and EU level and by addressing both the legislative gaps and the practical barriers faced by victims. The goal is to ensure access to what the UN Working Group on Business and Human Rights described as a ‘bouquet of remedies’, allowing victims of business-related abuses to choose the most appropriate avenue depending on the circumstances of each case.²⁰

Aim and Methodology

The aim of this Report is to identify a range of possible regulatory and/or soft-law options, both at Member State and EU level, intended to increase access to remedy in the EU and ensure corporate respect of human rights. The Report refers to ‘rights’ in a broad sense to encompass all internationally recognised human rights, including those sanctioned in international human rights treaties as well as in regional instruments such as the European Convention on Human Rights and the EU Charter of Fundamental Rights. The relevant impacts include business-related human rights violations of varying degrees of severity. When not differently stated, the Report refers to undertakings of any size and sector based in the EU, as well as to undertakings established in non-EU countries that operate in the internal market, for instance non-EU incorporated enterprises selling goods or providing services, including financial services, in the EU market.

¹⁶ Rolf H Weber and Rainer Baisch, ‘Liability of Parent Companies for Human Rights Violations of Subsidiaries’, 27(5) EBLR 2016:669, 676.

¹⁷ Isabelle Schömann and Claudia Saller, ‘Ensuring Human Rights and Sustainability in Company Supply Chains’, Social Europe, 12 2020 <<https://www.socialeurope.eu/ensuring-human-rights-and-sustainability-in-company-supply-chains>>.

¹⁸ In February 2021, the European Parliament’s Committee on Legal Affairs adopted recommendations on the shape of a future EU directive on mandatory human rights and environmental due diligence: EP CLA, ‘Report with recommendations to the Commission on corporate due diligence and corporate accountability’, 11 February 2021 (2020/2129(INL)).

¹⁹ John G Ruggie, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’, 7 April 2008, A/HRC/8/5, para 7.

²⁰ Working Group on the issue of human rights and transnational corporations and other business enterprises, ‘Human Rights and Transnational Corporations and other Business Enterprises’, 18 July 2017, A/72/162, 12–13 <<https://digitallibrary.un.org/record/1298796?ln=en>>.

The Report does not aim at addressing the full range of regulatory and policy measures relevant to the business and human rights debate,²¹ but rather zooms in on a set of ideas that the authors deem central to the Report's aim. In particular, the Project Team has focused on a number of issues that it considered necessary to address in order to reduce the persisting barriers that hinder access to justice and effective remedies for business-related human rights violations. These include appropriate legal procedural rules, availability of judicial collective redress procedures and of effective non-judicial mechanisms, access to information, private international law jurisdictional rules and applicable law regimes, as well as the link between human rights due diligence and remedies.²² The Report presents desk-based analyses of the main issues, in five thematic chapters, and formulates recommendations as to how EU and Member State action could address the persisting obstacles. The final recommendations also take stock of the research conducted by the FRA in its 2020 comparative study,²³ which collected evidence on access to remedy in EU Member States in relation to business-related human rights abuses. The FRA study identifies both constraining and facilitating factors to access to justice, providing evidence-based inputs designed to guide EU action in this field. Some of its key findings are referred to in this Report in order to highlight areas in which action is required, both at the EU and Member State level. The FRA's 2017 opinion on 'Im-

proving access to remedy in the area of business and human rights at the EU level' also constitutes a key background study for this Report.

Limitations

It is important to flag up some crucial issues which go beyond the scope of this Report and which have been extensively discussed in other publications. Firstly, this Report does not undertake a comprehensive analysis of the EU's competences in relation to business and human rights, although specific aspects of the division of competences are referred to in some of its chapters. This choice was made for reasons of efficiency, having regard to the fact that the question of EU competences has already been addressed in detail by several studies, including the recent report published by the European Commission on due diligence requirements through the supply chain,²⁴ the 2015 Commission Staff Working Document on Implementing the UNGPs²⁵ and several other publications.²⁶

²¹ The EU also takes action in the fields of Corporate Social Responsibility and Responsible Business Conduct, paradigms that are relevant to business and human rights but characterised by voluntary and market-based initiatives. While acknowledging EU action in those fields, this Report is situated within the 'business and human rights' paradigm, which is characterised by a normative approach to state and business responsibilities based on internationally-recognised standards (on this distinction, see: European Commission, Staff Working Document, 'Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress' (2019) SWD(2019) 143 final, 3 <<https://ec.europa.eu/transparency/regdoc/rep/10102/2019/EN/SWD-2019-143-F1-EN-MAIN-PART-1.PDF>>).

²² For the purpose of exploring its link to remedies, in this Report we refer to the general concept of 'human rights' due diligence, in line with the language adopted by the UNGPs. However, we will use the expression 'human rights and environmental' due diligence in relation to the proposed EU-wide legislation on mandatory due diligence (Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, 'Study on Due Diligence through the Supply Chain – Final Report', European Commission DG Justice and Consumers, February 2020, 39 <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>).

²³ FRA (n 2).

²⁴ EC (n 22) 182.

²⁵ European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play' (SWD(2015) 144 final, 2015) <<https://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-144-EN-F1-1.PDF>>.

²⁶ See, for instance: Stephanie Bijlmakers, Mary Footer and Nicolas Hachez, *The EU's Engagement with the Main Business and Human Rights Instruments* (European Commission 2015) <<http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf>>; Peter Drahn, 'Business and Human Rights: A New and Contentious EU Policy Area' in *Adoption of EU Business and Human Rights Policy. Contributions to Political Science* (Springer 2020) 17; European Parliament, 'EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims', 2020, <https://gala.gre.ac.uk/id/eprint/28793/8/28793%20MARTIN-ORTEGA_EU_Human_Rights_Due_Diligence_Legislation_2020.pdf>; Alexandra Gatto, *Multinational Enterprises and Human Rights Obligations under EU Law and International Law* (Edward Elgar 2011); Fabrizio Marrella, 'The UN Guiding Principles on Business and Human Rights. A Challenge for the European Union or Only for Its Member States? Towards an EU National Action Plan', SSRN, 2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845320>; Vivian Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?', SSRN, 2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753155>.

Secondly, this Report does not contain a comparative assessment of rules of civil procedure which might hinder or facilitate access to remedy in EU Member States, such as the rules on the burden of proof, disclosure, equality of arms, etc. Whilst beyond the scope of this Report, analyses of these crucial aspects may be found in a number of existing studies.²⁷

Structure of the Study

The Report is made up of the following thematic chapters:

Chapter 1 – Human Rights Due Diligence²⁸ focuses on how the concept of human rights due diligence relates to remedy for victims. It does so by referencing the UNGPs' concept of human rights due diligence and of access to remedy. It clarifies the difference between human rights due diligence and reporting requirements and also refers to the ways in which remedies have (or have not) been included in recent developments with regard to mandatory human rights due diligence regulation. The chapter concludes that, if mandatory human rights due diligence is introduced as a legal standard of care at a European level, it should expressly require Member States to ensure that a right to civil remedy is established in their jurisdictions. It also formulates specific recommendations for Member States in this regard.

Chapter 2 – Collective Redress²⁹ starts from the consideration that most business and human rights grievances connected with the conduct of European companies have a collective dimension. Consequently, it evaluates the availability and optimal design of judicial collective redress procedures for typical business and human rights cases involving mass harm before EU courts in the light of recent European legal developments. Its main conclusion is that, in order to guarantee the effectiveness of collective procedures and remedies in business-related human rights vio-

lation cases, judges need to be provided with various case-management tools and allowed significant flexibility in order to apply collective redress procedures in manners which are most congruent with the circumstances of the cases before them.

Chapter 3 – Issues of Private International Law³⁰ assesses whether remedies for human rights and environmental violations may be brought against multinational companies based in the EU when the said violations have been committed by their subsidiaries or contractors outside the EU. Considering the frequency of scenarios in which the victims of abuses committed outside the EU cannot obtain a fair trial/satisfaction in their domestic courts, the chapter assesses on what basis they could sue the company on top of the value chain in a EU Member State. To answer the question, the chapter analyses the rules on jurisdiction and the rules on the applicable law. It also raises the question of a possible common approach to the liability of parent companies for subsidiaries and of companies for their suppliers and the desirability of promoting mechanisms that may allow victims of human rights violations to hold companies based in the EU liable.

Chapter 4 – Additional Pathways to Effective Redress³¹ focuses on 'non-judicial' solutions which may have the potential to offer an alternative pathway to a resolution or remedy in some cases of violations of human rights. First, building on the available literature and on the findings of the FRA Report, it highlights the strengths and weaknesses of some notable existing examples of this type of mechanism. Secondly, the chapter explores the possible lessons that the EU could draw, in particular, from the field of consumer alternative dispute resolution and from the structure and role of the Ombudsman in some European countries. Finally, the chapter assesses the potential for, and the feasibility of, creating a bespoke follow-on action inspired by practice in the anti-trust field.

²⁷ See, for instance: European Parliament, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', 2019 <<https://lirias.kuleuven.be/retrieve/534258>>; OHCHR, 'The OHCHR Accountability and Remedy Project - Illustrative Examples for Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse', 2016 <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.pdf>; Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction', 4 *The Rabel Journal of Comparative and International Private Law* 2016:783; Philipp Wesche and Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK' 16(2) *Human Rights Law Review* 2016:370; Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (Routledge 2017).

²⁸ This chapter was drafted by Lise Smit.

²⁹ This chapter was drafted by Duncan Fairgrieve, Filip Gregor and Christopher Patz.

³⁰ This chapter was drafted by Robert Bray and Ilaria Pretelli.

³¹ This chapter was drafted by Diana Wallis, Duncan Fairgrieve and Robert Bray.

Chapter 5 – Action and Transparency³² starts by assessing to what extent EU Member States have adopted NAPs on Business and Human Rights reflecting an adequate level of ambition from the point of view of the availability and accessibility of effective remedies. It then focuses on transparency. On the one hand, it assesses the availability of information on the human rights and environmental performance of companies. On the other, it examines victims' access to information about available remedies both at State and company level. Finally, the chapter explores the role the EU could and should play in pushing for developments in the above-mentioned areas, for instance through the Open Method of Coordination, or stepped-up incentives for Member States to achieve greater alignment with joint EU approaches.

³² This chapter was drafted by Daniel Augenstein, Jonas Grimheden and Laura Guercio.

Recommendations

Summary

This section presents a schematic summary of a set of recommendations stemming from the thematic analyses elaborated in this Report. The recommendations must be read not as mutually exclusive, but rather as mutually reinforcing interventions that the EU could undertake in order to improve access to remedy in the business and human rights sphere by expanding the options available to victims in terms of judicial and non-judicial remedies, as well as by reducing the barriers which currently make the existing redress avenues difficult to pursue. These recommendations stem from the expert analyses carried out by the Project Team, but also build on previous studies, such as the work of the FRA (as detailed in the Introduction to this Report) and on the European Law Institute (ELI)-International Institute for the Unification of Private Law (UNIDROIT) Model European Rules of Civil Procedure.³³

The proposed actions undoubtedly reflect different levels of ambition. In some cases, they entail the adoption of new legislation or the amendment of existing regulatory instruments, such as in the case of collective redress, as well as the development of specific schemes or procedures, such as in the case of the proposed EU Action Plan, the EU Ombudsman scheme and the Open Method of Coordination (OMC) on business and human rights. These proposed actions, while politically ambitious, are in line with the division of competences in the EU system and are justified by the need to fill existing gaps in access to remedy in the EU and its Member States. Other proposed measures imply a lower degree of complexity and could be speedily adopted, such as the recommendation for the EU to encourage and facilitate a harmonised approach to NAPs on the part of the Member States and to ensure that the review of the Non-Financial Reporting Directive (NFRD) will address the

need to collect key information for a greater number of companies. Several of the recommendations, then, pertain to the design of the upcoming EU instrument on mandatory human rights and environmental due diligence. These concern the need to ensure that the new rules will be linked to civil remedies in the Member States and that they will facilitate litigation in the forum of the EU-based parent company in relation to the conduct of business partners in third countries, thus easing the barriers that have so far hindered victims' access to courts in the EU. The combination of the proposed measures contributes to a regulatory framework more consistent with the UNGPs and in line with the EU's and Member States' human rights and fundamental rights obligations.

Mandatory Human Rights Due Diligence

- If mandatory human rights due diligence is introduced as a legal standard of care at the EU level, it should expressly require Member States to ensure that a right to civil remedy is established in their jurisdictions.
- Any provisions requiring companies to remediate their own harmful impacts (whether as part of a mandatory human rights due diligence duty or separately, and whether individually or as part of an industry or multi-stakeholder initiative) should not be understood as a substitute for a judicial civil remedy.
- Any legal duties to undertake human rights due diligence should be formulated in accordance with the UNGPs as a context-specific 'duty of care', 'duty to exercise an expected standard of conduct' or 'duty to prevent', rather than a 'safe harbour' or 'tick-box' requirement which excludes the right of victims to take judicial action if the company has taken certain procedural steps.

³³ European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), *ELI-UNIDROIT Model European Rules of Civil Procedure* (Oxford University Press 2021), <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_UNIDROIT_Model_European_Rules.pdf>.

- Any new statutory duties of human rights due diligence should place the evidentiary burden on the company to show that it has undertaken the human rights due diligence reasonably expected in the circumstances. Statutory remedies introduced for a failure to undertake mandatory human rights due diligence should be accompanied by provisions for discovery of information for the purposes of trial.
- Where regulatory oversight bodies are afforded powers to receive and investigate complaints from victims as well as issue binding remedial orders, such as for compensation, restitution or injunctions, these administrative oversight processes should not exclude, substitute or delay victims' ability to access judicial remedies in courts.

Collective Redress

The majority of cases of severe business-related human rights abuses are mass harm cases affecting from dozens to thousands of victims. The EU and its Member States should therefore establish effective judicial collective redress mechanisms available to victims of such abuses in accordance with the UNGPs.

Such efforts should be guided by the ELI-UNIDROIT Model European Rules of Civil Procedure, which constitute a sufficiently flexible model to accommodate key characteristics of business and human rights cases. From the business and human rights perspective, the most important elements of the design of collective redress procedures include the following:

- The European Commission and the EU Member States should adopt new legislation or expand the Consumer Representative Actions Directive beyond consumer protection law so as to cover collective redress in civil law with respect to all business and human rights abuses and categories of claimants beyond consumers. The European Commission should include standard collective redress clauses in every proposal for sector or issue-specific legislation aiming at the protection of fundamental rights.
- To the maximum extent possible, the EU and its Member States should design the procedural rules governing the application of the

collective redress mechanism in accordance with the recommendations on collective redress provided in the ELI-UNIDROIT Model European Rules of Civil Procedure.

- The scope of the collective redress mechanism needs to be horizontal, that is, applicable 'across the board' to any claim, irrespective of the substantive law being applied, thereby specifically including basic tort claims for damages.
- The threshold to be applied by judges to determine whether a collective action is permissible should be based on the simple criterion that the case is not suitable for simple joinder; complex time-consuming procedures should be avoided.
- The means of constituting a collective claim, or forming the class, should be governed by a hybrid model, affording the court discretion to allow the collective claim to be pursued either as an opt-in or opt-out procedure, according to the realities of the case before it.
- Standing should be afforded to various types of established and ad hoc qualified entities, as well as natural persons who are themselves members of the group of victims. Such a flexible approach is necessary in business and human rights cases given the diversity of potential abuses and underlying contexts.
- Compensatory redress is essential to provide remedy especially in cases of severe human rights harm.
- Collective redress regulation should not attempt to prohibit contingency fees, as this would *de facto* impinge upon the right of victims to go to court, given their lack of other means to cover the costs of business and human rights litigation.

Private International Law

- Member States should be encouraged to ensure that jurisdiction may be retained as regards subsidiaries and entities in the value chain of companies having their seat in their legal order. This would allow the exercise of EU jurisdiction as a result of the combination of

the Brussels Ibis³⁴ general rule (the court where the defendant is domiciled has jurisdiction to hear the case), joinder of actions and national rules.

- The Commission should take steps to ensure that the Rome II Regulation³⁵ is understood by the courts as allowing the application of the *lex fori*'s human rights and environmental due diligence legislation in cases concerning damage occurring outside of the forum State by referring to the law of the place:
 - where the decision causing the environmental damage and the human rights violations was taken (on the basis of Article 7 of the Rome II Regulation);
 - where the decision causing the human rights violations independent of related environmental damage was taken (on the basis of Article 4(3) of the Rome II Regulation);

and by excluding an exemption of liability of the EU-based company on the basis of Article 17 of the Rome II Regulation.

- The EU legislator and the courts should have due regard to the development of case law in the area of supply chain liability, particularly in the UK and the Netherlands.
- A future EU instrument should envisage a statutory duty of care for EU companies at the top of the value chain, allowing victims of human rights and environmental violations committed by subsidiary companies and business relations in third countries to sue for breaches of that duty of care in courts having jurisdiction in the EU.
- The same instrument should also require the duty of care to be extended by contract by the principal company to subsidiaries and other parties in the supply chain. To this end,

the regulation should include model contract clauses on the lines proposed in the body of this chapter.

- To ensure human rights and environmental due diligence, the model clause should include a uniform additional criterion of jurisdiction to target companies based outside the EU. Such criterion should be pondered and decided once for all, in order to avoid confusion between the clear-cut scope of EU private international law regulations (including companies based in the EU), and the existing and future sectorial legislation. Existing legislation often includes, within its scope, companies based outside the EU and apprehended with reference to the most diverse criteria such as 'operating, directing activities or having obtained an authorisation to distribute products in the internal market'. The Commission should not miss the opportunity, in defining the scope of the regulation, to adopt uniform terminology in this respect, especially if, in the fullness of time, it should contemplate introducing an additional rule of private international law.

Additional Pathways to Effective Redress

If ADR mechanisms in general are to be used in the human rights field, then a strong overarching regulatory framework such as that provided by the ADR Directive in the consumer field³⁶ would be necessary to ensure the effectiveness and fairness of any such schemes.

Establishing an EU Ombudsman might entail several advantages in the business and human rights sphere, as it could provide an alternative dispute resolution mechanism equipped with relevant expertise and able to play a role both in standard-setting and complaint-handling, avoiding issues of private international law. If well-designed, such a scheme could provide an additional option for victims of business-related human rights impacts and a clear and harmonised level playing field for businesses.

Suggested principles for the operation of an EU Ombudsman scheme:

³⁴ 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 [2012] OJ L351/1.

³⁵ 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.

³⁶ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

- The Ombuds institution should be an independent organisation and free to access by victims.
 - The Ombuds institution should be able to undertake its own investigations into breaches of human rights by corporations by means of an investigatory process, with proper resources and adequate powers to make that investigatory role effective including, over and above the ability to require companies to provide information and documentation (with sanctions for non-compliance) and the possible grant of a right to conduct investigations in situ at business premises (subject to relevant procedures and court supervision).
 - The Ombuds institution should be able to examine individual grievances as well as undertake systematic reviews and make general recommendations as to practices of those involved.
 - The Ombuds institution should have discretion to determine the exact principles on which remedies are to be awarded, and the appropriate remedies for cases submitted to it.
 - In order to make the Ombuds' remedies effective, consideration should be given to allowing for enforcement of ADR decisions and/or financial sanctions for non-compliance.
 - The Ombuds institution should be properly resourced by means of a sustainable funding model. The funding model adopted should ensure that it has operational independence and is insulated from governmental and industry influences.
 - The existence of the Ombuds institution should not affect the availability of legal remedies through the courts, and the Ombuds process should simply supplement the current dispute resolution system. Where there has been wrongdoing on the part of company officers, then orthodox criminal and civil remedies should be available.
- through conducting a baseline assessment on availability, accessibility and effectiveness of transparent, participatory and inclusive remedies (including costs, times, actual usage in business and human rights contexts). Ideally there should be an obligation set by the EU for its Member States to adopt NAPs in accordance with a given formula. The EU should also adopt an Action Plan in accordance with the same formula.
- The Non-Financial Reporting Directive (NFRD) has not yet yielded sufficiently concrete, detailed and comparable information on company performance. The review of the NFRD must address these shortcomings. EU Member States also need to provide accessible, transparent and comparative overviews of data and information on remedies, including costs, times and actual usage in business and human rights contexts. The EU should boost its e-justice portal to ensure that this type of information is available across the EU Member States, and for the EU itself.
 - The EU should develop an Open Method of Coordination (OMC) on business and human rights to enhance the implementation of the UNGPs through NAPs. The OMC should: (a) build upon a set of common indicators and benchmarks; (b) institutionalise a State-to-State peer review process; (c) establish a common timetable for the production and revision of NAPs; and (d) promote multi-stakeholder initiatives and dialogues at the European and national level.

Action and Transparency

- NAPs in EU Member States are not sufficiently forward looking, there is no 'smart mix' of mandatory and voluntary instruments; insufficient attention is paid to judicial remedies. NAPs in EU Member States have to address these shortcomings, including

1 Human Rights Due Diligence*

1.1 Introduction

Recently, discussion of access to remedy for corporate human rights abuses has increasingly focused on the developments around mandatory due diligence legislation.

Amidst ongoing proposals or calls for mandatory human rights due diligence legislation at various stages of development in several Member States¹, the European Commission announced on 29 April 2020 that it will be launching a legislative initiative for mandatory human rights and environmental due diligence at European Union (EU) level.²

As a result of these developments, there is extensive literature on mandatory human rights due diligence,³ including the European Commission study on due diligence through the supply chain (the EC due diligence study),⁴ which preceded the legislative announcement. The EC due diligence study showed that civil society viewed the provision of access to remedy as one of the most important reasons for introducing mandatory due diligence as a legal standard.⁵

However, the introduction of mandatory due diligence as a legal duty or standard of care will not automatically establish a remedy for victims, unless it is designed to do so.⁶ Other regulations at EU level which are often mentioned as examples of EU-level 'due diligence' mechanisms, such as the EU Conflict Minerals⁷ and EU Timber Regulations,⁸ do not provide for remedies for victims. For our purposes, the French Duty of Vigilance Act⁹ is the principal example to date of a law which requires a general duty to exercise a standard of care (duty of vigilance) for human rights and environmental impacts, and which provides avenues for civil remedy, including preventative and compensatory orders. The more recent German *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* (Law on Corporate Due Diligence in Supply Chains, also known as the Supply Chain Law) of 11 June 2021 provides that the new statutory due diligence obligations created for the purpose of improving the human rights situation in international supply chains are to be enforced through administrative proceedings and administrative penalties. But domestic trade unions and non-governmental organisations

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¹ Business and Human Rights Resource Centre (BHRRC), 'National & Regional Developments on Mandatory Human Rights Due Diligence' <<https://www.business-humanrights.org/en/mandatory-due-diligence/national-regional-developments-on-mandatory-human-rights-due-diligence>>.

² European Parliament Working Group on Responsible Business Conduct, 'European Commission Promises Mandatory Due Diligence Legislation in 2021', 30 April 2020 <<https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>>.

³ For example, Olivier De Schutter, Anita Ramasastry, Mark B Taylor and Robert C Thompson, 'Human Rights Due Diligence: The Role of States', December 2012. This study collected over than 100 examples of how due diligence is used in other areas of law in over 20 States and a wide variety of regulatory sectors.

⁴ Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, 'Study on Due Diligence through the Supply Chain – Final Report', European Commission DG Justice and Consumers, February 2020 <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>.

⁵ Ibid at 154.

⁶ Moreover, in addition to expressly providing for a right of action for victims, the regulation would also need to consider the existing and well-documented legal, procedural, practical and financial barriers to remedy inherent in seeking justice against multinational companies. This study aims to consider these barriers and how they could be addressed at EU level.

⁷ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1.

⁸ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295. Both this Timber Regulation and the Conflict Minerals Regulation *ibid* were mentioned by MEP Hautela in introducing the presentation of the EC due diligence study above (n 4).

⁹ *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

can sue under the Law in their own name on another's behalf, thereby allowing them to take legal action if a violation of an 'eminently important legal position' is to be asserted in court.

A mandatory due diligence requirement as discussed in this chapter and in the EU due diligence study would establish a duty or standard of care for companies. The UN Guiding Principles on Business and Human Rights (UNGPs)¹⁰ do not expect States to carry out companies' due diligence for them, nor do they expect companies to provide victims with the requisite State-based judicial remedies. In terms of international human rights law, and under the third pillar of the UNGPs, the primary obligation to provide remedy and sanction for human rights violations remains with States.

This chapter will focus on how the concept of human rights due diligence relates to remedy for victims. It will do so with reference to the UNGPs' concept of human rights due diligence, and the ways in which remedies have been included (or not) in recent developments around mandatory human rights due diligence regulation.

1.2 The Concept of Human Rights Due Diligence

The concept of human rights due diligence was first introduced by the UNGPs. It forms part of the corporate responsibility to respect human rights, which is set out in the second pillar of the UNGPs and applies 'to all enterprises regardless of their size, sector, operational context, ownership and structure.'¹¹

Guiding Principle 15 sets out three components of the corporate responsibility to respect human rights:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to

identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The second component of the responsibility to respect human rights, namely human rights due diligence, is described in more detail in UNGP 17 as follows:

In order to *identify, prevent, mitigate and account for* how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.¹²

It further describes human rights due diligence as having four components:

- 1) Identifying and assessing actual or potential adverse impacts;
- 2) Taking action to address these impacts;
- 3) Tracking the effectiveness of the actions taken; and
- 4) Communicating on the steps taken.

It is further stated that human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

¹⁰ United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (June 2011) UN Doc A/HRC/17/L.17/31 (hereafter UNGPs).

¹¹ Ibid, GP 14.

¹² Emphasis added.

For our purposes the following features of human rights due diligence are relevant:

- 1) Human rights due diligence is an ongoing process, rather than a one-off pre-transactional process.¹³
- 2) Human rights due diligence should go beyond a focus on risks to the company, to focus on risks to rights-holders.¹⁴
- 3) Human rights due diligence applies to all companies regardless of size, sector or country of operation. However, similarly to a legal standard of care, it is context-specific and the level of complexity expected will depend on the relevant circumstances, including the company's size, the risks of severe impacts and the nature and context of operations. In accordance with UNGP 14, 'the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.'

The UN Office of the High Commissioner for Human Rights Interpretive Guide on the corporate responsibility to respect human rights (Interpretive Guide) describes the context-specific aspect of human rights due diligence as follows:¹⁵

If abuses do occur where they could not reasonably have been foreseen, the enterprise's stakeholders will assess it on its response: how well and how swiftly it takes action to prevent or mitigate their recurrence and to provide for or support their remediation.

It is likely that a similar test would be applied by courts or regulators to determine whether a company has met any future mandatory human rights due

diligence standard.¹⁶

The UNGPs distinguish between those impacts that the company *causes or contributes* to and those adverse impacts to which it is *directly linked* through its operations, products or services by a business relationship. This distinction determines the human rights due diligence expectations which apply in each of these circumstances:¹⁷

Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to *cease or prevent* the impact.

Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to *cease or prevent* its contribution and use its leverage to *mitigate* any remaining impact to the greatest extent possible.¹⁸

Where the company does not cause or contribute to the impact, but is directly linked to it in another way, the Commentary explains that 'the situation is more complex', and appropriate action will be determined with reference to factors such as:¹⁹

[T]he enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

Leverage is defined as existing 'where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.'²⁰ Where leverage is limited, steps should be taken to increase leverage, failing which the company may consider terminating the relationship, provided that it has considered the adverse human rights impacts of doing so.²¹

¹³ Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights', 28 European Journal of International Law 2017:899; De Schutter et al 2012 (n 3).

¹⁴ UNGPs, Commentary to GP 17.

¹⁵ UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', 2012, 42 <https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf>.

¹⁶ It is also noted that here, the Interpretive Guide refers to remediation by the company of the adverse impact *by the company* as part of the corporate responsibility to respect, which is distinct from the State duty to provide for access to remedy which is under consideration in this study (see below).

¹⁷ UNGPs, Commentary to GP 19.

¹⁸ Emphasis added.

¹⁹ UNGPs, Commentary to GP 19.

²⁰ Ibid.

²¹ Ibid.

The UNGPs acknowledge that companies may need to prioritise certain risks based on their severity. The Interpretive Guide provides some examples of situations where prioritisation might be justified, or even expected:²²

This would include, for example, agricultural products sourced from suppliers in an area known for child labour; security services provided by contractors or forces in areas of conflict or weak governance and rule of law; and drug trials conducted through partners in areas of low education, literacy and legal safeguards.

1.3 Human Rights Due Diligence and Access to Remedy

A legal standard of mandatory human rights due diligence and access to remedy can be flip sides of the same coin. In order to be 'mandatory', any legal duty would need to be accompanied by some consequence for a failure to meet the standard. This, in turn, provides an opportunity for liability in terms of civil remedies for those affected.

Indeed, although the UNGPs are not legally binding, the Commentary to UNGP 17 provides a hint as to how human rights due diligence could act as, or interact with, a legal defence:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

As mentioned above, Guiding Principle 15 describes the corporate responsibility to respect with reference to three distinct components: a human rights policy, human rights due diligence, and processes to enable

remediation.

Accordingly, remediation by the company (as the third component) is understood to be distinct from human rights due diligence (the second component), although the two are interrelated as discussed below.

Guiding Principle 17 sets out the responsibility to undertake human rights due diligence with reference to the company's '*actual and potential* human rights impacts'. The Commentary explains that:²³

Potential impacts should be addressed through prevention or mitigation, while *actual* impacts – those that have already occurred – should be a subject for remediation (Guiding Principle 22).²⁴

The Commentary to Guiding Principle 18 similarly continues:

The initial step in conducting human rights due diligence is to identify and assess the nature of the *actual and potential* adverse human rights impacts with which a business enterprise may be involved.²⁵

It is furthermore clear that human rights due diligence applies to *both actual and potential* impacts insofar as 'ceasing' an ongoing (ie *actual*) impact is expected both when a company causes or contributes to an impact.²⁶

In contrast, the Interpretive Guide describes human rights due diligence and remediation as 'separate but interrelated'.²⁷

²² Interpretive Guide (n 15) 42.

²³ UNGPs, Commentary to GP 17.

²⁴ Emphasis added.

²⁵ Emphasis added.

²⁶ UNGPs, Commentary to GP 17, Commentary to GP 19.

²⁷ Interpretive Guide (n 15) 34.

Human rights due diligence aims to prevent and mitigate any *potential* human rights impact in which an enterprise might be involved. Remediation aims to put right any actual human rights impact that an enterprise causes or contributes to.²⁸

This relationship between human rights due diligence and remediation by the company is similarly described in the Organisation for Economic Co-operation and Development (OECD)'s Due Diligence Guidance for Responsible Business Conduct:²⁹

When involvement in adverse impacts cannot be avoided, due diligence should enable enterprises to mitigate them, prevent their recurrence and, where relevant, remediate them.

The UNGPs provide for the corporate responsibility to remediate those adverse human rights impacts which the company causes or contributes to, but not those to which it is directly linked. Accordingly, the corporate responsibility to undertake human rights due diligence – which *does* apply to impacts directly linked to the company – extends further than the corporate responsibility to remediate. This distinction is important for any mandatory human rights due diligence mechanism which seeks to turn the responsibility to undertake human rights due diligence (as set out in the right-hand column of Table 1 below) into a 'hard law' duty to undertake mandatory human rights due diligence.

It is important to note, however, that this refers to the *corporate* responsibility to remediate, set out in the second pillar as part of the wider responsibility to respect human rights. This predominantly relates to direct remediation *by the company* through internal company grievance mechanisms, or those at industry association level (collectively termed operational-level grievance mechanisms). This is distinct and largely separate from the *State* duty to provide a remedy for human rights, which is set out in the third pillar as well

as in international human rights law more generally.

Grievance mechanisms are distinguished from State-based remedies in the Interpretive Guide as follows:³⁰

Unlike many State-based mechanisms (courts, ombudsman's offices and so forth), an operational-level grievance mechanism does not have to wait until an issue amounts to an alleged human rights abuse or a breach of other standards before it can address it. It can receive and address concerns well before they reach that level and before an individual's or a community's sense of grievance has escalated.

Effective grievance mechanisms also help reinforce aspects of the human rights due diligence process. They can help in identifying adverse human rights impact in a timely manner and in tracking the effectiveness of responses to impact raised through the mechanism. They can also help build positive relationships with stakeholders by demonstrating that the enterprise takes their concerns and the impact on their human rights seriously.

Operational-level grievance mechanisms should therefore play both a preventative role, by avoiding the severity of the harm escalating to a level where it requires judicial intervention, as well as an identification role. In this way, the UNGPs understand operational-level grievance mechanisms as both forms of direct remediation by the company and part of the company's human rights due diligence process.³¹

The Interpretive Guide explains how human rights due diligence and remediation are related by reference to the following examples:³²

For example, an effective grievance mechanism through which those directly affected can raise concerns about how they are or

²⁸ Emphasis in original.

²⁹ OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct', 2018, 16 <<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>>.

³⁰ Interpretive Guide (n 15) 68.

³¹ See also OHCHR, Interpretive Guide (n 15) 70: 'For instance, communities that find that an enterprise persistently ignores their concerns about noise, dust or work opportunities may feel driven to take action to disrupt its operations as the only way to get its attention, perhaps leading to physical confrontation and even risk to life. One of the comparative advantages of an operational-level grievance mechanism over formal third-party mechanisms is precisely its ability to identify and address problems early, before they escalate.'

³² Ibid, 34.

may be harmed can be a good indicator of potential and recurring human rights impact. Tracking the effectiveness of the enterprise's responses to human rights impact will similarly benefit from feedback via an effective grievance mechanism, as well as from wider stakeholder engagement. Moreover, enterprises should be in a position to communicate, as appropriate, both on how they address human rights risks in general and how they have remedied significant human rights impact.

The UNGPs and Interpretive Guide underscore the distinction between State-based remedies and company-level remediation in explaining that company-level remediation procedures are not suitable in all circumstances. In particular, the Commentary to UNGP 31 states:

Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

Similarly, the Interpretive Guide notes:³³

In some circumstances, it may be most appropriate for remediation to be provided by an entity other than the enterprise. For instance, if a court process or some other State-based proceeding is under way, it may be necessary or appropriate for the enterprise to defer to that process rather than pursuing direct remediation. As the commentary to Guiding Principle 22 makes clear, such deferral is likely to be necessary if crimes are alleged.

For our purposes, this distinction is important, because remediation at the company level also refers to a curing of the harm in practical terms – ceasing an ongoing harmful activity, reinstating victims in the position they were before the harm commenced, avoiding predicted future harms of the same kind. These kinds of practical steps towards remediation of a harmful impact could be understood to be part

of the ongoing due diligence process, but would not constitute access to remedy for the purposes of meeting the State's duty to ensure remedy recognised under international human rights law.

Those mechanisms which companies are expected to include in their human rights due diligence to remediate (cease) their own impacts (through cause or contribution) should therefore be distinguished from the State-based or judicial remedies which are under consideration in this study, and required by international human rights law.

When States introduce regulation which requires human rights due diligence, any UNGPs-compliant standard should, in principle, extend to those impacts to which the company is directly linked (as described in the right-hand column of Table 1). In turn, any failure to meet the legal duty would give rise to liability which could be the subject of the statutory remedy. As such, there is no reason why a statutory remedy for a failure to meet such a mandatory due diligence standard should exclude those impacts to which the company is directly linked.

Table 1: The responsibility to undertake human rights due diligence and remediation

Nature of link between company and impact	Responsibility on the company to remediate	Responsibility to undertake human rights due diligence
Cause	Yes	Yes – cease or prevent
Contribute	Yes	Yes – cease, prevent, use leverage to mitigate
Directly linked	No	Yes – appropriate action, including leverage

³³ Ibid, 64.

1.4 A Few Observations Relating to Ongoing Regulatory Developments

As indicated above, the ongoing regulatory movements towards the introduction of mandatory human rights due diligence are fast-moving and will not be addressed herein. However, within the context of these discussions, a few observations are relevant to the interaction between human rights due diligence and access to remedy.

The UNGPs refer to human rights due diligence for *actual* or *potential* adverse impacts. It is anticipated that remedies for failure to undertake mandatory human rights due diligence would similarly be available for harms that have already taken place, are ongoing, or are imminent, anticipated or foreseen. For ongoing or future harms, injunctions, interdicts, orders to cease the activity, interim awards or other similar orders could be issued, depending on the terminology and practices within each legal system.³⁴

The EC due diligence study found that a legal duty of human rights and environment due diligence should follow the UNGPs concept of human rights due diligence, which the study described as a 'duty of care' or duty to exercise an expected 'standard of care'. It contrasted this with having a duty which operates as a 'tick-box' exercise, which stakeholders were strongly against.

Depending on its design and application, such a 'duty of care' shares similarities with the UK Joint Committee on Human Rights recommendation³⁵ of a 'duty to prevent' mechanism coupled with a statutory defence of having undertaken reasonable human rights due diligence.³⁶ This model is used in the UK Bribery Act of 2010,³⁷ and was subsequently included in the UK Criminal Finances Act 2017, in relation to tax evasion.³⁸ In the ten years since its introduction, the 'duty to prevent' mechanism has been shown to have incentivised changes in corporate practices³⁹ despite low prosecution rates.⁴⁰ The 'duty to prevent' formulation of human rights due diligence is also included in the UN Draft Treaty on business and human rights,⁴¹ and in the civil society campaigns for mandatory human rights due diligence regulation at EU level⁴² and in the UK.⁴³

One advantage of the 'duty to prevent' formulation for the purposes of remedy is that it places the duty on the company to prevent harms from occurring. It also allows the company to defend itself on proof of having undertaken reasonable or appropriate due diligence, thereby not only incentivising good quality due diligence,⁴⁴ but also placing the evidentiary burden on the company. As shown by the FRA study,⁴⁵ the status quo, which requires claimants to prove facts regarding the company's decisions and resources, which are often within the exclusive possession of

³⁴ Smit et al (n 4) 258.

³⁵ UK Joint Committee on Human Rights (JCHR), 'Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability, Sixth Report of Session 2016-17', 5 April 2017. <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>>.

³⁶ Irene Pietropaoli, Lise Smit, Julianne Hughes-Jennett and Peter Hood, 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms', February 2020, 62 <<https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms>>. In order to rely on the defence, the company would need to show, in a fact-based inquiry, that it has exercised the leverage expected of a reasonable company in the particular circumstances.

³⁷ Section 7 of the UK Bribery Act 2010.

³⁸ Sections 45(2) and 46(3) of the UK Criminal Finances Act 2017.

³⁹ Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' 8(3) Global Policy 2017:15.

⁴⁰ Pietropaoli et al (n 36) 58.

⁴¹ 'Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises', Second Revised Draft, 6 August 2020, Art 8.7 <<https://media.business-humanrights.org/media/documents/7ebffa2b7510a719d61fdab83fd8b2c19de4c650.pdf>>.

⁴² 'Civil society statement on the adoption of European Parliament Due Diligence & Corporate Accountability Legislative Report', 11 March 2021, available at: <https://media.business-humanrights.org/media/documents/CSO_Statement_INL_plenary_vote.pdf>.

⁴³ Corporate Justice Coalition, 'Parliamentary Briefing: A Corporate Duty to Prevent Negative Human Rights and Environmental Impacts', 26 October 2020 <<https://corporatejusticecoalition.org/resources/parliamentary-briefing-a-corporate-duty-to-prevent-negative-human-rights-and-environmental-impacts/>>.

⁴⁴ 'Rather than promote a 'check box approach', if businesses know that they will ultimately have to stand behind the quality of their due diligence in order to extinguish liability, this could encourage a much more meaningful and substantive engagement with human rights due diligence. This is an advantage over, for example, a mandatory due diligence mechanism where the quality of a statement must somehow be monitored and regulated in the abstract.' (Pietropaoli et al (n 36) 53).

⁴⁵ FRA, 'Business and Human Rights – Access to Remedy Comparative Report', 2020, <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf>.

the corporate defendant, poses a significant barrier to remedy.

This defence, which places the evidentiary burden on the company to persuade the court that it has done what could be reasonably expected of it in the particular circumstances, should be distinguished from a 'safe harbour' or 'tick-box' provision, which would exclude the ability to bring legal action if the company has met certain procedural requirements.⁴⁶ A 'safe harbour' or 'tick-box' approach is inconsistent with the right to remedy,⁴⁷ and in some cases could even operate to 'actually remove access to those civil remedies which currently exist' in tort law, whereby 'rights-holders wishing to access remedy would be in a worse position than they are now'.⁴⁸ As clarified in a recent study on the application of the 'duty to prevent' model in this context:⁴⁹

[A] pure procedural 'check box' or 'safe harbour' provision that would shield a company completely from liability if any kind of human rights due diligence was performed, would not be aligned with the concept of due diligence contained in the UNGPs. Moreover, as is evidenced from the Guidance on the Bribery Act and the Skansen case, such a 'safe harbour' approach is clearly not the way in which a due diligence defence is interpreted by the English courts in the context of the Bribery Act.

Lastly, current regulatory discussions include considerations relating to regulatory oversight by State-based authorities. However, administrative fines are not remedies. Moreover, where regulatory bodies are afforded powers to receive and investigate complaints from victims as well as issue binding remedial orders, such as for compensation, restitution or injunctions, these administrative oversight processes should not exclude, substitute or delay victims' ability to access judicial remedies in courts, which the UNGPs describe

as 'at the core of ensuring access to remedy'.⁵⁰ In the context of the right to privacy, the European Court of Justice has found⁵¹ that even where independent, State-based supervisory authorities are given a 'wide range of powers', persons who claim that their rights have been adversely affected must still 'have access to judicial remedies...before the national courts', in accordance with Article 47 of the EU Charter of Fundamental Rights.⁵²

1.5 Distinguishing Human Rights Due Diligence from Reporting Requirements

Lastly, it is important to distinguish between mandatory human rights due diligence requirements, and laws that require companies to report on their due diligence. While examples of mandatory due diligence laws are new or still under development, due diligence reporting requirements are slightly more established. Frequently mentioned examples include the EU Non-Financial Reporting Directive⁵³ and the UK Modern Slavery Act.⁵⁴

These examples of reporting requirements do not require substantive human rights due diligence to be undertaken. In turn, mandatory human rights due diligence as a standard of care does not constitute a reporting requirement. Although the UNGPs refer to communication as the fourth component of human rights due diligence, it is noted that communication is a wider concept than public reporting and, in keeping with the context-specific nature of the human rights due diligence standard, would not be required of all companies under all circumstances. A company which has reported comprehensively on its due diligence steps would be in a better position to demonstrate that it has met the legal standard of human rights due diligence required in any particular case. However, it would also be possible, in theory, to show that the standard has been met where there was no reporting, but also no risk or sufficient (unreported)

⁴⁶ Lise Smit and Claire Bright, 'The Concept of a "Safe Harbour" and Mandatory Human Rights Due Diligence', *CEDIS Working Paper* December 2020 <https://cedis.fd.unl.pt/wp-content/uploads/2020/12/CEDIS_working-paper_the-concept-of-safe-harbour.pdf>.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid, 52.

⁵⁰ UNGPs, Commentary to UNGP 26.

⁵¹ *Schrems v Data Protection Commissioner*, C-362/14, ECLI:EU:C:2015:650.

⁵² Ibid, paras 64–65.

⁵³ Directive 2014/95/EU.

⁵⁴ UK Modern Slavery Act 2015.

internal processes commensurate to the risks.

The kind of reporting required by existing regulatory reporting requirements, and as part of human rights due diligence, should also be distinguished from the kind of information which claimants need to enable access to remedy. Reporting requirements, and even the communication component of human rights due diligence in the UNGPs, require companies to report on the steps they have taken, which may include publication of 'risk mapping'.

In contrast, claimants seeking remedy for harms suffered need information about the actual harms and the company's factual relationship to those harms. Expert witnesses, data, and other evidence are required to succeed with a legal claim. This is not the kind of information that a company would necessarily be required to report as part of its human rights due diligence process. Instead, in some jurisdictions, civil procedure allows for this information to be obtained through disclosure and discovery procedures once a civil claim is underway.

However, as is evidenced by the FRA report, this is not necessarily the current civil practice in many Member States. In some Member States, even where a statutory remedy is provided in certain areas of existing law, claimants still do not have access to the disclosure they would require in order to succeed with these kinds of claims. The challenge which human rights victims face in obtaining the evidence to substantiate a claim against companies has been described as one of the most notable obstacles to access to remedy. As recent case law such as *Lungowe v Vedanta*,⁵⁵ *Okpabi v Shell*⁵⁶ and *Milieudefensie v Shell*⁵⁷ shows, corporate defendants have been raising various preliminary challenges, based on exceptions to jurisdiction or standing, before any disclosure by the defendant is required. As a result, in order even to access the disclosure phase of a trial, claimants in these cases have needed to show that an arguable duty of care exists which brings the matter within the court's jurisdiction. For this, they have had to rely (almost) exclusively on the company's publicly available materials, such as human rights policies and sustainability reports, to

demonstrate that a duty of care exists.

These hurdles to access to remedy (including the inability to access the evidence required to bring a claim) have been put forward as one of the reasons why a mandatory human rights due diligence law would improve access to remedy.⁵⁸ However, to cure this shortcoming, Member States would need to ensure that any new statutory or judicial remedies introduced for a failure to undertake mandatory human rights due diligence are also accompanied by provisions for discovery of information for the purposes of trial. The detailed fact-specific information which claimants need on a case-to-case basis in order to pursue their right to remedy can never be satisfied through a general corporate reporting requirement.

In this way, as mentioned above, a 'duty of care' or 'duty to prevent' human rights harms, could facilitate remedy by eliminating the need for human rights claimants to rely exclusively on publicly available materials. Instead, claimants would be able to formulate their claims by reference to a human rights harm which they allege constitutes a breach of the statutory duty to exercise reasonable care, thereby placing the evidentiary burden to prove the quality of its human rights due diligence on the company.

1.6 Recommendations

In light of the above, the following recommendations are made:

- If mandatory human rights due diligence is introduced as a legal standard of care at the EU level, it should expressly require Member States to ensure that a right to civil remedy is established in their jurisdictions.
- Any provisions requiring companies to remediate their own harmful impacts (whether as part of a mandatory human rights due diligence duty or separately, and whether individually or as part of an industry or multi-stakeholder initiative) should not be understood as a substitute for a judicial civil remedy.

⁵⁵ *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

⁵⁶ *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (12 February 2021).

⁵⁷ *Milieudefensie et al v Royal Dutch Shell and another*, *Hague Court of Appeals* (29 January 2021).

⁵⁸ Smit et al (n 4); Axel Marx, Claire Bright and Jan Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Report for the European Parliament Sub-Committee on Human Rights (PE 603.475), February 2019.

- Any legal duties to undertake human rights due diligence should be formulated in accordance with the UNGPs as a context-specific 'duty of care', 'duty to exercise an expected standard of conduct' or 'duty to prevent', rather than a 'safe harbour' or 'tick-box' requirement which excludes the right of victims to take judicial action if the company has taken certain procedural steps.
- Any new statutory duties of human rights due diligence should place the evidentiary burden on the company to show that it has undertaken the human rights due diligence reasonably expected in the circumstances. Statutory remedies introduced for a failure to undertake mandatory human rights due diligence should be accompanied by provisions for discovery of information for the purposes of trial.
- Where regulatory oversight bodies are afforded powers to receive and investigate complaints from victims as well as issue binding remedial orders, such as for compensation, restitution or injunctions, these administrative oversight processes should not exclude, substitute or delay victims' ability to access judicial remedies in courts.

2 Collective Redress[†]

2.1 Introduction

The UN Guiding Principles on Business and Human Rights (UNGPs)¹ are premised upon the recognition that business enterprises' human rights obligations need to be matched by appropriate and effective remedies when breached.

The third pillar of the UNGPs specifies that States – in line with their international law obligations to ensure the right to an effective remedy² – 'should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.'³ The UNGPs further recognise that business-related human rights abuses often affect groups rather than only individuals and that the '[l]egal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed' include 'inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants.'⁴ Research into business and human rights grievances

connected with the conduct of European companies suggests that the collective nature of such grievances is a general characteristic, rather than an exception, and that civil law collective redress mechanisms with respect to such cases remain largely unavailable in Europe.⁵

In 2016, the Council of Europe recommended its Member States to consider possible solutions for the collective determination of similar cases in respect of business-related human rights abuses⁶ and the Council of the European Union (EU) requested the European Union Agency for Fundamental Rights (FRA) to draw up an Opinion on the 'possible avenues to lower barriers for access to remedy at the EU level'.⁷ The subsequent Opinion provided an up-to-date summary of such barriers and identified a number of steps that could be taken with respect to legal aid, burden of proof, matters of private international law, non-judicial mechanisms and criminal justice. Among its principal recommendations, the FRA concluded that the EU and its Member States should provide for effective collective redress in business and human rights cases⁸ and include it in the standards for non-judicial mechanisms in the business and human rights field,⁹ and in EU Member States' National Action Plans on

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¹ United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (June 2011) UN Doc A/HRC/17/L.17/31 (hereafter UNGPs or UN Guiding Principles).

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR) art 2(3); Council of the European Union, Charter of Fundamental Rights of the European Union [2007] OJ C303/01, Art 47.

³ UNGPs, GP 26.

⁴ Ibid.

⁵ European Union Agency for Fundamental Rights (FRA), 'Business-Related Human Rights Abuse Reported in the EU and Available Remedies', 2019 (FRA Report 2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf>; Directorate-General for External Policies of the European Parliament, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', 1 February 2019 (DROI Report 2019) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)>.

⁶ Council of Europe, 'Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business', 2 March 2016 (Council of Europe, Recommendation CM/Rec(2016)3), para 42 <<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>>.

⁷ European Union Agency for Fundamental Rights (FRA), 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level. Opinion of the European Union Agency for Fundamental Rights', FRA Opinion 1/2017, 10 April 2017 (FRA Opinion 1/2017) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf>.

⁸ Ibid, Opinion 2.

⁹ Ibid, Opinion 13.

Business and Human Rights.¹⁰

For these reasons, this chapter will evaluate the availability and optimal design of judicial collective redress procedures for typical business and human rights cases involving mass harm before the courts of the Member States of the EU in the light of recent European legal developments, including the recent European Law Institute (ELI)-International Institute for the Unification of Private Law (UNIDROIT) Model European Rules of Civil Procedure (ELI-UNIDROIT Model European Rules), of which one section concerns collective redress.¹¹

Collective redress procedures are increasingly common in jurisdictions across the world, adopted for their potential to enhance the right to effective remedy as well as judicial efficiency.¹² However, the global trend has not been one of standardisation or harmonisation. The functional elements in the design of a collective claim procedure are numerous, with different jurisdictions pursuing different options, leading to different outcomes. For instance, recent studies have shown, on the one hand, that jurisdictions which impose burdensome administrative conditions on victim-claimants in collective claim procedures tend to be inefficient, resulting in long drawn-out procedures and a reluctance on the part of victims and their representatives to use the procedures, followed by a subsequent abandonment of claims.¹³ On the other hand, procedures involving a 'toxic cocktail' of design elements have led to serious concerns that they encourage 'abusive' (groundless or vexatious) litigation, notably in the United States.¹⁴

The principal conclusion of the analysis presented in this chapter is that in order to guarantee the effectiveness of collective procedures and improve access to remedy in business human rights cases in a balanced manner, judges need to be provided with various case-management tools and allowed significant flexibility to apply collective redress procedures in a manner relevant to the circumstances of the cases before them. Importantly, this means that such procedures should be applicable to a broad variety of laws, in particular tort claims, rather than being limited to specific types of harm or legal regulations of business conduct. These conclusions rest on the following three grounds.

Firstly, as asserted by the UNGPs, '[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their responsibility to respect applies to all such rights.'¹⁵ Secondly, in the absence of civil regimes specifically designed for human rights abuses, claimants in typical business and human rights cases have been bringing their claims on the basis of general tort law principles.¹⁶ Thirdly, flexibility in the application of collective procedures enables judges to overcome the common problem of procedural rigidity that typically hinders collective claims, whilst guarding against the latent risk of abusive litigation.

2.2 The Need for Collective Redress in the Business and Human Rights Field

Inadequate options for aggregating civil claims for compensation have consistently been identified as a practical and procedural barrier to accessing judicial

¹⁰ Ibid, Opinion 18. As a means to implementing the UNGPs, States are obliged under the framework to develop National Action Plans (NAPs) on Business and Human Rights.

¹¹ European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), *ELI-UNIDROIT Model European Rules of Civil Procedure* (Oxford University Press 2021), <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_UNIDROIT_Model_European_Rules.pdf>.

¹² Linklaters, 'Collective Redress across the Globe – Overview' <<https://www.linklaters.com/en/insights/publications/collective-redress-2018/collective-redress-across-the-globe-2018/overview>>; British Institute of International and Comparative Law, 'Focus on Collective Redress' <<https://www.collectiveredress.org/collective-redress/>>; Baker & McKenzie Global Class & Collective Actions blog <<https://www.globalclassactionsblog.com/>>.

¹³ European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) (European Commission Report on Recommendation 2013/396/EU), 19.

¹⁴ European Consumer Commissioner, 'Green Paper on Consumer Collective Redress', Press conference speaking points, 27 November 2008 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_08_657>.

¹⁵ UNGPs, Commentary to GP12.

¹⁶ Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses. Towards a Fairer and More Effective System of Domestic Law Remedies. A Report Prepared for the Office of the UN High Commissioner for Human Rights', 2014, 45 <https://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-09-04_OHCHR_Discussion_Paper_-_Corporate_Liability_for_gross_Human_Rights_Abuses__September_2014_.pdf>.

remedy in business human rights cases by judicial commentators and practitioners,¹⁷ as well as by international and regional European human rights institutions and bodies.

Typical barriers facing victim-claimants include prolonged legal proceedings, significant legal fees and court costs together with expensive expert evidence in the form of testimony or scientific studies, which are especially common in so-called toxic tort (a specific type of personal injury claim claiming harm from exposure to a dangerous chemical or substance) and environmental harm cases.¹⁸ In addition to such ongoing and significant one-off costs, and given the prevalence of the 'loser pays' principle in many jurisdictions worldwide (excluding the US), victim-claimants also face the intimidating risk of liability for the corporate defendant's legal costs if they lose their case. Whilst some jurisdictions¹⁹ may cap or mitigate the amount of the defendant's legal costs for which unsuccessful victim-claimants may be held liable,²⁰ the prospective risk may in itself constitute a powerful psychological inhibitor to even bringing a claim, as even reduced amounts would lead to financial ruin for those already burdened with the costs or loss of livelihood associated with the harm they have sustained.

Class or collective actions are clearly recognised as an effective means for a large number of victims to access remedy, principally because they 'have the potential to reduce legal fees and risks for claimants' by allowing them to band together.²¹ For victim-claimants asserting claims against large and well-resourced corporate defendants, the legal fees and financial risks are often so significant as to prohibit bringing

an individual claim. In its analysis of access to justice in the consumer protection field, the European Commission concluded that in many instances affected consumer claimants who are unable to join forces in order to seek redress collectively will simply abandon their justified claims owing to the excessive burdens of individual proceedings.²²

This conclusion can be extrapolated to business and human rights grievances involving environmental, labour and other forms of harm. Owing to the nature of human rights abuses and the typical vulnerability of the affected people as compared with European consumers, it is reasonable to assume that such a chilling effect is even greater in this area. The harm suffered in such cases is also typically very serious, and often more egregious, including harm to life and limb, property, or the environment. Victims in business human rights cases also often belong to particularly vulnerable groups such as migrant workers or indigenous communities, are located in developing countries where they have comparatively limited financial resources and are already managing the impacts of significant harms. Interpretations of the right to a fair trial and effective remedy,²³ not least by UN monitoring mechanisms, have also stressed the particular importance of enhancing access to remedy for such persons in situations of vulnerability.²⁴

As noted in the introduction to this chapter, the Council of Europe, the Council of the EU, and the FRA identified the need for effective collective redress in cases of business-related human rights abuse. A similar conclusion was reached by the UN High Commissioner for Human Rights in his report to the UN Hu-

¹⁷ Ibid; DROI Report (n 5) 16; European Coalition for Corporate Justice, 'EU Law for Collective Redress. Case for the Environment, Human Rights and Fair Competition', December 2017 (ECCJ Policy Paper), available at <https://corporatejustice.org/eccj_eu_law_for_collective_redress_position-paper2017_1.pdf>; Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business', December 2013 <https://corporatejustice.org/documents/publications/eccj/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf>.

¹⁸ FRA (n 7) 5–6.

¹⁹ One Member State (PT) provides for the reimbursement of only 50% of the defendant's costs in the case of dismissal of the claim both in group actions and in representative actions, thus limiting the risk for those bringing collective actions. See European Commission (n 13) 8.

²⁰ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2020] (Directive on representative actions for the protection of the collective interests of consumers); Art 8(a)(2) provides that 'Individual consumers concerned by a representative action for redress shall not pay the costs of the proceedings'.

²¹ Zerk (n 16) 82.

²² European Commission (n 13) 19.

²³ Such as the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), Art 8; ICCPR, Art 2(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (adopted 4 November 1950, entered into force on 3 September 1953) (ECHR), Arts 6 and 13.

²⁴ Convention on the Rights of Persons with Disabilities (CRPD) Art 13; General Comments by the Monitoring Mechanism for the International Covenant on Economic, Social and Cultural Rights (ICESCR); FRA (n 7) 6.

man Rights Council, concerning the implementation of the UNGPs.²⁵

Similarly, those analyses studying in detail collective redress procedures in the EU, and commissioned by the EU institutions,²⁶ reach the common conclusion that well-designed collective redress procedures are a key instrument for alleviating procedural and other difficulties encountered when seeking judicial remedy. They also point out that more inclusive rules on legal standing which allow claims related to the same dispute to be handled in one single set of proceedings also obviate a proliferation of individual proceedings. Such broadened rules improve procedural economy with beneficial results in terms of costs and time not only for claimants and defendants but also for the court system and therefore for public resources in general.²⁷

2.3 The State of Affairs Concerning Business and Human Rights Cases in the EU

Instances of corporate mass harm have been widely reported in the mainstream news for decades, with a series of studies indicating serious concerns regarding widespread corporate adverse human rights risks and impacts.²⁸

Such findings are supported by a 2019 empirical mapping by the FRA of serious corporate harm incidents involving EU companies, both within the EU and in third countries, during the seven-year period from the adoption of the UNGPs in June 2011 to June 2018.²⁹ Of the 155 cases examined, 45 concerned

abuse outside the EU with an EU-headquartered company playing a significant role, either directly or through its supply chain.³⁰ All the incidents chosen involved some attempt by the victims (including where unsuccessful) to have access to some form of redress (access to justice).

Overall, the majority of incidents involved environmental harm and labour harm associated with working conditions, followed by cases of discrimination and incidents where human life and the right to an effective remedy were at stake.³¹ A review of the various cases also reveals that the vast majority are, in fact, mass harm cases affecting anywhere from dozens to thousands of victims directly or indirectly. The 'class' or category of victims included consumers, workers, persons with disabilities suffering from discrimination and groups of indigenous people whose health or survival was jeopardised by the expansion of extractive activities.³² Examples of extra-territorial mass harm incidents involving EU companies included oil spills in the Nigerian Niger Delta by Dutch, British and Italian oil companies; nomadic tribes in Northern Kenya affected by alleged land-grabbing by a Danish wind energy company; local Chilean communities affected by the dumping of toxic waste by a Swedish mining company; hundreds and thousands of workers producing for EU brands killed in separate industrial disasters in Pakistan and Bangladesh respectively; the construction of a hydro-electric power plant in Laos by an Austrian company allegedly contributing to severe environmental damage and displacement of local communities.

The study concluded with 'a rather clear indication

²⁵ United Nations Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse. Report of the United Nations High Commissioner for Human Rights', 10 May 2016, UN Doc A/HRC/32/19.

²⁶ British Institute of International and Comparative Law, 'State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation', November 2017 <https://www.biicl.org/documents/1881_StudyontheStateofCollectiveRedress.pdf>; Directorate General for Internal Policies of the European Parliament, 'Collective Redress in the Member States of the European Union, Study Requested by the JURI Committee', October 2018 <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282018%29608829>.

²⁷ European Union Agency for Fundamental Rights (FRA), 'Access to Justice in Europe: an Overview of Challenges and Opportunities', 2011, 39.

²⁸ United Nations Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises. Addendum. Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse', 23 May 2008, UN Doc A/HRC/8/5/Add.2; International Peace Information Service, 'The Adverse Human Rights Risks and Impacts of European Companies: Getting a Glimpse of the Picture', October 2014 <https://corporatejustice.org/documents/ahrri_report_final-2.pdf>. The Study by the International Peace Information Service indicated that over half of the largest companies by market capitalisation listed on main European stock exchanges (based on analysis of companies included in German DAX 30, France's CAC 40 and the UK's FTSE 100) have been identified in allegations or concerns regarding adverse human rights risks and impacts; allegations primarily concerning their overseas operations. These allegations may not necessarily meet the standard required for civil liability.

²⁹ FRA (n 5).

³⁰ Ibid, 8.

³¹ Ibid.

³² Ibid, 9.

that the cross-border element adds difficulties for the victim to be able to get the case heard, and even more so if the case relates to a cross-border situation outside the EU.³³ Such extra-territorial claims will typically only be able to rely on a judicial cause of action in tort law³⁴ under the operation of the Rome II regime,³⁵ given that EU law on environmental, labour and consumer protection (for example) is generally neither applicable nor enforced extra-territorially (there being some exceptions).

A 2019 study commissioned by the European Parliament's Sub-Committee on Human Rights³⁶ investigated in more detail extra-territorial cases of harm involving EU companies with findings that, from the early 2000s until the present day, only approximately 40 foreign direct liability cases have been brought before courts in Europe against European companies for alleged harms committed abroad.³⁷ Of 35 cases studied in detail, 20 were civil claims for compensation.³⁸ Of the former, civil compensation claims, just two have resulted in positive judicial outcomes so far.³⁹ These figures reveal the current civil compensation claim success rate in transnational business human rights cases involving EU companies, for the entire EU, as notably meagre. Whilst it is likely that not all the allegations mentioned at the beginning of this section would come up to proof on the facts or on the basis of the applicable substantive law, the significantly low success rate affirms other findings that there are indeed major barriers to accessing judicial procedures and remedy for overseas victim-claimants.

2.4 Availability of Collective Redress Procedures in the EU Member States

Following a 2013 European Commission Recommendation to the EU Member States promoting collective redress,⁴⁰ discussions of collective redress in the EU once again came to the fore as a result of a 2018 EU legislative proposal for a harmonised EU consumer collective redress mechanism, which was adopted in law as the EU Consumer Representative Actions Directive.⁴¹ According to the 2013 Commission Recommendation, Member States should have collective redress mechanisms available to achieve EU policy objectives such as the better enforcement of EU law, protection of consumers, improvement of access to justice, better efficiency of justice systems, avoidance of abusive litigation and the effective right to compensation. The implementation of the 2013 Recommendation by the Member States was, however, very limited.⁴²

While most of the Member States now have collective redress mechanisms on the statute book, the forms and contours of those mechanisms are very different and their scope of application limited.⁴³ One thing that is striking is that, due to strong opposition from business organisations, most Member States have not adopted a generic mechanism applying horizontally across different sectors, preferring instead a sectoral approach, with the notable exception of the Netherlands⁴⁴ Italy⁴⁵ and Poland⁴⁶, while some, including the Czech Republic, Slovakia and Estonia, do not yet provide any compensatory collective redress procedure.

Research by the FRA published in 2020 showed that

³³ Ibid, 15.

³⁴ Zerk (n 16) 45.

³⁵ 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) [2007] OJ L199/40.

³⁶ DROI (n 5).

³⁷ LFH Enneking, 'Judicial Remedies: The Issue of Applicable Law' in Alvarez Rubio, Juan Jose and Yiannibas Katerina (eds), *Human Rights in Business* (Routledge 2017) 38, 40–41. See also Zerk (n 16); DROI (n 5) 13.

³⁸ DROI (n 5).

³⁹ Ibid.

⁴⁰ European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) [2013] OJ L201/60 (European Commission Recommendation 2013/396/EU on collective redress) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>>.

⁴¹ Directive on representative actions for the protection of the collective interests of consumers (n 20).

⁴² BIICL (n 26).

⁴³ Linklaters (n 12); BIICL (n 12). The Baker & McKenzie Global Class & Collective Actions blog is available at <<https://www.globalclassactionsblog.com/>>.

⁴⁴ Settlement of Large-scale Losses or Damage (Class Actions) Act 2020 (NL); as well as the collective action procedure based on Arts 3:305a-305d of the Dutch Civil Code. See also BIICL, 'State of Collective Redress' (n 26) 223.

⁴⁵ Legge 12 aprile 2019, n 31 (IT). See also BIICL, 'State of Collective Redress' (n 26) 319.

⁴⁶ Act on Class Actions (*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*) 2009 (PL). See also BIICL (n 26) 233.

of 32 cases discussed during interviews in the eight Member States covered by the research, 21 related to collective damage (where a group of victims was affected by the abuse), but collective remedy was used in only four cases.⁴⁷ The main reason identified in the research was that, in most Member States, collective redress or representative actions are limited to consumer protection law and certain aspects of environmental law, and their application is further complicated by various procedural criteria. The research study provides further details documenting these problems in the Dutch, French, German, Polish, Finnish and Swedish systems, and describing a recent reform of the Italian law on class actions which has been adopted in order to address such limitations.⁴⁸

The Consumer Representative Actions Directive will introduce in the law of EU Member States a new harmonised procedure which will enable ‘qualified entities’ – generally consumer organisations – to bring representative actions in the EU in order to further consumer protection goals.⁴⁹ This may help to overcome some of the procedural barriers identified by the FRA research study.

Nevertheless, it is obvious but important to note that, owing to their limited scope with regard to rights-holders, consumer collective redress procedures are grossly inadequate to secure access to remedy to the extent envisaged by the third pillar of the UNGPs, which clearly specifies that access to remedy must be available to all rights-holders, not just EU consumers.⁵⁰ There is some overlap between consumer rights and human rights, for example the right to life or health in the case of product safety, but insofar as other consumer rights are (or are not) human rights⁵¹, the harm sustained by consumers is often not as serious as loss of life in industrial accidents, large-scale environmental harm, or abuses of core labour rights, such as the prohibition of child and forced labour. Moreover, whilst Article 38 of the EU Charter of Fundamental Rights requires that ‘Union

policies shall have a high level of consumer protection’, Article 47 provides that ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article’.

Whilst it is clear that collective redress mechanisms are on a growth trajectory within the EU, their availability remains notably inconsistent, since it is based on a patchwork regulatory approach. One clear consequence is that the aforementioned serious business human rights cases remain unlikely to be covered by the existing collective redress mechanisms that are available in most EU jurisdictions. When it comes to enhancing their right to effective remedy, victims of abuses of human rights committed by businesses are liable to fall through the cracks of the current EU collective redress *status quo*. Moreover, even though the forthcoming EU consumer collective redress legislation is expected to constitute an advance for consumer interests,⁵² it is, in various different ways, ill-suited to cope with the peculiarities of typical business human rights cases brought by the aforementioned categories of victims, such as affected communities (including indigenous communities), workers (both inside and outside the EU) and victims of environmental damage (caused by EU companies both inside and outside the EU) whose claims are excluded from the scope of the legislation. Not only by scope, but also by design, the new EU Consumer Representative Actions Directive does not represent an advancement for general business and human rights victims.

2.5 A Balanced Approach to the Growth and Harmonisation of Collective Redress Procedures in the EU

What is now needed is a clear path forward with respect to collective redress in the EU, so as to make collective redress available to victims of all forms of business human rights abuses. Through collaboration

⁴⁷ European Union Agency for Fundamental Rights (FRA), ‘Business and Human Rights – Access to Remedy’, Report, 2020, 58 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf>.

⁴⁸ *Ibid*, 59–61.

⁴⁹ Directive on representative actions for the protection of the collective interests of consumers (n 20).

⁵⁰ UNGPs, GP 25.

⁵¹ Iris Benöhr, *EU Consumer Law and Human Rights* (OUP 2013).

⁵² Civil society and consumer groups have nonetheless raised concerns about the effectiveness of the procedure in relation to the various, stringent requirements for bringing claims.

between the ELI and UNIDROIT,⁵³ leading European academics, practising lawyers, judges and members of the European institutions from both civil and common law jurisdictions have developed model rules providing for the availability of collective redress on the basis of a broad, non-sectoral approach as initially indicated by Commission Recommendation 2013/396.⁵⁴ These model rules, which constitute expert guidance for procedural design, are best-placed to guide the development of collective redress in the Member States of the EU in a manner consistent with both Commission Recommendation 2013/396 and the recently adopted Consumer Representative Actions Directive 2020/1828, as well as further national development of existing collective redress mechanisms, as seen in recent years. The key to the practicality and utility of the model rules is their simplicity and flexibility, together with the discretion they afford judicial authorities when it comes to case management.

Discussions about the optimum design of procedural rules for collective redress are underpinned by a variety of public policy goals. Whilst the reduction in the barriers to justice/remedy faced by victim-claimants is put forward as a primary policy goal, it goes hand-in-hand with the need to prevent so-called ‘abusive’ litigation. The need for overall efficiency of procedure and the need to mitigate undue economic impact on corporate defendants caused by a possible sharp increase in damage claims (the ‘floodgates’ arguments) are related policy concerns.⁵⁵ Due weight must be afforded to each of the public policy concerns, as undue emphasis on either one carries a serious risk of institutionalising a procedure which is unbalanced and unworkable in practice and ultimately unfit for purpose. The ELI-UNIDROIT Model European Rules

afford all necessary tools which could be required by national judicial authorities in order to prevent abuses of collective redress procedures, whilst facilitating access to justice for victim-claimants. The flexibility of the ELI-UNIDROIT Model European Rules wisely acknowledges that there is no ‘one size fits all’ collective redress mechanism, given the numerous and significant differences between cases (type of harm, number of claimants, etc).

Firstly, it is essential to note that the most comprehensive empirical study of collective redress mechanisms across the EU Member States to date, commissioned by the European Commission and undertaken by the British Institute for International and Comparative Law, concludes that, after many years (in some cases decades) of collective redress mechanisms observed or monitored in numerous Member States, there is no evidence of abusive litigation in any jurisdiction.⁵⁶ The absence of abusive litigation stems from the particularities of EU civil jurisdictions compared to the United States, where it was historically so prevalent that reforms had to be introduced in the recent period to curb the phenomenon.⁵⁷ The single most significant and relevant factor distinguishing EU civil jurisdiction procedure from the one in the US in this regard may well be the ‘loser pays’ rule, whereby the losing party to a civil dispute has to pay the winning side’s legal costs⁵⁸, which constitutes – together with general prohibition on punitive damages and regulation of contingency fees – a strong and effective disincentive to bringing false, vexatious, unfounded or simply difficult cases.⁵⁹

There are strong reasons to believe that expanding the availability of collective redress to cover business and human rights cases, including those which are extra-territorial, is unlikely to increase the risks of abu-

⁵³ The official website of the International Institute for the Unification of Private Law is accessible at <<https://www.unidroit.org/about-unidroit/overview>>.

⁵⁴ ELI-UNIDROIT Model European Rules (n 11) 240.

⁵⁵ See the criteria set out by the European Commission in its study evaluating the effectiveness of the 2013 Recommendation, namely: ‘the impact on access to justice, the right to obtain compensation, the need to prevent abusive litigation, the impact on the functioning of the single market, the economy of the EU and consumer trust’, see European Commission Report on Recommendation 2013/396/EU (n 40) para 41.

⁵⁶ BIICL (n 26) 40. ‘More than three quarters of respondents did not report any instances of abusive litigation. The 14 respondents who referred to the risk of abusive litigation, however, pointed to potential risks rather than current instances of abuse. One respondent referred to media reports about the initiation of potentially abusive litigation by fake consumer associations without being able to verify the information’.

⁵⁷ Class Action Fairness Act 2005 (US).

⁵⁸ Application of the loser pays principle is typically subject to the discretion of the judge, who can relieve the losing party from the obligation to pay the legal fees and costs incurred by the other party, taking into account the interest of justice. Such fee shifting, however, cannot be relied on by the claimants in advance, and thus the loser pays principle remains a powerful deterrent of speculative and vexatious litigation.

⁵⁹ BIICL (n 26) 41, ‘several respondents showed that the potential of collective actions to generate abusive litigation is rather limited and the situation in its whole being incomparable to the US. One respondent commented that in the EU, “there is more of a risk of inadequate collective redress mechanisms and a lack of litigation than a risk of abusive litigation”’.

sive litigation or lead to such a large number of cases as to exceed the capacity of EU judicial systems. First, as noted above, the current civil compensation claim rate in transnational business human rights cases per Member State is very low (approximately 20 cases since the early 2000s, of which just one has resulted in a positive final decision for the victim-claimants).⁶⁰ Secondly, collective redress has now been enshrined at EU level for breaches of consumer law, which typically operate on strict liability regimes the thresholds for which are notably lower than for general tort law. In business and human rights cases, where liability is typically determined by general tort law principles,⁶¹ victim-claimants are required not only to prove that the harm occurred, but also that the defendant did not meet the required standard of care (that is, that it was negligent). Human rights due diligence legislation, such as the French Act on the duty of vigilance and the legislative initiative announced by the European Commission,⁶² may expand the scope of corporate liability to harm caused by third parties (such as controlled or economically dependent entities) in the supply chain. However, in order to prove liability under these new regimes, it would still need to be established that a corporate-defendant, having not acted with due care, contributed in some way to the harm in question.⁶³ As against the relative simplicity of consumer claims, victim-claimants in such cases would need to prove these additional elements, requiring significantly more evidence and resources. Thirdly and at the same time, in business and human rights cases where claimants are frequently located in third countries and belong to vulnerable groups, all the aforementioned procedural, financial and practical hurdles and costs are significantly higher compared with standard consumer cases. Lastly, in business and human rights cases, the quantum of damages is far more difficult to predict compared with typical consumer claims, which typically concern specific, easi-

ly identifiable and quantifiable economic harm. The combined effect of a significantly higher threshold for liability, higher financial costs and practical hurdles; as well as associated higher legal uncertainty and unpredictability of damage (compensation) that can reasonably be expected, is that business and human rights cases will continue to remain unattractive for abuse of third party funding and speculative litigation.⁶⁴

For these reasons, in line with the recommendations of the Council of Europe, the FRA and the UN Human Rights Council, the European Commission should present a proposal for legislation to provide for a collective redress mechanism in civil law with respect to all business-related human rights abuses. This could take the form of new stand-alone legislation or an expansion of the Consumer Representative Actions Directive 2020/1828 beyond the boundaries of consumer protection law to all types of mass harm and all categories of claimants beyond consumers. The European Commission should also include standard collective redress clauses in every proposal for sector or issue-specific legislation aiming at protection of fundamental rights. By the same token, when transposing the aforementioned Directive (the deadline for which is summer 2022), EU Member States will have a unique opportunity to expand the application of the collective redress regime they are obligated to implement beyond the requisite EU consumer law and make it applicable to their general civil law, and in particular, tort law. Such an extension of scope would enable victim-claimants in typical business-related human rights violation cases to collectivise their claims and overcome key barriers to access to judicial remedy to which we have adverted above.

In designing these collective redress mechanisms, both the EU and its Member States should follow, to the maximum extent possible, the respective section

⁶⁰ DROI (n 5).

⁶¹ Cees van Dam and Filip Gregor, 'Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care' in Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union* (Routledge 2017); Zerk (n 16) 45.

⁶² See Chapter 2, para 1 above.

⁶³ Whilst a European Commission legislative proposal on corporate due diligence remains forthcoming, preliminary indications from the European Parliament indicate any associated civil liability regime ought to retain a form of due care defence. See Committee on Foreign Affairs of the European Parliament, 'Opinion of the Committee on Foreign Affairs for the Committee on Legal Affairs with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability', 2020/2129(INL) [2020] <https://www.europarl.europa.eu/doceo/document/AFET-AD-655782_EN.html?redirect>; European Parliament Resolution 'On an EU legal framework to halt and reverse EU-driven global deforestation', 2020/2006(INL) [2020] <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html>.

⁶⁴ All of the aforementioned factors correlate to well-known barriers to accessing remedy which currently sustain the mass global victim remedy deficit identified by the United Nations Guiding Principles on Business and Human Rights and must also be addressed in order to meet State commitments under Pillar III of the UNGPs.

of the ELI-UNIDROIT Model European Rules of Civil Procedure, and in particular, the flexibility and control over procedure these rules afford judges in case management procedure.

2.6 The Application of ELI-UNIDROIT Model European Rules on Collective Redress in the Business and Human Rights Context

The overall ELI-UNIDROIT Model European Rules project is ambitious and seeks to provide a set of model procedural rules that can be applied in all civil and commercial litigation⁶⁵ arising before courts in the Member States of the EU.⁶⁶ The following section will survey the main procedural elements provided by these model rules that are relevant to the design of a collective claims mechanism in the business and human rights context as elaborated above.

2.6.1 Scope of Application

The scope of application will determine what type of harm or the type of legal breach to which the procedure applies. Sector-specific collective redress mechanisms are applicable to claims originating under a specific piece or body of legislation, such as consumer, competition, environmental protection or privacy laws, for harm suffered as a result of a failure to fulfil obligations under those laws.⁶⁷ Such sector-specific mechanisms are typically designed for, and tailored to, the particularities of claims originating under the said specific body of law, and adopt relevant design

features, accordingly. Sector-specific mechanisms are to be contrasted with *horizontal* collective redress mechanisms. The latter are applicable ‘across the board’ to any claim, irrespective of the substantive law being applied, and thereby include basic tort claims for damages. Horizontal mechanisms are typical of common law jurisdictions where procedural law is generally trans-substantive, meaning it is applied uniformly in all types of action regardless of the area of substantive law in question.⁶⁸ As already mentioned, there is, however, experience with horizontal collective redress mechanisms in civil law jurisdictions, for example in the Netherlands with its Collective Settlements of Mass Claims Acts.⁶⁹ In addition, Italy and Poland provide for full horizontal collective redress mechanisms in their civil procedure law.⁷⁰ The European Parliament,⁷¹ the European Economic and Social Committee⁷² and the European Commission⁷³ have all called for and promoted a horizontal scope of application for collective redress, that is to say, the availability of collective redress for all forms of harm under all relevant bodies of law. The ELI-UNIDROIT Model European Rules are intended to be of such general, horizontal application, meaning that they can be used for actions brought on the basis of domestic/national or EU legislation and can be sector-specific for specific breaches of specific legislation or used for general tort law or both.⁷⁴ The rules are ‘trans-substantive’ in the sense that they are applicable to all forms of harm, and afford the benefits of collective redress outlined by the aforementioned human rights authorities in the previous section to all

⁶⁵ Vincent Smith, ‘Redress through collective actions in Europe: ELI-UNIDROIT and European Commission Proposals’ 24 Uniform Law Review 2019:1, 4; ELI-UNIDROIT Model European Rules (n 11), Rule 1.

⁶⁶ ELI-UNIDROIT Model European Rules (n 11), Rule 1 and Commentary.

⁶⁷ The French system, notably its evolution, is quite representative of this sectoral approach and consumer-driven protection device. France initially followed a very restricted sectoral approach and the mechanism was first made available in consumer and competition law only. It was then expanded to cover other sectors, including health issues through the law on the modernisation of the health system, discrimination, environment and privacy. While the *action de groupe* exists in all these areas, it cannot be said that France has adopted a horizontal approach as the procedural rules vary from one sector to another.

⁶⁸ Directorate General for Internal Policies of the European Parliament (n 26). See, for example, Canada, Ontario Class Proceedings Act [1992] SO 1992, Chapter 6; Australia, Federal Court of Australia Amendment Act [1991]; the United States of America, Federal Rules of Civil Procedure, Rule 23.

⁶⁹ See above (n 44).

⁷⁰ See above (n 45) and (n 46).

⁷¹ European Parliament Resolution ‘Towards a Coherent European Approach to Collective Redress’, 2011/2089(INI). With the adoption of this resolution, on 2 February 2012, the European Parliament called for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the Union and specifically but not exclusively dealing with the infringement of consumer rights.

⁷² Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a European Horizontal Framework for Collective Redress [2014] OJ C170/11.

⁷³ European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Towards a European Horizontal Framework for Collective Redress’ [2013] COM(2013)401 (Collective Redress Communication).

⁷⁴ ELI-UNIDROIT Model European Rules (n 11), Rule 1 and Commentary.

victim-claimants. By virtue of their application to basic tort law claims, the rules ensure the availability of collective redress to victim-claimants in typical business human rights claims, given that general tort law (typically negligence) is most commonly relied on as a cause of action by victim-claimants in those cases.⁷⁵

2.6.2 Thresholds

The ELI-UNIDROIT Model European Rules afford judges discretion to allow a group of civil claims to proceed collectively, according to the simple threshold criterion that the case is not suitable for simple joinder.⁷⁶ In allowing the claims to proceed together collectively, the judge must also be satisfied that all the claims have enough in common to be tried in a single procedure.⁷⁷ The ELI-UNIDROIT Model European Rules also, however, foresee the possibility of establishing sub-groups in appropriate cases⁷⁸ in order to classify claims relating to a different category of harm but which derive from the same alleged harmful action. Through the innovation of claimant sub-groups, judges are afforded enhanced means to undertake case-management of collective claims efficiently, resulting in better overall procedural economy.

2.6.3 Opt-In and Opt-Out

The means of constituting a collective claim, or 'forming the class', is another major and often controversial feature of collective claims procedures. The means of constituting a collective claim may fall into two categories known as 'opt-in' and 'opt-out'. Whereas opt-in obliges victim-claimants expressly to give their consent as a precondition for joining the collective claim (thereby placing a communication and advertisement burden on those with standing to bring the claim), opt-out considers them to have tacitly joined

the claim by virtue of their having suffered similar harm as the collective. Therefore, in an opt-out system, victim-claimants are automatically included in a collective redress claim unless and until they decide to opt-out. Whilst the opt-in system may be considered more compatible with the principle of party autonomy, an opt-out model can be considered a far more effective means of overcoming the rational apathy of victims about joining a collective claim⁷⁹ and disincentives specific to business and human rights grievances, such as logistical difficulties in obtaining consent from all victims, intimidation and even risks to life,⁸⁰ which are not present in consumer protection cases.

Hybrid models, whereby the court can decide what is the best means of constituting the collective claim, either opt-in or opt-out, depending on the circumstances of the claim, also exist, for example in Belgium, Bulgaria, Denmark and the United Kingdom.⁸¹ The ELI-UNIDROIT Model European Rules provide for such a hybrid model, affording a judicial discretion to pursue the collective claim either as an opt-in or opt-out procedure, according to the realities of the case before them.⁸² This approach is consistent with the 2013 Commission Recommendation, which permits the use of opt-out procedures if they are justified in the interests of the sound administration of justice.⁸³ The ELI-UNIDROIT Model European Rules provide that an opt-in procedure should be the default⁸⁴ but that a court retains the discretion to⁸⁵ proceed with an opt-out procedure if two conditions are met: firstly, that the group members' claims cannot be brought individually because of their small size; and secondly, that a significant number of group members would not opt-in to the collective proceeding (as a result of *rational inaction*).⁸⁶ An opt-out procedure under the

⁷⁵ Zerk (n 16) 45.

⁷⁶ ELI-UNIDROIT Model European Rules (n 11), Rule 212(1)(a).

⁷⁷ Ibid, Rules 212(1)(b) and (c).

⁷⁸ Ibid, Rules 212, 218(a), 218(d), 219(b), 228(a).

⁷⁹ European Law Institute, 'Statement of the European Law Institute on Collective Redress and Competition Damages Claims', 2014, 43; Georg E Kodek, 'Kollektiver Rechtsschutz in Europa – Diskussionsstand und Perspektiven' in Walter Blocher, Martin Gelter and Michael Pucher (eds), *Festschrift für Christian Nowotny zum 65. Geburtstag* (Manz 2015) 143.

⁸⁰ UNGA Res A/70/2017 Report of the Special Rapporteur on the Situation of Human Rights Defenders, UN Doc A/70/217; FRA Opinion 1/2017 (n 5) 5.

⁸¹ Directorate General for Internal Policies of the European Parliament (n 26) 86.

⁸² ELI-UNIDROIT Model European Rules (n 11) 215(2)–(4).

⁸³ European Commission Recommendation 2013/396/EU on collective redress (n 40), para 21.

⁸⁴ ELI-UNIDROIT Model European Rules (n 11) Rule 215(1).

⁸⁵ ELI-UNIDROIT Model European Rules (n 11), Rule 215(2); see also similar position in European Commission Recommendation 2013/396/EU on collective redress (n 4039), para 3(b).

⁸⁶ ELI-UNIDROIT Model European Rules (n 11), Rule 215(2)(a)&(b) Such a solution is proposed in the Czech Republic for consumer class actions. See: Press 775/0, part no 1/4, Proposal of the Government of Law on Collective Proceedings, House of Representatives, 48, <<https://www.psp.cz/sqw/text/orig2.sqw?idd=171615>>.

ELI-UNIDROIT Model European Rules also affords judicial certainty in that the judgment will be deemed to be binding on all claimants who have not opted-out in time with the effect that any other collective actions brought in respect of any claims determined as part of the initial opt-out action are disallowed.⁸⁷

The opt-out model foreseen by the model rules should thereby result in more legal certainty as regards the consequences of a judgment (or settlement) for claimants, their representatives and defendants.⁸⁸ This greater finality for defendants could well facilitate the earlier settlement of justified claims, since the final financial exposure of the defendant is more certain earlier in the process.⁸⁹

2.6.4 Standing

Rules on standing are a crucial element as they determine who is eligible to bring a collective claim. Rules on standing are typically divided between those granting *locus standi* to *representative entities*, that is to say, an organisation acting on behalf of the group of victim-claimants, and those granting it directly to members of the harmed group themselves. Once again, hybrid models also exist permitting both representative entities and members of the group to initiate a collective claim.

In the case of representative entities, rules laying down the criteria for qualifying as a representative entity can vary in strictness. On the one hand, restrictions on standing are generally a response to concerns about abusive litigation, and it is generally thought that, if legal standing is strictly regulated, it will decrease the scope for abusive litigation.⁹⁰ This is often put forward as a justification for limiting standing in representative actions to representative entities.⁹¹

On the other hand, such rules granting exclusive standing to representative entities encroach upon or even usurp the rights of individual victim-claimants

to represent themselves collectively in pursuance of a right to effective remedy, and may also be at odds with emerging European Court of Justice jurisprudence concerning the right of claimants to choose their own legal representation.⁹² This must also be viewed in the light of the well-known barriers to justice faced by individual victim-claimants (the high financial cost of bringing proceedings and the risk stemming from inequality of arms) which prohibit them from bringing their own individual claims. Such barriers coupled with restricted representative standing are likely to mean victim-claimants will be left completely dependent on the will, capacity and competence of the representative entity to pursue their collective claim as the only means of fulfilling their right to an effective remedy. A collective redress mechanism that exclusively limits standing to so-called representative entities (a term the Model Rules find problematic for various reasons⁹³) presupposes, moreover, the existence of a representative entity matching a given collective claim, namely one which is genuinely 'representative'. For this reason, actions brought by so-called representative entities are more likely to be utilised in sector-specific collective redress models, where the existence of specific corresponding representative entities may be considered unproblematic, as in the Directive on Consumer Representative Actions, which affords standing only to such qualified entities (Member States may, however, afford claimants standing directly).⁹⁴ Many jurisdictions could claim to be able to guarantee the existence of a consumer representative body with sufficient capacity and means to claim protection for a whole spectrum of consumer rights. However, this may not be the case with collective claims concerning the environment, in particular where there is extra-territoriality, or other abuses of human rights. Even in consumer protection cases, the experience across the Member States shows that a combination of high costs of such litigation and limited resources available to consumer organisations severely limit

⁸⁷ Ibid, Rule 227(1).

⁸⁸ Smith (n 65) 9.

⁸⁹ Ibid.

⁹⁰ Directorate General for Internal Policies of the European Parliament (n 26) 27.

⁹¹ Collective Redress Communication (n 73).

⁹² *Eschig v UNIQA*, C-199/08, [2009] ECLI:EU:C:2009:538, paras 60–64.

⁹³ ELI-UNIDROIT Model European Rules (n 11), Rule 204 and Commentary.

⁹⁴ Directive on representative actions for the protection of the collective interests of consumers (n 20).

their capacity to bring collective claims.⁹⁵

In line with this perspective, the ELI-UNIDROIT Model European Rules on standing are broad and consequently in line with the 2013 Commission Recommendation, and afford legal standing to various types of established and ad hoc 'qualified claimants'⁹⁶, which includes natural persons who are themselves a member of the group of victim-claimants.⁹⁷ However any group or person seeking status as a 'qualified claimant' under the Rules must meet certain criteria, namely: have no conflict of interest with other group members; have sufficient capacity to bring the claim; be legally represented; and not be a legal professional.⁹⁸ Such a flexible approach is absolutely essential in business and human rights cases, given the diversity of potential abuses and underlying contexts. In many instances there would not be any suitable representative organisation, whereas in other cases the nature of the harm and the circumstances of the case would prevent victim-claimants from taking an active role in litigation, which would necessitate the involvement of a representative body. The reality concerning standing is born out by the above-mentioned FRA research, which found that in about half of the cases covered, victims themselves (individually or in groups) sought redress, whereas representative organisations such as NGOs and labour unions, and State entities such as environmental agencies, law enforcement bodies or regulators, sought justice in the other half.⁹⁹

2.6.5 Type of Redress

The type of redress available is a primary feature of a collective claims procedure and can be either injunctive or compensatory, or both. Whereas victim-claimants may claim financial compensation for the harm they have suffered as a result of the defendant's conduct, injunctive relief gives rise to an obligation (in the form of an injunctive order) that the defendant should desist from doing certain acts or should undertake a particular action. Although the ELI-UNIDROIT Model European Rules concern only compensatory redress and not injunctive relief, there are no significant differences between the two types of redress such as to require a different approach in this regard.

In the business and human rights context, as emerges from the UNGPs,¹⁰⁰ both types of redress are needed, because human rights abuses often concern irreversible harm that cannot be cured by injunctive relief, in particular in cases that involve harm such as loss of life, health or livelihood.

The need for injunctive as well as compensatory relief in disputes concerning human rights abuse mirrors the general trend in the development of collective redress procedures, as illustrated by the 2013 Commission Recommendation and the 2020 European Consumer Collective Redress Directive,¹⁰¹ both of which focus on compensatory redress.

⁹⁵ In France, there were 14 consumer group actions and 21 in total between October 2014 and June 2020, according to the National Assembly's Legal Affairs Committee. See 'Rapport d'Information en conclusion des travaux d'une mission d'information sur le bilan et les perspectives des actions de groupe', Assemblée Nationale, 11 June 2020, <https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3085_rapport-information.pdf>. The experience of French consumer organisations is presented by Cécile Prudhomme, 'Le flop des 'class actions' à la française. De nombreuses contraintes freinent l'utilisation des recours collectifs' *Le Monde*, 16 February 2018, <https://www.lemonde.fr/economie/article/2018/02/16/le-flop-des-class-actions-a-la-francaise_5257948_3234.html>.

The German Federal Office of Justice recorded 15 consumer collective actions between November 2018 and March 2021. See the website of the German Federal Office of Justice, <https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Bekanntmachungen/Klagen_node.html;jsessionid=98914764E83F13D47D102E896EE6D65C.1_cid383>.

The Czech government argues in the justification for the legislative proposal for consumer class actions that the current model of representative consumer collective redress is inadequate. See 'Proposal of the Government for a Law on Collective Proceedings', House of Representatives, available at <<https://www.psp.cz/sqw/text/orig2.sqw?idd=171615>>.

A comprehensive overview of experience with collective redress in the Czech Republic, Hungary, Poland and Slovakia is provided by Rita Simon and Hana Müllerová (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: an Achievable Target?* (Praha Institute of State and Law, 2019) <https://www.ilaw.cas.cz/upload/web/files/books/Visegrad_Manuscript.pdf>.

⁹⁶ ELI-UNIDROIT Model European Rules (n 11), Rule 208(a)&(b).

⁹⁷ Ibid, Rule 208(c).

⁹⁸ ELI-UNIDROIT Model European Rules (n 11), Rule 209.

⁹⁹ FRA (n 47) 10–11.

¹⁰⁰ UNGPs, Commentary to GP 25.

¹⁰¹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

2.6.6 Financing

The financing of business and human rights judicial claims is a major, well-known barrier, with collective redress claims being no exception, despite their potential to reduce the costs per capita of victim-claimants.¹⁰² Given that financial costs in such cases involving cross-border cases with third-country victim-claimants are particularly high, including not only legal representation but translations, travel and potential expert testimony and studies,¹⁰³ public funding in the form of legal aid will often not suffice. In such instances, regulated contingency fees can ensure that victim-claimants are able to bring their cases to court. Whilst the ELI-UNIDROIT Model European Rules do not provide guidance on this point, the 2013 Commission Recommendation permits contingency fees exceptionally, provided that they are properly regulated 'taking into account the right to full compensation of the members of the claimant party'.¹⁰⁴ In Germany and Spain, blanket prohibitions on contingency fees have been ruled unconstitutional on grounds that such a prohibition would impinge on the right of victim-claimants to go to court (by effectively removing one of their potentially sole sources of litigation funding).¹⁰⁵ In 2018, nine Member States allowed some form of contingency fee arrangement between victims and their lawyers, with the maximum amount that can be paid to the lawyer set in law or professional regulations typically around 25% of the value of the award.¹⁰⁶ In business and human rights cases, contingency fees can be seen as an essential element for the funding of cases, given that public legal aid, even when granted, is far from likely to suffice to cover the particularly high costs of litigation, and claimants cannot rely in advance on fee-shifting discretion by judges. All three instruments, however, play an important and indispensable role in alleviating financial barriers that prevent victims of human rights abuses from accessing judicial remedy.

2.7 Recommendations

The majority of cases of severe business-related human rights abuses are mass harm cases affecting from dozens to thousands of victims. The EU and its Member States should therefore establish effective judicial collective redress mechanisms available to victims of such abuses in accordance with the UNGPs.

Such efforts should be guided by the ELI-UNIDROIT Model European Rules of Civil Procedure, which constitute a sufficiently flexible model to accommodate key characteristics of business and human rights cases. From the business and human rights perspective, the most important elements of the design of collective redress procedures include the following:

- The European Commission and the EU Member States should adopt new legislation or expand the Consumer Representative Actions Directive beyond consumer protection law so as to cover collective redress in civil law with respect to all business and human rights abuses and categories of claimants beyond consumers. The European Commission should include standard collective redress clauses in every proposal for sector or issue-specific legislation aiming at the protection of fundamental rights.
- To the maximum extent possible, the EU and its Member States should design the procedural rules governing the application of the collective redress mechanism in accordance with the recommendations on collective redress provided in the ELI-UNIDROIT Model European Rules of Civil Procedure.
- The scope of the collective redress mechanism needs to be horizontal, that is applicable 'across the board' to any claim, irrespective of the substantive law being applied, thereby and specifically including basic tort claims for damages.
- The threshold to be applied by judges to de-

¹⁰² FRA (n 47) 18.

¹⁰³ DROI (n 5) 16.

¹⁰⁴ European Commission Recommendation 2013/396/EU on collective redress (n 40).

¹⁰⁵ BVerfG, Beschluss des Ersten Senats, 12 December 2006, 1 BvR 2576/04, Rn 1-115, ECLI:DE:BVerfG:2006:rs20061212.1bvr257604. See also Daniel S. Mason and José M. Umbert, 'Private Enforcement', 32 *The Comparative L YB of Int'l Business* 2010:127.

¹⁰⁶ European Commission Report on Recommendation 2013/396/EU (n 40) 16. The cap on contingency fees ranges from 15% under Slovenian draft legislation.

termine whether a collective action is permissible should be based on the simple criterion that the case is not suitable for simple joinder; complex time-consuming procedures should be avoided.

- The means of constituting a collective claim, or forming the class, should be governed by a hybrid model, affording the court discretion to allow the collective claim to be pursued either as an opt-in or opt-out procedure, according to the realities of the case before it.¹⁰⁷
- Standing should be afforded to various types of established and ad hoc qualified entities, as well as natural persons who are themselves members of the group of victims. Such a flexible approach is necessary in business and human rights cases given the diversity of potential abuses and underlying contexts.
- Compensatory redress is essential to provide remedy especially in cases of severe human rights harm.
- Collective redress regulation should not attempt to prohibit contingency fees, as this would *de facto* impinge upon the right of victims to go to court, given their lack of other means to cover the costs of business and human rights litigation.

¹⁰⁷ ELI-UNIDROIT Model European Rules (n 11), under Rules 215(1) and 215(2) ('Types of Collective Procedure') both are permissible.

3 Issues of Private International Law*

3.1 Introduction

This chapter considers, from the point of view of the European Union (EU) rules on private international law, the availability to citizens of third countries of remedies against multinational companies based in the EU for violations of human rights and environmental damage¹ committed by their subsidiaries or business partners in non-EU countries.

This chapter considers 'access to remedy' as a core element of 'access to justice' on the part of victims of human rights or environmental violations carried out by multinational companies based in the EU *through* their subsidiaries or business partners based in third countries. It concentrates on what we consider to be the principal issues.

Up to now, the EU has adopted a bureaucratic approach, by requiring multinational companies to conduct social audits in compliance with the Non-Financial Reporting Directive.² However, incidents such as the collapse of the Rana Plaza building³ show that that approach is unsatisfactory.

Moreover, for those multinational companies which adhere to ethical standards and have an organisational culture which ensures that human rights and environmental protection are respected by their subsidiaries and contractors around the globe, adding a layer of bureaucracy by requiring them to satisfy an obligation of non-financial reporting seems to be neither efficient nor sufficiently effective for the purpose of enhancing human rights due diligence.⁴ Then again, reporting obligations do not exclude the possibility of multinational companies deliberately taking advantage of the shortcomings of the legal systems of certain third countries⁵ and suppressing

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¹ Although this Report deals with human rights due diligence, this chapter takes account of environmental due diligence since (a) environmental damage is frequently the subject of due diligence litigation, (b) violations of human rights often go hand-in-hand with depredations of the environment and (c) this enables account to be taken of Art 7 of 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) 2007 OJ L199/40 (hereinafter referred to as 'the Rome II Regulation' or 'Rome II').

² 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 [2014] OJ L330/1.

³ International Labour Organization, 'The Rana Plaza Accident and its Aftermath' <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm>.

⁴ See the critical conclusions of the European Reporting Lab, 'Appendix 4.6: Stream A6 Assessment Report – Current Non-Financial Reporting Formats and Practices', February 2021, 72 ff. <https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FsiteAssets%2FEFRAG%2520PTF-NFRS_A6_FINAL.pdf>. See also: Alliance for Corporate Transparency, 'An Analysis of the Sustainability Reports of 1000 Companies pursuant to the EU Non-Financial Reporting Directive', Research Report, 2019 <<https://www.ecia.eu/2020/05/alliance-for-corporate-transparency-2019-research-report/>>.

⁵ Particularly egregious and shocking cases which have come before the courts include the Union Carbide Bhopal disaster, the collapse of the Rana Plaza building in Bangladesh and the facts underlying the Ogoni people's litigation in various jurisdictions. Weak enforcement of labour law and factory legislation is also exploited in Europe: see Sarah O'Connor, 'Dark Factories: Labour Exploitation in Britain's Garment Industry', *Financial Times*, 17 May 2018, <<https://www.ft.com/content/e427327e-5892-11e8-b8b2-d6ceb45fa9d0>>.

the effectiveness of host State judicial mechanisms⁶ while continuing to pursue profit at the expense of human rights and environmental protection in the territory of those States. Past experience shows that these shortcomings are often exacerbated by weak administrations and corruption. It is thus unlikely that reporting obligations constitute an adequately dissuasive tool.

The victims of human rights or environmental violations often have little or no access to remedy in the domestic civil courts. There is also the consideration that claimants in third countries may prefer to bring proceedings against parent companies where the local entities in the supply chain are undercapitalised and 'claimant unfriendly'.⁷

This is the backdrop to our considerations.

3.2 Role and Scope of Private International Law Rules

We are considering whether private international law instruments – existing or potential⁸ – may play a role in depriving unscrupulous multinational companies of the impunity which they have enjoyed at the expense of hundreds of persons, families and the environment.

The EU may enact legislation under Article 114 of the Treaty on the Functioning of the European Union (TFEU),⁹ requiring all companies placing their goods or services on the market to comply with human rights due diligence. Although EU private international rules in force do not contemplate a general connecting factor such as the US criteria of 'corporate presence' or 'doing business',¹⁰ such criteria are provided for in specific sectors. For instance, EU Regulation 2017/821 targets 'Union importers', meaning any natural or legal person declaring minerals or metals for release for free circulation in the internal market, regardless of its place of incorporation or establishment.¹¹ Similarly, the European Parliament's proposal for a Directive on corporate due diligence and corporate accountability, refers to companies 'operating in the internal market'.¹² All these criteria aim at targeting those companies, based in the EU, which are on top of the value chain and are the ultimate beneficiaries

⁶ See, for instance, the allegations of bribery of witnesses on which the Dutch Court allowed the claimants to give evidence in the *Ogoni 9* case (Rechtbank Den Haag, ECLI:NL:RBDHA:2019:4233, 1 July 2019, para 4.134 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670>>) on the basis of the reports 'Nigeria Fundamental Rights Denied. Report of the Trial of [E] and Others by [the representative] QC' published in June 1995; 'Nigeria. The Ogoni Crisis: A Case Study Of Military Repression In South-eastern Nigeria' published in July 1995 by Human Rights Watch and 'Nigeria. The Ogoni trials and detentions' published on 15 September 1995 by Amnesty International, all of which refer to the bribing of key prosecution witnesses with the involvement of the Shell Petroleum Development Company of Nigeria Ltd.

⁷ See Penelope A Bergkamp (under the scientific supervision of Prof Dr ME Storme and C Van Den Broeck), *Models of Corporate Supply Chain Liability* (KU Leuven 2019), <<https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>>

⁸ This could be on the basis of a specific law – which could of course be a transposition of an EU directive or an EU regulation – or on the basis of existing human rights commitments already taken up by Member States. Following the endorsement by the UN Human Rights Committee of the UN Guiding Principles on Business and Human Rights in June 2011, the adoption of the OECD Due Diligence Guidance for Responsible Business Conduct in May 2018 and many other international initiatives to reduce social dumping policies, States are starting to impose specific obligations of human rights and environmental due diligence on private companies. Within the EU, the main initiatives have been the EU Non-Financial Reporting Directive 2014/95/EU requiring companies with more than 500 employees to provide information relating to 'environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors' (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 [2014] OJ L330/1) and Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas of 17 May 2017 in force as of 1 January 2021 [2017] OJ L130/1.

⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. See: European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Annex <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title1>. The Annex puts forward proposed wording for a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability and cites as the legal basis Arts 50, 83(2) and 114 of the TFEU. It is submitted that Art 83(2) cannot be combined with the other two articles as it is subject to the Danish opt-out and the Irish opt-in.

¹⁰ See Paul R Dubinsky, *The Reach of Doing Business Jurisdiction and Transacting Business Jurisdiction over Non-U.S. Individuals and Entities* (New York Law School 1998) <https://1997-2001.state.gov/global/legal/legal_affairs/dubinsky.html>.

¹¹ See Art 2 (l) of Regulation (EU) 2017/821 (n 8).

¹² European Parliament (n 9).

of the business companies based abroad.¹³

The assumption underlying this chapter is that Member State A requires companies to carry out human rights and/or environmental due diligence with regard to the impact of their business activities and business relationships abroad. Thus, in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs),¹⁴ such a company based in Member State A ought to prevent its subsidiary or business partner in third country B from causing serious damage to the health, property and livelihoods of people in third country B. If, nevertheless, serious damage is caused, and the victims are prevented from obtaining a fair trial or appropriate satisfaction in their domestic courts, the question arises as to on what basis they have access to a remedy in Member State A. This in turn raises the question of the impact of the existing rules of private international law and conflicts of law and whether they need or ought to be changed, together with the possible adoption of a human rights/environmental due diligence instrument which might be formulated in order to avoid problems of jurisdiction and applicable law from the outset.

Whatever solution is ultimately adopted depends, not only on the specific policy objectives of any human rights and environmental due diligence instru-

ment, but also on the specific nature and purpose of the EU's rules on private international law and conflicts of law.¹⁵

Since the rules of private international law and conflicts of law of the EU have been harmonised, they constitute an exclusive competence of the EU.¹⁶ However, when the defendant is domiciled outside the EU, jurisdiction is determined by the national rules of private international law of each Member State.¹⁷ In other words, in order to determine whether a court in the EU has jurisdiction despite the defendant's being domiciled in a third country, reference has to be made to the national rules of the Member State in question, unless there is an exclusive head of jurisdiction pointing to its forum (ie the forum of the immovable property, the forum of enforcement, etc).¹⁸

As for the rules of the Rome II Regulation, they are of universal application, that is to say, subject to the rules on overriding mandatory provisions¹⁹ and public policy,²⁰ and any law specified by the regulation is to be applied whether or not it is the law of a Member State.²¹

3.3 The Rules on Jurisdiction

3.3.1 The Defendant is Domiciled in the EU

European jurisdictional rules have a high degree of

¹³ Catherine Kessedjian, 'Preliminary Document No 9 of July 1998 for the Attention of the Special Commission of November 1998 on the Question of Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters', 1998, 31, <<https://assets.hcch.net/docs/3385edb5-6f63-4624-934c-4d4245fdcef6.pdf>>. Kessedjian (Deputy Secretary General) considers that a 'doing business' connecting factor may be easily replaced by the provision of three other connecting factors, namely 'one head of jurisdiction in matters relating to contract, another for matters relating to tort, and a third for activity conducted by a branch or establishment'.

¹⁴ Discussed elsewhere in this Report.

¹⁵ Reference is made to the rules on jurisdiction of the Brussels Ibis Regulation (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 [2012] OJ L351/1 (Brussels Ibis) and the rules of the Rome II Regulation on the law applicable to non-contractual obligations (n 1). The relevant provisions of the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L339/3) are set out in the Annex but not specifically discussed herein since they are identical to those of the Brussels Ibis Regulation. No account is taken of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (<<https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>>) because it is not yet in force and, besides, it covers only recognition and enforcement of judgments. It is worth recalling that on 16 June 2021, the Commission submitted a proposal for a Council decision on the accession by the EU to the Convention: European Commission, Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters COM(2021) 388 final. The proposal, the impact assessment and a study are available here at <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/international-cooperation-civil-justice_en>.

¹⁶ CJEU, Opinion 1/03, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ECLI:EU:C:2006:81.

¹⁷ Brussels Ibis (n 15) Art 6.

¹⁸ For these rules, see Prof Nuyts' admirable 2007 study produced for the European Commission on residual jurisdiction (Arnaud Nuyts, 'Review of the Member States' Rules Concerning the "Residual Jurisdiction" of their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations', 2007 <https://gavclaw.files.wordpress.com/2020/05/arnaud-nuyts-study_residual_jurisdiction_en.pdf>) and I Pretelli and L Heckendorn Urscheler, (eds), *Possibility and Terms for Applying Brussels I Regulation (recast) to Extra-EU Disputes*, PE 493.024, Brussels 2014, esp at 13–37 <<https://op.europa.eu/en/publication-detail/-/publication/80e4b40b-4a9f-4b53-8908-e7f730c5ffc6>>.

¹⁹ Rome II (n 1) Art 16.

²⁰ Ibid, Art 26.

²¹ Ibid, Art 4.

uniformity, thanks to the success of the allocation of jurisdiction originally conceived for the 1968 Brussels Convention and maintained in subsequent instruments, such as the Brussels Ibis Regulation and the Lugano Convention. The general rule is *actor sequitur forum rei*. It states that persons domiciled in a Member State are to be sued in the courts of that State.²²

Whenever the *reus* is a company, jurisdiction is always allocated to the EU Member State where the company has its statutory seat, central administration or principal place of business (see Brussels Ibis, Article 4 in conjunction with Article 63).²³ However, victims are not compelled to follow the rule *actor sequitur forum rei* and may also bring claims against the companies based in the EU in other Member States, always within the EU's area of freedom, security and justice.

Points (2) and (3) of Article 7 of the Brussels Ibis Regulation allow the claimant to sue a defendant in alternative *fora*, namely the courts for the place where the harmful event occurred or may occur (*forum damni* ex Article 7(2)) or in the courts for the place where the behaviour giving rise to the event was committed (*forum commissi delicti* ex Article 7(2))²⁴ and also in the court seised of criminal proceedings as regards a civil claim for damages where that court may entertain civil proceedings under its own law (Article 7(3)). The Court of Justice of the European Union (CJEU) has clarified that the two criteria of Article 7(2) may be used simultaneously by means of the so-called 'mosaic rule', which enables the claimant to sue the defendant in multiple *fora* in order to claim in each forum compensation for the damage incurred

in that jurisdiction.²⁵

Lastly, under Article 8, where a person domiciled in a Member State is one of a number of defendants, he/she may also be sued in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear them together in order to avoid the risk of irreconcilable judgments.

3.3.2 The Defendant is Domiciled Outside the EU

At present, the only plain possibility to sue a foreign subsidiary (or a contractor) of the parent company in the forum of the parent company in an EU Member State depends on the existence of a head of jurisdiction under a national provision of the forum (unless there is an exclusive head of jurisdiction or similar pointing to a Member State in the Brussels Ibis Regulation). On this basis, separate entities, such as a parent company and its subsidiary, have been successfully sued jointly in the *forum rei* of the European parent company under Article 8(1) of the Brussels Ibis Regulation and national provisions taken together.

This strategy, already used in a tort case,²⁶ was employed against *Vedanta*,²⁷ which unsuccessfully challenged it by asserting that the UK courts lacked jurisdiction on the ground that 'non-EU claimants are using the existence of the claim against an EU domiciled party as a device to ensure that their real claim, against another defendant, is litigated in this jurisdiction rather than in the natural forum.'²⁸

²² Brussels Ibis (n 15) Art 4.

²³ The notion of the company seat is very broad, including its statutory seat, the seat of its central administration; as well as its principal place of business. Moreover, in the case of 'Ireland, Cyprus [and the United Kingdom]', 'statutory seat' includes the registered office or, failing that, the place of incorporation or, failing that, the place under the law of which the formation took place.

²⁴ It should be noted that, according to the Court of Justice, the place where the harmful event occurred or may occur means both *the place where the damage occurred and the place of the event which gives rise to and is at the origin of that damage*: CJEU, *Handelskwekerij GJ Bier v Mines de Potasse d'Alsace*, 21/76, ECLI:EU:C:1976:166.

²⁵ CJEU, *Fiona Shevill*, C-68/93, ECLI:EU:C:1995:61.

²⁶ *Andrew Owusu v NB Jackson*, C-281/02, ECLI:EU:C:2005:120, 1 March 2005. Owusu was a British national acting to obtain redress for a tort of which he had been victim in Jamaica. He sued 'at home', in his own forum, Mr Jackson, who was also domiciled in that State, and several Jamaican companies, in relation to a tort which was committed in Jamaica.

²⁷ *Lungowe & Ors v Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528 (13 October 2017).

²⁸ *Ibid*, para 33. See also *Lungowe v Vedanta Resources plc* [2019] UKSC 20 [35] replying to the defendants' allegation of the existence of 'an established line of authority which limit[s] the use of the abuse of EU law principle as a means of circumventing article 6 (now article 8) to cases where the ability to sue a defendant otherwise than in the member state of its domicile [is] the sole purpose of the joinder of the anchor defendant' that [40] 'leaving aside those cases where the claimant has no genuine intention to seek a remedy against the anchor defendant, the fact that article 4 fetters and paralyses the English forum conveniens jurisprudence [...] cannot itself be said to be an abuse of EU law, in a context where those difficulties were expressly recognised by the Court of Justice when providing that forum conveniens arguments could not be used by way of derogation from what is now article 4 [and that] to allow those very real concerns to serve as the basis for an assertion of abuse of EU law would be to erect a forum conveniens argument as the basis for a derogation from article 4, which is the very thing that the Court of Justice held in *Owusu v Jackson* to be impermissible. [...]'

3.3.3 Rationale for Attracting Non-EU Defendants in EU Fora

There are numerous examples in case law of human rights violations which occurred outside the EU yet have been litigated in the EU. It is worth reflecting upon the reasoning employed by the courts in question in order to affirm their jurisdiction, and reflect upon the lessons to be learned.

The liability of a company for acts or omissions of other entities in the supply chain consisting of violations of human rights or environmental damage is often motivated either by the impossibility for claimants to access an effective remedy in their local courts or by their preference to pursue their claims against the parent company, where the local entity is under-capitalised or the rules are unfriendly to claimants.

In these circumstances, the question has been addressed from the point of view of whether a parent company can be held to be under a duty to obviate or prevent such violations or environmental damage. Such liability has been regarded as an exception to the general rule that a person is not liable for another's acts or omissions.

The courts of England and Wales²⁹ and, to a lesser extent, the courts of the Netherlands have undertaken such analyses. In certain cases, they have affirmed their jurisdiction and also applied the law of countries which are in the common law family.

The English courts have considered the questions of the relationship between parent companies and subsidiaries and the potential liability of parent companies for acts and omissions of subsidiaries in an evolving series of cases: in particular, *Chandler v Cape Plc*,³⁰ *Adams v Cape*,³¹ *Thompson v Renwick Group*,³² *AAA v Unilever*,³³ and *Vedanta*.³⁴

The recent UK Supreme Court case of *Okapi*,³⁵ ruling on whether the claimants had an arguable case

so as to allow the case to proceed to trial, considers the question when a parent company can be liable for damage (in this case, oil spills and pollution rendering water sources unusable). The case is a highly significant one.

Whereas the Court of Appeal and earlier case law latched on to the question of 'control', the UK Supreme Court considered that this was just the starting point. The question was 'the extent to which the parent did take over or share with the subsidiary the management of the relevant activity'. 'Control of a company and *de facto* management of a part of its activities are two different things'. Evidence had been adduced that the Shell Group was organised on business and functional lines rather than according to corporate form. Secondly, the Court held that there was no limiting principle to the effect that the promulgation of group-wide policies could never in itself give rise to a duty of care. Thirdly, there was no generalised presumption that a parent company would not be liable for the acts of its subsidiaries. Lastly, the Court held that the normal principles of negligence applied in determining questions of parent liability for acts of a subsidiary: there was no special category of liability. The following factors were relevant but not exhaustive: (a) taking over the management or joint management of the relevant activity; (b) providing defective advice and/or promulgating defective group-wide policies; (c) taking steps to adopt and implement group-wide policies; and (d) the fact that the parent company held out that it exercised a particular degree of supervision and control of a subsidiary. This seems to be a potentially particularly claimant-friendly decision.

In the Netherlands, the Court of Appeal held that it had jurisdiction in the *Milieudefensie v Shell* case,³⁶ since the parent company of the Shell group, RDS, was established in the Netherlands. The claimants had characterised the claim against Shell in relation

²⁹ The English cases referred to in this connection were commenced when the UK was still a member of the EU and so are highly relevant. The quality of the judgments makes it a matter of regret for the sake of the development of the law, not only that the UK left the EU, but also that the EU has refused the UK's application to accede to the Lugano Convention.

³⁰ [2012] PIQR P17, [2012] 1 WLR 3111, [2012] ICR 1293, [2012] 3 All ER 640, [2012] EWCA Civ 525.

³¹ *Adams v Cape Industries Plc* [1990] Ch 433.

³² *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635.

³³ *AAA and others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532.

³⁴ *Lungowe v Vedanta Resources plc* [2019] UKSC 20.

³⁵ *Okpabi and Others v Royal Dutch Shell Plc and Another* [2021] UKSC 3.

³⁶ District Court of The Hague, *Milieudefensie et al v Royal Dutch Shell PLC* [26 May 2021] C/09/571932/HA ZA 19-379 (English version) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>>.

to the oil spills in Nigeria as ‘an unlawful act within the meaning of the Brussels Ibis Regulation,’³⁷ also arguing that the defendant had ‘its place of business, that is, its principal place of business and its management board in the Netherlands’ and thus jurisdiction against Shell should be retained on the basis of Articles 4 and 63 of the Brussels Ibis Regulation.³⁸ The claimants explicitly referred to the circumstance that the strategic decisions of Shell – those that have ‘a direct impact on the business operations of Shell and its subsidiaries [including] those with regard to the climate policy to be pursued and contribution of the company to climate change’ are taken in the Netherlands. In addition, ‘shareholders’ meetings are held in The Hague, the Netherlands and the Netherlands can be regarded as the fiscal place of business of Shell’.

Article 7(2) of the Brussels Ibis Regulation would also ground jurisdiction on the basis of the principle set in the *Bier v Mines de Potasses d’Alsace* case mentioned above.³⁹

These two cases may reveal the similarities and the differences between the common law and the continental law approach. Whilst, in England and Wales, the courts seem to use the approach of duty of care to affirm jurisdiction and hold parent companies liable for the acts and omissions of entities in the supply chain, in continental law, it is sufficient to base the tortious claim on fault, damage and a causal link between the fault and the resulting damage to the same end. These tests are almost identical to the common law requirements of duty of care,⁴⁰ a breach of that duty, and a causal link between the breach of the duty and the harm that occurred.⁴¹

3.3.4 Rules Ensuring International Harmony of Solutions

The *Municipio de Mariana* case⁴² is important in that it sets a clear precedent against abuse of process. The case was brought by over 200,000 claimants for compensation for the massive human, environmental and economic damage caused by the collapse of the Fundão Dam in South Eastern Brazil in 2015. Abuse of process was mainly affirmed on the grounds that parallel proceedings were pending in Brazil at an advanced stage; a compensation fund for the victims had been established in 2015 and another one was being negotiated and individual claims were being brought by individuals who had not been admitted to such compensation schemes. Although jurisdiction was not retained on grounds of abuse of process,⁴³ the court discusses *obiter* the application of the *lis pendens* rule of the Brussels Ibis Regulation with reference to third States and concludes that, given the actual risk of irreconcilable judgments, it would have applied Article 34 of the Brussels Ibis Regulation in order to stay proceedings.⁴⁴

These rules are inspired by desirability of an international harmony of solutions. Reference is also made to the doctrine of comity: ‘Furthermore, the court must have regard to the strong desirability of achieving comity. As Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 observed: “97 Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required.” In *HRH Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), at para 121, Fraser J commented that “the court has to

³⁷ A translation of the claim is provided at <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_summons.pdf>. See, para 79.

³⁸ *Ibid*, para 81.

³⁹ *Ibid*, para 91: ‘Shell adopts the group policy that results in the environmental damage in the Netherlands. The subsidiaries of Shell also pursue this group policy. On the other hand, Shell’s policy causes damage to people and the environment in the Netherlands (as well)’.

⁴⁰ Lucas Roorda, ‘Wading Through the (Polluted) Mud: the Hague Court of Appeals Rules on Shell in Nigeria’, Rights As Usual, 2 September 2021 <<https://rightsasusual.com/?p=1388>> accessed 10 May 2021: ‘These judgments are of seminal importance for improving accountability of transnationally operating businesses for violations of human and environmental rights. This is because it is the first appeals case in Europe that resulted in a victory on the merits for the victims, but also the first case to hold that a parent company was under a (common law) duty of care with regard to foreign claimants’.

⁴¹ Bergkamp (n 7).

⁴² *Municipio de Mariana v BHP Group plc and BHP Group Ltd* [2020] EWHC 2930 (TCC) <<https://www.bailii.org/ew/cases/EWHC/TCC/2020/2930.html>>.

⁴³ *Ibid*, para 145 (‘It must follow that, having adjudged these claims to amount to an abuse of the process of the court, I have further determined that the only proper procedural consequence of this is that they should be struck out. In reaching this view, I cannot emphasise too strongly that I am not in any way whatsoever seeking to trivialise the hardships suffered by the many victims of the collapse of the dam. But what they need and deserve is a mechanism by which to obtain a fair and just outcome. I am entirely satisfied that this would not be served up at the table of an English Barmecide feast’).

⁴⁴ *Ibid*, para 234.

be very careful before passing qualitative judgments on the legal systems of other sovereign nations."⁴⁵

Moreover, to borrow a metaphor used in another context,⁴⁶ lawyers who complain about the complexity of such rules of private international law are like sailors complaining about the sea.

3.4 The Rules on Applicable Law

The structure of the Rome II Regulation includes a rather rigid general rule coupled with two exceptions and a series of special rules. These establish specific connecting factors for certain grounds of liability in tort in order to pursue precise policy goals.

3.4.1 The General Rule and its Exceptions

The general rule on tort claims in the Rome II Regulation gives exclusive relevance to the *lex loci damni*, ie the law of the place where the damage occurs (Article 4(1)). The rule is overcome either by the existence of a common habitual residence of the parties (Article 4(2)) or by the *clause d'exception* allowing for the application of a more significant law, ie a law which appears to be more closely connected to the damage (Article 4(3)) explicitly referring to the law applicable to a pre-existing contractual (or quasi-contractual) relationship between the parties similarly to Article 5(2); Article 10(4); Article 11(4); Article 12(2)(c). None of these rules are applicable if there is a valid choice of law, even though party autonomy is always subject to the safeguard of overriding mandatory provisions (Article 14).⁴⁷

3.4.2 Environmental Damage

In the case of environmental damage or damage sustained by persons or property as a result of such damage, the applicable law is the law of the country in which the damage occurs unless the person seeking compensation elects to base his/her claim on the law of the country in which the event giving rise to the damage occurred (Article 7).

The Article is based on the principle of *favor laesi*, the value of which appears to be plainly admitted as regards jurisdictional rules, although it has received a questionable restrictive recognition as regards the applicable rules, since we find it only in Article 7 of the Rome II Regulation.⁴⁸ It has been observed that the rule was conceived to discourage polluting activities and draws attention to the high consideration that the EU pays this particular ground of liability. As a result, Article 7 should encourage corporations to adopt higher protective standards and environmentally-friendly behaviour.⁴⁹

It is worth recalling that *favor laesi* allows the injured party to choose the law applicable to compensation when the harmful event and the cause of the damage are located in different countries.

This principle was first accepted – without any limitation depending on the characterisation of the damage – by German case law and was subsequently enshrined in the 1999 reform of Article 40(1) EGBGB (Introductory Act to the Civil Code).⁵⁰ German schol-

⁴⁵ Ibid, para 246. The conclusion follows: 'I am of the view that the claimants' evidence falls far short of establishing, upon sufficiently cogent evidence, that substantial justice cannot be done in Brazil'.

⁴⁶ 'Politicians complaining about the newspapers is like a sailor complaining about the sea', attributed to Winston Churchill.

⁴⁷ This legal framework is consistent with the evolution of American private international law. It is noteworthy that American jurisprudence was encouraged to replace the hard and fast rule of the *lex loci commissi delicti* expressed by the first Restatement by a more flexible norm (a trend that had, besides, the collateral effect of giving impetus to the famous methodological revision of the discipline known as the American conflict of laws revolution). As a consequence, the second Restatement contains a more plastic solution, which allows the judge to weigh the elements of the concrete case and to identify the forum with which the case has the most significant link. (Restatement (Second) Conflict of Laws, 1971, s 145: '(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties [...] (2) Contacts to be taken into account [...] to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centred. These contacts are to be evaluated according to their relative importance with respect to the particular issue.' For examples of implementation, see the 'most significant relationship' rule (*Enron Wind Energy Sys, LLC v Marathon Elec Mfg Corp (In Enron Corp)*, 367 BR 384 (Bankr SDNY 2007); the governmental interests analysis rule (*District of Columbia v Coleman*, 667 A2d 811 (DC 1995), and the comparative impairment approach (*Bernhard v Harrah's Club*, 16 Cal 3d 313 (Cal 1976)).

⁴⁸ Fiona Shevill, C-68/93, ECLI:EU:C:1995:61.

⁴⁹ On Art 7 EU Regulation 864/2007, see Ilaria Pretelli, 'La legge applicabile alle obbligazioni non contrattuali nel Regolamento «Roma II»', in Bonomi (ed) *Diritto internazionale privato e cooperazione giudiziaria in materia civile* (Giappichelli 2009) 449.

⁵⁰ See Peter Hay, 'From Rule-Oriented to Approach' in German Conflicts Law', 47 American Journal of Comparative Law 1999:633.

ars refer to it as the *Günstigkeitsprinzip*.⁵¹

Since then, the principle of *favor laesi* is well known in a comparative law perspective. For instance, Article 62 of the Italian Law on Private International Law (L no 218/1995) had introduced an *optio legis* in favour of the injured party, which allowed that party to ask for the law of the place of the harmful event to be applied if it was more favourable than the law of the place of the wrongful act.

3.4.3 Overriding Mandatory Provisions

The use of Article 16 of the Rome II Regulation in order to make human rights and environmental due diligence legislation enforceable against the parent company has also been suggested. If certain human rights and environment norms were to be characterised as mandatory provisions of the law of the forum, then they would have to be applied in lieu of the law of the country of the subsidiary, which would normally be applicable under the general rule of Article 4(1) of the Rome II Regulation. Despite divergences, public international law offers arguments for recognising the existence of *erga omnes* obligations of States to comply with and guarantee respect for human rights.⁵²

Were such a characterisation to be confirmed, Article 16 would become applicable, with the result that higher standards of protection would be set.

This conclusion could also be prayed in aid in any future human rights/environment due diligence instrument where the following analysis may be useful.

When a case is brought, the court will have to carry out the following appraisal before deciding on the applicable law: first, is the applicable law under the Rome II Regulation adequate in the light of the duty of care (*devoir de vigilance, neminem laedere*) imposed by the human rights/environment due diligence instrument? If it is, the court can apply it. If the applicable law contravenes overriding mandatory provisions of the forum, then the court should apply them by means of Article 16.

Indeed, the European Parliament resolution of 10 March 2021⁵³ '[s]tresses that victims of business-related adverse impacts are often not sufficiently protected by the law of the country where the harm has been caused; considers, in this regard, that relevant provisions of the future directive should be considered overriding mandatory provisions in line with Article 16 of the Rome II Regulation'.⁵⁴

3.4.4 Rules on Safety and Conduct

Article 17 of the Rome II Regulation on rules of safety and conduct allows courts in Europe to take account of local norms on safety and conduct when applying a foreign law. This seems problematic for the following reasons.

The corresponding recital in the preamble makes it clear that rules of safety and conduct 'in the country in which the harmful act was committed' may be taken into account 'even where the non-contractual obligation is governed by the law of another country' and that the expression is to be 'interpreted as referring to all regulations having any relation to safety and con-

⁵¹ Peter Hay, 'Contemporary Approaches to Non-Contractual Obligations in Private International Law', *The European Legal Forum* 2007:137, 139.

The opposite policy is enshrined in the double actionability rule, initially developed by English jurisprudence and once expressed in particularly strict terms in Japanese private international law, in the so-called 'Horei'. The 2006 reform replaced the double actionability rule by a more modern reference to the *lex loci damni*, albeit maintaining a special exception of public policy in matters of tort. See Yuko Nishitani, 'Die Reform des internationalen Privatrechts in Japan', *IPRax* 2007:552. See also Art 117 of the Model Law of Private International Law of the People's Republic of China, sixth version, 2000 presented by Hay. A homeward trend is also visible in legislation allowing for the application of the *lex fori*, as in Art 132 of the Swiss Law on Private International Law, which allows a choice of law in favour of the law of the forum.

⁵² See the Order of the Inter-American Court of Human Rights of 6 March 2003 in the case of the *Communities of the Jiguamiandó and the Curbaradó*, at para 11: 'in order to guarantee effectively the rights enshrined in the American Convention, the State Party has the obligation, erga omnes, to protect all persons subject to its jurisdiction. In the Court's opinion, this means that the said general obligation is imperative not only with regard to the State authorities, but also in relation to the acts of individual third parties, even irregular armed groups of any kind'. See also para 3 of the same decision: 'This is, in my view, a case which clearly requires the recognition of the effects of the American Convention vis-à-vis third parties (the *Drittwirkung*), without which the conventional obligations of protection would be reduced to little more than dead letter'. See also the Order for Provisional Measures of the same Court of 24 November 2000 in the *Peace Community of San José de Apartadó Case*, para 19, and Antônio Augusto Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (Editorial Jurídica de Chile, 2001), ch V, 183–265, suggesting that there is a convergence '— at normative, hermeneutic and operative levels, — between the three branches of protection of the rights of the human person, namely, the International Law of Human Rights, International Humanitarian Law and the International Law of Refugees prompting to the recognition of erga omnes obligations'.

⁵³ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Annex <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title1>.

⁵⁴ *Ibid*, para 29.

duct, including, for example, road safety rules in the case of an accident’.

According to the explanatory memorandum of the Commission’s proposal for the Rome II Regulation,⁵⁵ where the law that is designated is not the law of the country in which the event giving rise to the damage occurred, the relevant article of the proposed regulation requires the court to ‘take account of the rules of safety and conduct which were in force at the place and time of the relevant event’. It goes on to state that this article is based on the corresponding articles of the Hague Conventions on traffic accidents (Article 7) and product liability (Article 9). There are equivalent principles in the conflict systems of virtually all the Member States, either in express statutory provisions or in decided cases.

The explanatory memorandum makes it clear that the rule is based on the fact that the perpetrator must abide by the rules of safety and conduct *in force in the country in which he operates*, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability. The explanatory memorandum further states that:

*[t]aking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author’s good or bad faith for the purposes of the measure of damages.*⁵⁶

Consequently, the rule was conceived and enacted by reference to road traffic accidents and product liability and was, in addition, conceived to allow local law to be taken into account when the applicable law is that of a foreign country. In a nutshell, the rule is based on the presumption of equivalent safeguards⁵⁷ and on the principle that the local law is better placed to set the standard of protection required locally.

As far as human rights due diligence is concerned, the rule is particularly inappropriate in that it could serve to exempt from liability companies that comply with low local safety standards and thereby encourage social dumping. It would therefore need to be amended accordingly.

3.5 Is There a Need to Alter the EU’s Rules of Private International Law and/or Conflicts of Law?

As a preliminary observation, it is worth recalling that the rules of private international law have been the subject of negotiation between the Member States and have stood the test of time, fortified by the accretion of case law. In this respect, any further change should be motivated by stringent necessity.

It must further be borne in mind that, in view of Article 3 of the Protocol on the position of Ireland, annexed to the Treaty on European Union (TEU)⁵⁸ and Articles 1 and 2 of Protocol No 22 on the position of Denmark⁵⁹ annexed to the TEU and to the TFEU, the use of Articles 67 and 81 TFEU as a legal basis for any amendments to the EU conflict-of-law and private international law regulations could be problematic in conjunction with another or other articles of the TFEU.

It seems to us that the objectives of a putative human rights and environmental due diligence law of deterring corporations from acting in breach of their corporate social responsibility obligations outside the EU through a subsidiary and of giving victims of such infringements access to a remedy can be achieved without necessarily amending the existing EU legislation on private international law and conflicts of law.

Since interesting ideas have been put forward by academics for the use of Article 4 of the Rome II Regulation, for declaring in the human rights and environmental due diligence law that the human rights and environment norms referred to in it constitute overriding mandatory provisions of the forum or for using the provisions on rules and safety and conduct

⁵⁵ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), COM(2003) 427 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52003PC0427>>. Note that the relevant provision was Art 13 of the Commission’s proposal, which was adopted as Art 17 of the Regulation.

⁵⁶ Ibid, emphasis added.

⁵⁷ The implicit presumption is that, despite the different content of the rules on safety and conduct, the local law guarantees a comparable protection to citizens who comply with those rules, as is guaranteed by the rules of the forum.

⁵⁸ Consolidated version of the Treaty on European Union [2012] OJ C326/13.

⁵⁹ Consolidated version of the Treaty on European Union, Protocol (No 22) on the position of Denmark [2012] OJ C326/299.

in order to apply local and Member State rules cumulatively, it is possible that courts will embrace these solutions in order to address the actual problems of access to remedy in the near future. It may be worth waiting to see whether the promising solutions contemplated by UK and Dutch courts will be confirmed before undertaking additional legislative reforms.

3.5.1 Desirability of Adding Rules on *Forum Necessitatis*⁶⁰

Another alternative, which is non-existent in the present text of the Brussels Ibis Regulation, would be to introduce a rule on *forum necessitatis* on the lines of the rules provided for in the Successions Regulation⁶¹ and the Regulation on Maintenance Obligations.⁶²

Many jurisdictions have coded rules allowing their *fora* to judge human rights violations on the basis of *necessitas*. However, the impact of such rules has been always too slight to argue for a revision of the Brussels Ibis Regulation. Even when such articles have actually been referred to in order to sue a company for human rights violations abroad, in most cases they have not resulted in the victims obtaining fair compensation.⁶³

The European Commission proposed the addition of such a forum when it reviewed the main jurisdictional rules of Brussels I in 2012. However, the European Parliament rejected the proposal, not because it did not believe in the sound administration of justice for business and human rights and other cases, but because:

the more the EU expands its jurisdictional rules to cases that have less of an immediate link with the EU, the more, of course, it is likely

to be confronted with existing proceedings elsewhere and with policy concerns, about the EU interfering in issues which are not necessarily of their business. Lean and mean jurisdictional rules assist with speedy justice. Protracted lines of enquiry over vague or sometimes even redundant civil procedure provisions, do not.⁶⁴

Other discussants of *forum necessitatis* admit that whilst 'it may provide access to justice for victims of human rights abuses, it also creates the risk of forum shopping and potentially increases uncertainty for corporate defendants. Adopting forum of necessity thus requires striking a delicate balance between the interests of plaintiffs, defendants and the States asserting necessity jurisdiction.'⁶⁵ They go on to point out that, even though the Netherlands has a forum of necessity in its own legal system, the Commission's proposal for a provision on *forum necessitatis* in the proposal for a recast Brussels I Regulation⁶⁶ constituted a 'bridge too far' for the Member States without full harmonisation of the rules on jurisdiction of private international law.

Indeed, the joint Dutch advisory committees on Private International Law and Civil Law advised that full harmonisation of jurisdiction rules with respect to defendants from third States was not desirable on the grounds that the EU should leave full harmonisation of the private international law rules on jurisdiction to the Hague Conference and that the Brussels I regime was distributive rather than attributive in nature. In other words,

Brussels I was not meant to create new

⁶⁰ Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, Explanatory Memorandum, para 3.1.2 and Art 26.

⁶¹ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

⁶² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

⁶³ See for instance Anvil Mining Ltd, 2011 QCCS 1966, which did not give effect to Art 3136 of the Quebec Civil Code on *forum necessitatis*.

⁶⁴ Geert van Calster, 'Change for Change's Sake? A Succinct Primer on the European Parliament's Proposal to Amend Brussels Ia with a View to Boosting Corporate Due Diligence', NOVA Blog, 14 July 2021 <<https://novabhre.novalaw.unl.pt/european-parliament-proposal-to-amend-boosting-corporate-due-diligence/>>.

⁶⁵ Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe: the Promises Held by Forum of Necessity-based Jurisdiction', 80 The Rabel Journal of Comparative and International Private Law 2016:784, 784.

⁶⁶ COM(2010)748 final (n 60), Art 26 ('Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised').

grounds for jurisdiction, but “merely” to create a practical division of jurisdictional powers between the Member States – a roadmap for civil litigants, so to speak. The fundament beneath that regime is the Union principle of mutual trust in other Member States’ legal systems, a principle that does not apply for third States. Consequently, there would be no guarantee that third State courts will assume jurisdiction where an EU State cannot; nor would an EU Member State’s assumption of jurisdiction on the basis of the revised Brussels I regime guarantee recognition and enforcement by the courts in the third State concerned. Thus, the committees concluded, the closed nature of the Brussels I regime does not lend itself to extension to disputes involving third State defendants.⁶⁷

For its part, the Commission had argued that:

[t]he harmonisation of subsidiary jurisdiction ensures that citizens and companies have equal access to a court in the Union and that there is a level playing field for companies in the internal market in this respect. The harmonised rules compensate the removal of the existing national rules. ... [T]he forum of necessity guarantees the right to a fair trial of EU claimants, which is of particular relevance for EU companies investing in countries with immature legal systems.⁶⁸

This justification does not square with the reasons usually put forward for a forum of necessity for human rights due diligence cases.

More recently, in point 36 of Recommendation CM/REC(2016)3 of 2 March 2016,⁶⁹ the Committee of Ministers of the Council of Europe recommended that, where business enterprises are not domiciled within their jurisdiction, Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-

related human rights abuses against such a business enterprise if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the Member State concerned.

From the wording of this passage, the preamble and the various resolutions adopted by the Parliamentary Assembly, it would appear that this is based on the idea that Article 6(1) of the European Convention on Human Rights makes it necessary to adopt a *forum necessitatis*, which is a rather bold reading of the Convention and the case law of the European Court of Human Rights.

Roorda and Ryngaert⁷⁰ conclude that a middle course may have to be steered between doing justice to the moral imperative to provide a forum to those who need it most, and the more mundane concern over the effectiveness of necessity jurisdiction, also in terms of nudging more connected fora to assume enhanced responsibility for corporate human rights litigation.

It is noted that the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability abandoned the proposal for a *forum necessitatis* contained in paragraph 29 of the report of the Committee on Legal Affairs.⁷¹

On balance, we conclude that there is little to be gained by including a *forum necessitatis* in EU legislation, even it were narrowly worded to cover only human rights and environmental due diligence cases. *Forum necessitatis* does not seem to be used much in the EU even though at least ten Member States make provision in legislation or case law for such jurisdiction.⁷² Whether this situation would change were Council of Europe Member States to follow the recommendation of its Committee of Ministers is uncertain.

⁶⁷ Roorda and Ryngaert (n 65) 21, 22.

⁶⁸ COM(2010) 748, Explanatory Memorandum (n 60) para 3.1.2.

⁶⁹ Council of Europe, ‘Human Rights and business – Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States (2016)’, 2016, <<https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>>.

⁷⁰ Roorda and Ryngaert (n 65) 27–28.

⁷¹ European Parliament (n 53).

⁷² See Nuyts (n 18).

3.5.2 Desirability of Adding a Uniform Criterion for Companies Operating in the Internal Market

As observed above, the European Parliament is proposing, for specific sectors, criteria of jurisdiction *lato sensu* inspired by American conflict of laws theories and aimed at apprehending companies based outside the EU but using 'the internal market'.⁷³ Without entering into the merits of such criteria, it is important to draw the EU legislator's attention to the need to avoid the use of multiple criteria, all of which express the same policy goals. Reference is made to the EU Regulation 2017/821 criterion targeting 'Union importers'⁷⁴ as compared with other instruments referring to companies 'operating in the internal market', 'directing activities in the internal market' and the like.

In this respect, a choice of uniform terminology would certainly favour legal certainty, in the interest of the internal market and, more in general, of justice.

3.6 Possible Changes to the Rules on Applicable Law

It has been pointed out that since, as a general rule, the applicable law will be the law of the State in which the damage occurred and courts should apply that law to determine not only liability, but also other issues arising in connection with the proceedings, such as time limitations, immunity and remedy, this situation creates certain obstacles for victims seeking to pursue human rights claims against business enterprises, particularly where the law of the host State either does not recognise or limits vicarious and/or secondary liability (including parent company liability), provides for a higher burden of proof to establish a claim in tort or provides stricter immunities than does the forum State's law.⁷⁵

It ought to be observed at the outset that the third country's law will not necessarily be less strict than

that of the country in which the principal company is based. However, from experience, it is more difficult to assess, on the basis of the local law, abuses of labour standards, enforced removals from land and violence committed by private security agents.

It is therefore considered desirable to clarify the extent to which the exceptions in the Rome II Regulation may be used to address these problems and depart from the law of the place of damage by cumulatively applying the law of a Member State or applying the latter in lieu of the former.⁷⁶

3.6.1 Extending *Favor Laesi* by Means of the Exception Clause of Article 4(3) of the Rome II Regulation

Recently, the idea of identifying, as a more significant connecting factor for torts impairing human rights, the law of the country in which the conduct (or the omission) that triggered the damage can be situated has been put forward.⁷⁷ This alternative to the *lex loci damni* has the precise aim of granting human rights protection to victims of multinational businesses who would otherwise be left uncompensated. According to the authors, if the harmful event takes place in State B, the law of State A could be applied whenever it can be proved that the omissive conduct of the parent company which is domiciled in State A gave rise to the damage.

The proposed solution is consistent with the wording of the Rome II Regulation. It would suffice to demonstrate that the *lex loci damni* provides for a less significant connecting factor when compared to the law of the place where the conduct (active or passive) causing the injury occurred. This would lead to the application of Article 4(3) of the Rome II Regulation, thereby excluding the general rule set out in Article 4(1) providing for the application of the law of the country in which the damage occurred.

The solution would need to be confirmed by judicial practice or by a Commission interpretative communi-

⁷³ European Parliament (n 53).

⁷⁴ See Regulation 2017/821 (n 8) Art 2 (l).

⁷⁵ Filip Gregor, 'The EU's Business: Recommended Actions for the EU and its Member States to Ensure Access to Judicial Remedy for Business-related Human Rights Impacts', 2014, <http://www.bhrinlaw.org/documents/eu_business.pdf>.

⁷⁶ Ibid.

⁷⁷ Anne Peters, Sabine Gless, Chris Thomale and Marc-Philippe Weller, 'Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 06-202026, 2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561482>.

cation,⁷⁸ if not by adding a recital in the preamble or modifying the wording of Article 4 of the Rome II Regulation. Recently, the importance of the exception clause in the operation of the Regulation has been acknowledged by the English High Court, which used Article 4(3) of the Rome II Regulation to apply French law in a case where a rigid interpretation of Article 4 would have led to the application of English law.⁷⁹

The solution proposed consists in extending the rule adopted by Article 7 for environmental damage to human rights violations not necessarily connected with polluting activities resulting in environmental damage.⁸⁰

Both interpretations of the place most closely connected to a damage have been plainly admitted long before the Brussels I/Rome II Regulations ever since the *Mines de Potasse d'Alsace* case referred to earlier concerning pollution of the river Rhine.⁸¹ Given the tendency of the drafters of the European Regulations to codify CJEU case law, this circumstance is likely to explain why environmental damage is the only kind of damage for which the Rome II Regulation recognises the inherent value of the principle of *favor laesi* in the pursuit of justice.

In this respect, it is worth reflecting upon the consequences of the disapplication of previously applicable national provisions allowing the victim to opt for the better law (between the law of the behaviour and that of the event) and the hard and fast rule of Article 4(1) of the Rome II Regulation. Since the aforementioned national rules were more favourable to victims of all kinds of human rights abuses not necessarily linked to environmental damage, the Rome II Regulation has substantially decreased the practical opportunities for reacting promptly to violations of human rights. It is thus desirable to recover a role

for the principle of *favor laesi* in the case of human rights violations by means of a value-oriented interpretation of the exception clause enshrined in Article 4(3) whenever it appears to be in the interests of the victims.

3.6.2 Scope of the Law, Efficiency of Financial Compensation Versus Other Forms of Redress

According to the Rome II Regulation, the same law decides both on the existence and the *quantum* of the compensation for the injury occurred. Article 15(c) of the Rome II Regulation states that the law applicable to the damage includes 'the existence, the nature and the assessment of damage or remedy claimed'.⁸²

In most cases, remedies for torts, including human rights torts, entitle the victim to financial compensation from the tortfeasor. However, in cases of environmental torts and human rights violations, ordering the tortfeasor to reinstate the *status quo ante* may constitute a more efficient, fairer compensation.

In this respect, a possible evolution of the system could include the possibility of considering substantive rules introducing a specific duty of care and ordering the tortfeasor to compensate the victim by reinstating the *status quo ante*.

⁷⁸ On the lines of Commission interpretative communication (2000/C 43/03) on Freedom to provide services and the general good in the insurance sector, OJ [2000] C 43.

⁷⁹ *Owen v Galgey* [2020] EHC 3546 (QB): the case concerned a contract between English residents and citizens, the implementation of which concerned a property situated in France. Despite the clarity of Article 4(2), it was considered that its application would result in an unjust result: 'To my mind the tort/delict in this case is much more closely connected to [the place of the] property in France and [...] the French law contract [...]'. This point, taken in combination with the other points to which I have referred, in my view clearly outweighs the existence of [the supposed English contract between the Claimant and First and Second Defendants] ... I have taken into account the nationality and habitual place of residence of the Claimant and the First and Second Defendants, these do not seem to me to alter the conclusion to which I have come. I have also taken into account the fact that the consequences of the accident have to a significant extent been suffered by the Claimant whilst he was in England, but in my view the other factors to which I have referred clearly outweigh this consideration'.

⁸⁰ See, in the US, *Ling v Jan's Liquors*, 237 Kan 629 (Kan 1985), 26.

⁸¹ *Handelskwekerij GJ Bier v Mines de Potasse d'Alsace*, 21/76, ECLI:EU:C:1976:166.

⁸² Emphasis added. Differently, in the US, the quantification of damages seems to be a merely procedural issue to be addressed following the *lex fori*. See Patrick J Borchers, 'Punitive Damages, Forum Shopping, and the Conflict of Laws', 70 Louisiana Law Review 2010 <<https://digitalcommons.law.lsu.edu/lalrev/vol70/iss2/7>>.

3.7 The Case for a Statutory Duty of Care

3.7.1 Current Legislation Introducing a Duty of Care ex Lege

There is an increasing amount of national legislation in Europe which deals with certain aspects of human rights due diligence,⁸³ for instance, the Modern Slavery Act⁸⁴ in the UK, the *Wet zorgplicht kinderarbeid* (Child Labour Due Diligence Act)⁸⁵ in the Netherlands⁸⁶ and the *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* in France.⁸⁷ In addition, on 11 June 2021, the Bundestag enacted the *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* (Law on Corporate Due Diligence in Supply Chains, also known as the Supply Chain Law).⁸⁸ The Law applies to companies which have their central administration, headquarters or registered office in Germany, provided they have more than 3,000 employees, and to foreign companies which have a branch office in Germany and, in general, at least 3,000 employees in that country. As of 2024, the scope will be widened in order also to cover companies with a lower number of employees. The Federal Minister of Labour and Social Affairs stated that the Law will 'create legal clarity for business

and strengthen companies' compliance with human rights'.⁸⁹ The Law provides, however, that a violation of the obligations arising under it will not give rise to civil law liability, although, any liability arising independently from it remains unaffected. The new statutory due diligence obligations created for the purpose of improving the human rights situation in international supply chains are to be enforced through administrative proceedings and by means of administrative penalties. In the event of serious violations, companies can also be excluded from public procurement for up to three years. The Law does, however, allow domestic trade unions and non-governmental organisations to sue in their own name on another's behalf, thereby allowing them to take legal action if a violation of an 'eminently important legal position' is to be asserted in court.⁹⁰

The most instructive of these pieces of legislation for our purposes is the French law on the *devoir de vigilance*. Under this Law, undertakings employing more than certain specified numbers of persons (including subsidiaries abroad) have to draw up and implement a vigilance plan. The plan is to include reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of persons and the envi-

⁸³ See Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, 'Study on Due Diligence through the Supply Chain – Final Report', European Commission DG Justice and Consumers, February 2020, 39 <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>; Michael G Faure, 'Environmental Liability of Companies', PE 651.698, May 2020, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU\(2020\)651698_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU(2020)651698_EN.pdf)>; Markus Krajewski and Claire Methven O'Brien, 'Human Rights Due Diligence Legislation - Options for the EU', PE 603.495, June 2020, <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/DROI/DV/2020/06-22/DGEXPObriefingHumanRightsDueDiligence_EN.pdf>.

⁸⁴ UK Modern Slavery Act 2015.

⁸⁵ *Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen* <<https://zoek.officielebekendmakingen.nl/stb-2019-401.html>>. A useful summary in English may be found here: Harm Kerstholt and NautaDutilh, 'Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies', Ropes & Gray, 5 June 2019 <<https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>>.

⁸⁶ Both the Dutch and the British laws are criticised, see: Julianne Hughes-Jennett, 'Dutch Child Labour Due Diligence Law', Hogan Lovells 2019 <<https://www.lexology.com/library/detail.aspx?g=7ea77664-d4a4-4c0b-b1db-46c40ba630f3>>; Jonathan Ford, 'Britain's Necessary but Insufficient Battle on Modern Slavery', *Financial Times*, 17 January 2021; Sarah O'Connor, 'It is not up to consumers to police modern slavery', *Financial Times*, 2 March 2021; Jonathan Eley, 'MPs demand stronger laws to combat modern slavery', *Financial Times*, 17 March 2021.

⁸⁷ *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

⁸⁸ *Sorgfaltspflichtengesetz (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten)*. For a commentary in English, see Alexander Kiefner, Christian M Theissen, Norbert Wimmer, Anna Burghardt-Kaufmann, Julia Sitter, Adele Juliane Kirschner and Sabine Kueper, 'The German Parliament Passed the "Act on Corporate Due Diligence in Supply Chains" on 11 June 2021', White & Case 21 June 2021 <<https://www.whitecase.com/publications/alert/german-parliament-passed-act-corporate-due-diligence-supply-chains-11-june-2021>>.

⁸⁹ Hubertus Heil, Federal Minister of Labour and Social Affairs, 'Sorgfaltspflichtengesetz vom Bundeskabinett beschlossen', 3 March 2021: 'The Supply Chain Law ... represents a breakthrough in strengthening human rights. We are clearly regulating by law what responsibility companies bear for the conditions also at their suppliers. This is about human rights and decent work. This sends a clear signal to all those companies that already check their supply chains and ensure decent work. We are backing them. Because fairness must no longer be a competitive disadvantage. But it is also a clear signal to those companies that have so far weighed human rights against their economic interests. That is now a thing of the past. Above all, it is a success for the people who work under undignified, dangerous and sometimes deadly conditions around the world. The Supply Chain Law will give them more rights.' <<https://www.bmas.de/DE/Service/Presse/Pressemitteilungen/2021/bundeskabinett-verabschiedet-sorgfaltspflichtengesetz.html>>.

⁹⁰ Kiefner et al (n 88).

ronment resulting from the company's activities and those of the companies it controls, directly or indirectly, as well as from the activities of subcontractors or suppliers with which it has an established business relationship, when those activities are related to this relationship.⁹¹

Not only may any person having an interest to act apply to the court for an injunction to enforce the company's obligations under the vigilance plan,⁹² but also the company itself may incur civil liability and be obliged to pay damages.⁹³

In view of this proliferation of legislation, it is considered that there are good grounds for adopting EU legislation (preferably a regulation) on the basis of Article 114 of the TFEU establishing a duty of care/*devoir de vigilance* on the part of parent companies established in the EU in respect of their subsidiaries and business partners in order to protect the internal market. The potential content of the duty of care emerges from this report. The fact that Member States have adopted or are contemplating adopting different legislation on supply-chain liability whilst others have no such legislation has implications for the internal market such as to justify harmonisation under Article 114 of the TFEU.

In the case of a multinational corporation based in a Member State, the duty of care/*devoir de vigilance* is conceived as a positive, judiciable obligation to comply with, impose, monitor and enforce the relevant standards embodied in the duty of care/*devoir de vigilance* in all the geographical areas of operation of the multinational.

Litigation in the forum of the parent company in the EU, relying primarily on the law of that Member State, would then be possible without having to strain the

rules of private international law by recourse to overriding mandatory provisions, on the basis of a readily understandable and robust solution. It goes without saying that the existence of an EU instrument laying down a statutory duty of care would not preclude litigation relying on the rules of private international law.

The French law on the duty of vigilance imposes a duty on companies with respect to their subsidiaries and business relationships, and provides affected people with a possibility to enforce the duty by means of the civil law. Italy has set an example in Article 4.1 of Legislative Decree No 231/2001,⁹⁴ under which parent companies can be made answerable in Italy for criminal offences committed by a subsidiary abroad but not prosecuted, and in Article 2497 of the Italian Civil Code, under which parent companies have a duty of diligence (*di corretta gestione societaria e imprenditoriale*) in respect of their subsidiaries. In case of non-compliance, the shareholders may seek compensation from the parent company.

An EU instrument imposing such a duty would have the advantage of imposing the duty on the multinational company located in a Member State, therefore creating a potential cause of action there, thus founding jurisdiction. The advantages are plain: for instance, an application for interim relief would be readily able to be brought in the place where the registered office of the multinational is located, thus overcoming the barriers to access to remedy caused by insufficient legal protection and weak governance in the host country.

A further improvement would consist in wording the preamble of the instrument in such a way as to make it clear that victims of a breach of the duty of care have *locus standi* to bring proceedings in the home coun-

⁹¹ 'Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle au sens du II de l'article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation.' (Loi n° 2017-399 (n 87) Art 1(I) para 3).

⁹² Ibid, Art 1(II).

⁹³ Ibid, Art 2 'Dans les conditions prévues aux articles 1240 et 1241 du code civil, le manquement aux obligations définies à l'article L. 225-102-4 du présent code engage la responsabilité de son auteur et l'oblige à réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter' [Dispositions déclarées non conformes à la Constitution par la décision du Conseil constitutionnel n° 2017-750 DC du 23 mars 2017]. 'L'action en responsabilité est introduite devant la juridiction compétente par toute personne justifiant d'un intérêt à agir à cette fin'.

⁹⁴ Art. 4. Reati commessi all'estero

1. Nei casi e alle condizioni previsti dagli articoli 7, 8, 9 e 10 del codice penale, gli enti aventi nel territorio dello Stato la sede principale rispondono anche in relazione ai reati commessi all'estero, purché nei loro confronti non proceda lo Stato del luogo in cui è stato commesso il fatto.

2. Nei casi in cui la legge prevede che il colpevole sia punito a richiesta del Ministro della giustizia, si procede contro l'ente solo se la richiesta è formulata anche nei confronti di quest'ultimo'.

try of the company on which the duty is imposed.

3.7.2 Use of Contract to Oblige the Principal Company to Enforce Due Diligence in the Supply Chain and Enable it to be Held Responsible for Non-Compliance

This section was conceived in response to a request that compliance with due diligence should be enforceable in respect of business partners of the principal company upstream in the supply chain. It assumes that the necessary legislative provisions to implement this proposal form part of a legislative measure (a directive or a regulation) designed to introduce a duty of care/*devoir de vigilance* at EU level.

We suggest, as a more efficient tool, as compared to the obligation of reporting, a legislative measure providing that the principal company has specific duties of care vis-à-vis its subsidiaries and vis-à-vis business relationships with third parties with regard to business integrity, environmental protection, and health and safety of workers and of indigenous populations,⁹⁵ in alignment with the scope of the corporate responsibility to respect human rights and conduct due diligence outlined in the UNGPs.⁹⁶

In order to make such duties and responsibilities effective, access to justice is of the essence. This means that the courts of the principal company's seat should have jurisdiction over any litigation in connection with possible violations of such duties of care/*devoirs de vigilance*.

First, the proposal is designed to create by contract

a duty of care on the part of the principal company, which also covers other parties in the supply chain and can be enforced against it in the courts having jurisdiction over it. It is not intended to create an exception to the doctrine of privity of contract.⁹⁷ What it intends to do is create a contractually enforceable duty of care/*devoir de vigilance* covering specific issues.⁹⁸ Thereby, those who have suffered human rights abuses may bring an action in the courts having territorial jurisdiction over the principal company against that company, jointly with its subsidiaries and suppliers, on the basis of the applicable law, namely the law of the court having territorial jurisdiction.⁹⁹ The contractual element has several advantages. First, victims of human rights abuses could sue a multinational company 'at its home', not only on the basis of a statutory duty of care/*devoir de vigilance* granting an action for non-contractual (tortious) liability but also on the basis of the breach of the contractual clause. Secondly, breach of contract may offer an important element in the assessment of liability. Thirdly, it would afford a *norma agendi* explicating by means of non-exhaustive examples human rights due diligence requirements. Finally, it would cover the parties in the supply chain and make the clause more effectively enforceable. The purpose of this is to ensure effective access to justice for victims of violations of human rights and of damage to the environment.

As far as the duty of care/*devoir de vigilance* itself is concerned, it seems to us that if the English courts, for instance, can apply case law imposing a duty of care

⁹⁵ See, *ex multis*, The Fundamental Conventions of the International Labor Organization; The United Nations Universal Declaration of Human Rights; the UK Bribery Act 2010; The UN Global Compact Principles <www.unglobalcompact.org>; the UN Convention on Biological Diversity <<https://www.cbd.int/>>.

⁹⁶ UNGPs, Commentary to GP 13 ('[B]usiness relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services').

⁹⁷ The authors of this chapter have been confronted with the idea that privity of contract could represent an obstacle to the contractual clause. Despite being off topic, the remark needed to be addressed and has required a specific analysis.

⁹⁸ These should include: 1) Working conditions ensuring that employment is freely chosen and the dignity, health and safety of workers is respected in alignment with all ILO's standards and the prohibition of child labour; 2) An appropriate environmental impact assessment and the adequate means for the prevention and minimisation of the consequences of accidents. See also the Ethical Trading Initiative (ETI) Base Code <<http://www.ethicaltrade.org/>>.

⁹⁹ See Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (2013) <<http://www.bhrinlaw.org/the-third-pillar-final1.pdf>> ('There are multiple obstacles to access to judicial remedy in the transnational context, which combine to make access to justice for victims exceptionally difficult and frequently impossible. The complex corporate structures and value chains that characterize the organization of modern business are at the heart of these obstacles; practically speaking, victims have to deal with the combined effect of the twin principles of separate legal personality and limited liability, limitations on extraterritorial jurisdiction, and evidentiary burdens. Establishing that a business enterprise is liable for adverse human rights impacts caused by deficiencies in its group's operations is a complex, time-consuming, and costly exercise invariably undertaken in the context of litigation. At the same time, the local multinational enterprise's group entity or business partner often remains out of reach of the home State court's jurisdiction, and may not be held accountable in the host State due both to the weak capacities of many judicial systems across the world and, sometimes, to the protection of foreign investors' rights. Legislation imposing minimum due diligence standards on the controlling entities within business enterprises, for example on their headquarters companies, would clarify their legal responsibility and significantly reduce the need for costly litigation').

in this situation, *a fortiori* the legislator may create a statutory duty of care/*devoir de vigilance*.

This solution has the advantage that victims would not be faced with the expense and pitfalls of proceedings involving elements of private international law and conflicts of laws, in that proceedings are to be brought in the courts of the principal company on the basis of the law of the country in which the principal company is based.

This is reinforced by a provision stating that the contract should provide that the principal undertakes to monitor, supervise, and guarantee compliance with human rights and environmental due diligence by the party in the supply chain to which the duty of care has been extended by contract. As a result, the principal company is placed under a positive duty and cannot claim that it has carried out due diligence by merely ensuring that its business connections sign up to the relevant requirements. Indeed, the provision goes on to state that the principal company should take immediate positive action in the event of an infringement, including the imposition of penalties or suspension or, in the last resort, termination of the contract, depending on the gravity of the infringement. In order to avoid abuse, we suggest that the principal company should have to make an application to the competent court in the EU before it can terminate the contract.

If the principal company fails to give effect to these provisions, it would expose itself to administrative penalties.

This solution could readily be combined with

measures to relieve the evidential burden on victims.

This solution may be better understood bearing in mind that many companies wish to act properly in their dealings with suppliers and contractors abroad. Whilst we are not privy to what the American Bar Association, for instance, is doing in this area, at least one law firm is proposing that companies would be advised to conclude such contracts with companies in the supply chain.¹⁰⁰

It goes without saying that such contracts would be likely to be much more detailed than the sort of model rules that are set out below. This is not an argument against enacting such legislation and it is pointed out that the model rules would need to be further elaborated and specified to take account of the public consultations and impact assessment which always precede the presentation of proposals for legislation in the EU.

Lastly, the adoption of provisions such as those proposed here would not preclude victims from preferring any other proceedings open to them, in particular but not only, in their home country.

3.7.3 The Proposed Model Rules

‘1. In the event that the company has an intermediary, supplier or contractor¹⁰¹ in a third country, it shall ensure that it has a formal contract with such intermediary, supplier or contractor which contains a clause incorporating into the contract the due diligence provisions set out in Article X.

2. The contract shall further stipulate that the company undertakes to supervise and enforce

¹⁰⁰ Daniel Sharma and Franz D Kaps, ‘Human Rights Due Diligence Legislation in Europe’ (26 March 2021) <<https://www.lexology.com/library/detail.aspx?g=71c05fde-fe25-44cb-971b-ac03e268d567>> (‘Fourth, as part of their annual reporting obligations, companies must conduct a risk analysis of their value chains, verify that the due diligence mechanisms installed concerning their value chains are working and conduct an effective analysis of their preventive grievance mechanisms.

If a company identifies risks within the company’s entire value chain during the required risk analysis, it must take preventive measures; for example, by concluding appropriate agreements with its suppliers in which the suppliers are also required to comply with due diligence requirements relating to human rights, labour and environmental standards.

Good contract design that takes into account the specific features of India and South Asia can significantly reduce the cost of risk analysis and help reduce the need for action as part of the required ongoing screening process. In their supplier agreements, companies should require suppliers to comply with their code of conduct, which must ensure that the obligations under the applicable European supply chain laws are met. These supply contracts must also describe the expected cooperation with the supplier, which is shaped by the European supply chain laws, in a precise and legally binding manner. In addition, it is necessary to contractually secure audit rights from suppliers with regard to the obligations set out in the European supply chain legislation and to contractually embed an obligation on the part of the suppliers to prove that they have provided continuous training on the subject of human rights and environmental protection. Regular random checks of the aforementioned requirements, also on site, are likewise part of effective supplier management – preferably by independent third parties who are familiar with the characteristics in India and South Asia. Furthermore, suppliers can be required to ensure that the compliance standards described above are also observed in the downstream value chains’).

¹⁰¹ Manifestly, the terms ‘intermediary, supplier and contractor’ will have to be defined in the legislation. It would be hard to imagine a duty of care encompassing the whole of the supply chain when it extends to large numbers of small suppliers, eg of fungibles, such as thread for use in garment manufacture.

compliance by the intermediary, supplier or contractor, as the case may be, with due diligence provisions and take immediate positive action in the event of an infringement, by applying for leave to impose penalties or suspend or, in the last resort, terminate the contract, depending on the gravity of the infringement, to the judge having jurisdiction over human rights due diligence, with the compulsory intervention of the victims whose rights have purportedly been infringed.

3. In addition to the tortious and contractual liability resulting from the infringement of human rights, failure to comply with the provisions of this Article by the company shall give rise to administrative penalties which are effective, proportionate, and dissuasive.

4. A failure on the part of the company to discharge its obligations under this Article shall constitute a breach of the duty of care/diligence laid down in Article X which may found an action for non-contractual liability by persons who have suffered loss or injury as a result of the breach.

5. An action for non-contractual liability may be brought before the court seised for breach of contract, provided that the rules on civil procedure of the forum may be adapted in order to allow a joinder of actions.

6. The contract referred to in this Article and the ensuing duty of care shall be governed by the law of the Member State in which the company has its seat, and the courts of that Member State shall have sole jurisdiction in the event of any dispute.'

3.8 Recommendations

- Member States should be encouraged to ensure that jurisdiction may be retained as regards subsidiaries and entities in the value chain of companies having their seat in their legal order. This would allow the exercise of EU jurisdiction as a result of the combination of the Brussels Ibis general rule (the court where the defendant is domiciled has jurisdiction to hear the case), joinder of actions and national rules.
- The Commission should take steps to ensure that the Rome II Regulation is understood by the courts as allowing the application of the *lex fori*'s human rights and environmental due diligence legislation in cases concerning damage occurring outside of the forum State

by referring to the law of the place:

- where the decision causing the environmental damage and the human rights violations was taken (on the basis of Article 7 of the Rome II Regulation);
- where the decision causing the human rights violations independent of related environmental damage was taken (on the basis of Article 4(3) of the Rome II Regulation);

and by excluding an exemption of liability of the EU-based company on the basis of Article 17 of the Rome II Regulation.

- The EU legislator and the courts should have due regard to the development of case law in the area of supply chain liability, particularly in the UK and the Netherlands.
- A future EU instrument should envisage a statutory duty of care for EU companies at the top of the value chain, allowing victims of human rights and environmental violations committed by subsidiary companies and business relations in third countries to sue for breaches of that duty of care in courts having jurisdiction in the EU.
- The same instrument should also require the duty of care to be extended by contract by the principal company to subsidiaries and other parties in the supply chain. To this end, the regulation should include model contract clauses on the lines proposed in the body of this chapter.
- To ensure human rights and environmental due diligence, the model clause should include a uniform additional criterion of jurisdiction to target companies based outside the EU. Such criterion should be pondered and decided once for all, in order to avoid confusion between the clear-cut scope of EU private international law regulations (including companies based in the EU), and the existing and future sectorial legislation. Existing legislation often includes, within its scope, companies based outside the EU and apprehended with reference to the most diverse criteria such as 'operating,

directing activities or having obtained an authorisation to distribute products in the internal market'. The Commission should not miss the opportunity, in defining the scope of the regulation, to adopt uniform terminology in this respect, especially if, in the fullness of time, it should contemplate introducing an additional rule of private international law.

4 Additional Pathways to Effective Redress*

In its 2017 Opinion requested by the Council of the European Union (EU), the European Union Agency for Fundamental Rights (FRA) recommended that Member States should consider strengthening the role of non-judicial mechanisms in the business and human rights field.¹ In follow-up research undertaken on the same theme in 2019 and 2020, FRA reiterated those recommendations and specifically advised strengthening Ombuds institutions and those National Human Rights Institutions (NHRIs) already functioning as Ombuds.² It pointed out that non-judicial mechanisms can usefully supplement judicial mechanisms as they are generally more accessible, less costly and swifter than the latter. Such mechanisms may facilitate dialogue which may help identify systemic issues and potentially open up a wider range of settlement outcomes between the parties.

This chapter therefore takes a look at ‘non-judicial’ solutions, which may have the potential to offer an alternative pathway to a resolution or remedy in some cases of violations of human rights. Highlighting the strengths and weaknesses of such mechanisms, the objective is to explore the possible lessons that could be drawn in particular from the field of consumer alternative dispute resolution (ADR) and from Ombuds mechanisms in Europe. It is argued that establishing a European Ombuds Institution for corporate responsibility would provide a robust mechanism equipped with relevant expertise and able to play a role both in standard-setting and complaint-handling in this sphere. At EU level, such a construction would have

the added advantage of bringing together practice and experience from across the Member States. Such a scheme could provide an additional option for victims of business-related human rights violations impacts and a clear and harmonised level playing field for businesses. It is suggested that in constructing such a scheme, the EU could bring forward a legislative proposal under Article 114 of the Treaty on the Functioning of the European Union (TFEU)³ on the basis that a harmonised approach is required to improve the conditions for the establishment and functioning of the internal market, namely by avoiding the emergence of future obstacles to trade resulting from the likely development of a piecemeal, differentiated, and an ultimately less effective legal framework at Member State level.

It should also be stated at the outset of this chapter that the authors see many so-called ADR mechanisms not as ‘alternatives’ to the court system but rather as being able to fulfil a dispute resolution or early warning function that may not always amount to an effective remedy for a breach of human rights. Therefore it is essential that such schemes operate against the backdrop of a fully accessible formal justice system that is able to offer effective remedies in line with the aims of this Report. For this reason the Report will not undertake a detailed survey of all ADR mechanisms such as arbitration and mediation but acknowledges the work that has been done in these areas; we will rather look briefly at the recent activity at EU level whilst making a specific suggestion in respect of an

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¹ European Union Agency for Fundamental Rights (FRA), ‘Improving Access to Remedy in the Area of Business and Human Rights at the EU Level: Opinion of the European Union Agency for Fundamental Rights’ (2017), 54 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf>.

² European Union Agency for Fundamental Rights (FRA), ‘Business and Human Rights – Access to Remedy’ (2020), 46 ff <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf>.

³ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

EU level Ombuds system. It is our view that this targeted approach is more in keeping with the full title of this Report and the aims of the European Law Institute (ELI) to seek improvement to European law.

4.1 Alternative Dispute Resolution (ADR)

ADR is understood to cover mechanisms of dispute resolution where the parties to the dispute have agreed that a third-party neutral person, other than a judge, will contribute to resolving the dispute.⁴

Apart from the Mediation Directive,⁵ the EU's first discussions in this area were concerned with consumer ADR. Initially, the European Commission was reluctant to intervene, preferring to 'allow a thousand flowers to bloom' and so to allow experimentation. It is arguable whether that was the correct approach in that it was several years before we had Directive 2013/11/EU (hereinafter 'the ADR Directive'),⁶ which together with Regulation No 524/2013,⁷ established a regulatory system for consumer ADR and an ODR (Online Dispute Resolution) platform. Even so, the Directive is complicated in that it leaves a great deal to national law. Nevertheless, it establishes 'harmonised quality requirements for ADR entities and ADR procedures in order to ensure that, after its implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms...'. It is noteworthy that these instruments were internal market instruments thus achieving a fairly high level of harmonisation and domestic effect unlike the Mediation Directive, which was constructed as a 'justice' instrument with cross-border effect only.

The ADR Directive further provides for protection of the consumer as the weaker party in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer.

The Directive also makes it clear that ADR procedures are not intended to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. It does not prevent parties from exercising their right of access to the judicial system. In cases where a dispute could not be resolved through a given ADR procedure whose outcome is not binding, the parties should subsequently not be prevented from initiating judicial proceedings in relation to that dispute. Member States should be free to choose the appropriate means to achieve this objective. They should have the possibility to provide, *inter alia*, that limitation or prescription periods do not expire during an ADR procedure.

It would be possible to imagine a similar directive being adopted for disputes between corporations and victims of human rights/environmental violations.⁸ Accordingly, it could be considered that ADR could constitute a helpful adjunct on the basis of its being an integral requirement within mandatory due diligence as a legal duty or standard of care designed to establish a remedy for victims, provided that the ADR was carefully designed so as to protect victims' rights, bearing in mind that the victims in the cases under consideration will invariably be the weaker party (cf the protection afforded to consumers under the ADR Directive). Moreover, regard should also be had in designing such a system to the strictures of the Court of Justice of the EU in *Alassini*:⁹ an out-of-court settlement procedure should not cause a substantial delay for the purposes of bringing legal proceedings, should suspend the period for the time-barring of claims and should not give rise to costs – or give rise to very low costs – for the parties.

Optional ADR on the broad lines of the EU consumer ADR scheme has something to offer to both parties,

⁴ See Maud Piers, 'Europe's Role in Alternative Dispute Resolution: Off to a Good Start?', 2014 *Journal of Dispute Resolution* 2014 <<https://scholarship.law.missouri.edu/jdr/vol2014/iss2/5/>>, and the authors cited therein.

⁵ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, (2008) OJ L136/3.

⁶ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), (2013) OJ L165/63.

⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, (2013) OJ L165/1.

⁸ It is noted that many international agreements on environmental matters provide for ADR in one form or another: Sai Ramani Garimella, 'Environmental Dispute Resolution, ADR Methods and the PCA Arbitration Rules' *ILI Law Review*, Summer 2016:199 <<https://ssrn.com/abstract=2836347>>. See also in the United States, 'A Community Guide to Using Alternative Dispute Resolution to Secure Environmental Justice, Environmental Law Institute' (May 2011) <<https://www.eli.org/environmental-governance/community-guide-alternative-dispute-resolution-environmental-justice-intro>>.

⁹ *Alassini v Telecom Italia*, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 ECLI:EU:C:2010:146.

particularly at an early stage where the victims might otherwise be thinking of injunctive relief and the fact situation is likely to be less complicated. First, where an ADR entity is engaged at such an early stage, there is reason to hope that the matter may be resolved relatively swiftly and in a more satisfactory way for both parties before irreparable damage has been done, and at a less onerous cost than judicial proceedings. The possibility for ADR entities to arrive at satisfactory solutions not available to the courts should not be underestimated. It may also provide benefits for the business in understanding how bad practice has arisen and allowing for changes in process and behaviour.

It is considered that not only should National Consumer Contact Points play the role they already have with regard to online dispute resolution in providing guidance and assistance,¹⁰ but use should be made of the E-Justice portal. It could be envisaged that the E-Justice Portal should offer information on accredited ADR schemes and how to access them. Furthermore, reporting requirements similar to those laid down in Articles 7(2) and 20(6) of the ADR Directive should be provided for in order, in particular, to allow systematic or significant problems to be identified and reported nationally and at the European level. The findings emerging from such reporting could be used by individual companies when reviewing their due diligence performance and by ADR entities in identifying best practices.

There is also the possibility of private industry-led schemes, targeted at the business and human rights dimension, such as that established by the sugar cane industry body Bonsucro¹¹ with the help of the Centre for Effective Dispute Resolution (CEDR), a leading United Kingdom dispute resolution body, launched in August 2020.

It is imaginable that, as part of due diligence requirements, corporations could be required to belong to an accredited or regulated scheme. This would require overarching EU legislation and quality control

of the entities at national level as in the case of the ADR Directive. Such control would need to check at least the process to be used and the independence from the corporate business and there would have to be a result binding on the corporation but not necessarily on the victims/complainants (a point underlined in the recent FRA research on Access to Remedy¹²). There are also the questions of equality of arms, procedural safeguards, and costs to be resolved. Transparency and reporting requirements would also have to be satisfied.

The risk of ADR is the risk attaching to every sort of 'self-contained regime'. In other words, private complaints need to be somehow brought to the attention of public authorities, be it judges, prosecutors or other civil servants. Accordingly, any ADR scheme should prescribe notification of the complaint received to a public authority which may or may not decide on its own motion whether to engage in inquiries, in the interest of the whole category to which the victim asking for ADR belongs. This has a linkage with the reporting obligation described above in connection with the consumer ADR regime but in human rights cases is clearly worthy of a more robust process.

The conclusion is that ADR could afford access to justice in the jurisdiction of the business' home State or the State where the violation occurred to victims of human rights/environmental violations. However, the primary concern must be to give victims access to justice in the sense of access to a court or other public adjudicatory body in the country in which the business is established. Lastly if various forms of ADR are to be utilised in this sector, then a strong overarching regulatory framework such as that provided by the consumer ADR Directive would be necessary.

Whilst it is appreciated that some might have liked us to investigate more fully the possibilities offered by both mediation and arbitration, it was felt that at present these options could best be pursued in all their diversity under the format of an overarching regulatory approach as had been done within EU

¹⁰ See European Commission, 'Online Dispute Resolution' <<https://ec.europa.eu/consumers/odr/main/?event=main.complaints.odrList>>.

¹¹ Bonsucro, 'Bonsucro Launches New Grievance Mechanism' (15 June 2020) <<https://www.bonsucro.com/bonsucro-launches-new-grievance-mechanism/>>.

¹² FRA (n 2) 47: 'Overall, interviewees suggest that enforcement of ADR decisions and financial sanctions for non-compliance should be introduced'.

consumer law. Such developments as the Bangladesh Accords¹³ and The Hague Rules on Business and Human Rights Arbitration¹⁴ are impressive and welcome but ultimately depend on party consent. Human rights breaches are so fundamental that any consensual system of dispute resolution such as mediation or arbitration is open to capture by the stronger party unless effectively and externally controlled. This is not to dismiss these options but merely to indicate that in a report dealing with access to effective remedy for human rights breaches by corporates, we felt the emphasis should be on stronger public facing options with the necessary coercive powers.

4.2 Business, Human Rights and Ombuds Institutions

Accordingly in this section, we will consider an initiative at a supranational level to create a European Ombudsman for corporate responsibility.¹⁵ Ombuds institutions have become a common feature of the European legal landscape, both at a national and supranational level.¹⁶ Such institutions present an easily accessible point for consumer complaints, whilst corresponding to the agenda of seeking ADR solutions either prior to launching formal legal proceedings or during those proceedings, which has been an increasing priority of European civil justice systems in recent times.

It should, however, be underlined here that the creation of such an Ombuds institution ought not to affect the availability of litigation through the courts. An ombuds mechanism is designed to supplement and complement the formal court-based dispute resolution system by providing an effective non-judicial route. Those concerned, however, remain free to

bring legal proceedings in the normal way. As noted in the recent FRA Report, 'court proceedings remain the only effective remedy available to individuals for business-related human rights abuses, FRA's research shows. However, the length of court proceedings, associated costs and other elements make this route either ineffective or simply too costly for those affected by the adverse business behaviour to make effective use of it.'¹⁷

4.2.1 Ombuds Institutions at a National and Supranational Level

A rapid *tour d'horizon* of the current legal landscape shows the vitality of Ombuds institutions in general, as well as their particular relevance in the field of our current study.

At Member State level, the Ombudsman model is firmly anchored in the European legal landscape. From the 1970s onwards, a variety of public law organisations inspired by this model came into being. The phenomenon has been described by Ian Harden as follows:¹⁸

The word and the idea are of Swedish origin. In 1809, the Swedish Parliament established the office of Justitieombudsman to supervise the application of the law by public officials. Acting on the basis of inspections and inquiries into complaints, the Ombudsman was to be independent of the Executive branch of government. Finland established a similar institution in 1919. During the second half of the twentieth century, practitioners and academics enthusiastically promoted the idea ... and many countries took inspiration from it.

¹³ 2013 Accord on Fire and Building Safety in Bangladesh <<https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf>>; 2018 Transition Accord on Fire and Building Safety in Bangladesh <<https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf>>.

¹⁴ The Hague Rules on Business and Human Rights Arbitration <https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf>.

¹⁵ See also the proposal in favour of a corporate responsibility Ombudsman made by Juho Saloranta, 'Establishing a Corporate Responsibility Ombudsman: Enhancing Remedy Through State-based Non-judicial Mechanisms?' 28 Maastricht Journal of European and Comparative Law 2021:102.

¹⁶ The Council of Europe has been active in this sphere, including Parliamentary Assembly Recommendations 757 (1975) <<https://www.ombudsman.europa.eu/en/historical/en/4658>> and 1615 (2003) <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17133&lang=en>> and Resolution 1959 (2013) <<https://fra.europa.eu/en/law-reference/council-europe-parliamentary-assembly-resolution-1959-2013-strengthening-institution>>, as well as the Committee of Ministers' Recommendations R (85) 13 on the institution of the Ombudsman <<https://rm.coe.int/09000001680506bee>>, R (97) 14 on the establishment of independent national institutions for the promotion and protection of human rights <<https://rm.coe.int/16804fecf5>>. Note also the important contribution made by the Venice Commission in this topic, culminating in the Commission's adoption, on 15 March 2019, of the Principles on the protection and promotion of the Ombudsman institution (the 'Venice Principles'), drafted in cooperation with major international institutions including the Council of Europe's Commissioner for Human Rights and its inter-governmental Steering Committee for Human Rights (CDDH), the United Nations Office of the High Commissioner for Human Rights and the International Ombudsman Institute <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)>.

¹⁷ FRA (n 2) 47.

¹⁸ Peter Cane, Herwig CH Hofmann, Eric C Ip, and Peter L Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law*, (Oxford 2020), 774.

From its initial beginnings in Scandinavia,¹⁹ the Ombudsman phenomenon has been established in many countries, with the International Ombudsman Institute (IOI)²⁰ identifying over 200 independent Ombudsman institutions from more than 100 countries worldwide. There are a variety of different types of Ombudsman, and there is not a standardised approach across Europe.²¹

At a supranational level, similar institutions have also sprung up in recent times. The best known of these is the European Ombudsman,²² which was created in 1995. The European Ombudsman has the objective of ensuring that the EU's institutions and bodies are held to account. The Ombudsman examines individual complaints alleging maladministration on the part of the EU's institutions and agencies, and also carries out strategic investigations on its own initiative, thereby looking into wider systemic issues affecting the EU institutions and the democratic decision-making process, such as European Council transparency during the COVID-19 crisis. The European Ombudsman has also recommended greater use of Ombuds institutions in the context of fundamental rights in the EU, advising the European Commission to consider their role in providing 'an institutional safeguard that is complementary to the courts.' Ombuds institutions may also provide pro-active inquiries, which, according to the European Ombudsman, 'are particularly relevant when the EU and national competence is shared or when the EU and national authorities act jointly.'²³

Other types of Ombuds institutions have also been considered at a European level. Of direct relevance to this study is the mooted creation of an Ombudsman within the sphere of collective redress. The Directive on Representative Actions,²⁴ which introduces rep-

resentative actions for the protection of the collective interests of consumers, expressly anticipates the possibility of establishing a European Ombudsman for Collective Redress.²⁵ Whilst it is unclear what exact role such an Ombudsman would play, as this is to be assessed as part of the evaluation after five years of the application of the Directive, the focus would seem to be on cross-border representative actions at EU level. One could foresee such an entity being mandated to investigate pan-European representative actions, and playing a co-ordinating role in relation to similar institutions at a national level. It is to be noted that this might also tie in with the facility for consumers from several Member States to join forces within a single representative action in bringing a claim in one single action before one forum, which is also provided for in the Directive.²⁶ It could also be imagined that there might be the possibility for the consolidation of claims between EU consumers and those directly impacted by human rights breaches in the third countries arising out of the same activities.

Another example of an Ombudsman-type mechanism being introduced to resolve collective claims is that, at a domestic level, of the *Ombudsstelle* designed to resolve the Volkswagen (VW) dieselgate scandal in Germany. Created following a settlement between Volkswagen and the *Verbraucherzentrale Bundesverband* (consumer organisation), this Ombudsman scheme is intended to facilitate the payment of compensation to a large number of German consumers (approx 250,000) following the VW dieselgate scandal.²⁷ Payments have started to be made, though some concerns have been expressed about the lack of transparency on the part of the Ombudsman, particularly as regards the method of calculations of compensation.

¹⁹ A modern manifestation of this tradition in Scandinavia is the Danish Consumer Ombudsman (<<https://www.consumerombudsman.dk/about-us/>>) able to investigate complaints having a Europe wide implication, to treat complainants as holders of legal rights, to take an objective view of the dispute being external to the corporations concerned.

²⁰ International Ombudsman Institute (IOI) <<https://www.theioi.org>>.

²¹ Venice Principles (n 16) para 1.

²² See: Médiateur Européen <<https://www.ombudsman.europa.eu/fr/home>>.

²³ European Ombudsman submission to the European Commission's consultation on a new strategy for the EU Charter of Fundamental Rights, 30 April 2020, Ref.Ares(2020)2315778 <<https://www.ombudsman.europa.eu/en/news-document/en/129398>>.

²⁴ Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, (2020) OJ L409/1.

²⁵ Art 23(3): 'By 26 June 2028, the Commission shall carry out an evaluation of whether cross-border representative actions could be best addressed at Union level by establishing a **European ombudsman for representative actions for injunctive measures and redress measures**, and shall present a report on its main findings to the European Parliament, the Council and the European Economic and Social Committee, accompanied, if appropriate, by a legislative proposal.' See also recital 73.

²⁶ See, eg, recitals 23 and 31 in the preamble.

²⁷ For further details, see '*Ombudsstelle für VW-Vergleich*' VZBV <<https://www.vzbv.de/pressemitteilung/ombudsstelle-fuer-vw-vergleich>>.

4.2.2 Ombudsmen in the Human Rights Sphere

The original approach of Ombuds institutions was focused on the control of public-sector organisations. This public-sector Ombuds model has, however, evolved over time, and a more recent hybrid or extended model has developed with Ombuds institutions having an explicit human rights mandate, thereby going beyond the orthodox idea of a mere informal control of the public sector and administrative authorities to have a more extensive role. As has been noted by commentators, including Reif,²⁸ an emerging trend is of human rights Ombuds institutions having jurisdiction over human rights complaints *arising in the private sector*.

As noted above, the recent research undertaken by the FRA on access to remedies supports the strengthening of non-judicial mechanisms in the human rights sphere. The experts interviewed by the FRA during this research work highlighted the important role such bodies could play in facilitating access to justice for victims of human rights violations. The FRA also reported that interviewees recommended that Ombuds institutions strengthen their competence and role. They provide examples of well-functioning advisory services and bodies with legal standing in courts on behalf of consumers, but also point out that not all Ombuds institutions have such a mandate, and those that do face challenges due to a lack of human and financial resources.

Many of the Ombuds institutions in EU Member States also serve as Equality Bodies, a required institution under EU law.²⁹ Many are also NHRIs, accredited as such under the so-called Paris Principles.³⁰ The United Nations treaty on business and human rights, currently being negotiated, could include a role for NHRIs with draft references to 'adequate [national] monitoring mechanisms' (Article 16) and based on the Paris Principles (draft optional protocol, Article

2).³¹ The draft protocol envisages a mandate for such mechanisms including awareness raising, cross-border cooperation, enquiries by victims and offering recommendations (Article 3) but also requesting information from businesses (Article 4). Complaints handling may also be considered (Article 6). Both the draft treaty and the protocol anticipate organisations such as the EU also becoming parties (Article 17 and draft protocol Article 14). The UN Convention on the Rights of Persons with Disabilities,³² to which the EU is a party, obliges States (and the EU) to set up a monitoring mechanism to ensure better compliance.

In our view, the aforementioned examples and the powerful recommendations of the FRA in this sphere militate in favour of the creation of an Ombuds mechanism at a European level which is focused upon ensuring access to remedies for those affected by mass corporate human rights infringements. Whilst this may be an industry-initiative initially, it would ideally ultimately be an EU-created and -funded institution. The examples above show that an Ombuds mechanism can be adaptable to situations of aggregate harm in the human rights sphere. Another example of such an Ombuds acting in respect of business and human rights is the dedicated business and human rights Ombudsman scheme which has been set up in Canada.

The Canadian Ombudsperson for Responsible Enterprise (CORE) was created in 2018 to receive and investigate claims of alleged human rights abuses arising from the operations of Canadian companies abroad in the mining, oil and gas, and garment sectors. Over and above the review of individual complaints concerning alleged human rights abuses in these sectors, CORE can also launch investigations on its own initiative, and engage in independent fact-finding. It also issues public reports on its work and submits annual reports to the Canadian Parliament. CORE can also make recommendations for remedies. Commentators have, however, been critical of CORE. Certain

²⁸ Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Springer 2004), Chapter 2.

²⁹ European Union Agency for Fundamental Rights (FRA), 'Strong and Effective National Human Rights Institutions – Challenges, Promising Practices and Opportunities' (2020), 29 ff.

³⁰ Ibid.

³¹ United Nations, Open-ended Intergovernmental working group, Chairmanship, Legally Binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, second revised draft of 6 August 2020; and United Nations, Open-ended Intergovernmental working group, Chairmanship, Draft Optional Protocol to the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 4 September 2018, Art 2.

³² UN Convention on the Rights of Persons with Disabilities (CRPD) <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

NGOs and human rights groups consider that the entity is not sufficiently independent from the government and does not have the necessary investigatory and remedial powers.³³

Whilst the Canadian example illustrates the potential for an Ombuds institution in this sphere, it also highlights the importance of ensuring that the powers and status of such an institution allow it to undertake its work effectively. It would be particularly important for any European Ombuds institution to have investigatory and enforcement powers to make a difference.³⁴ In the light of this, we consider that any such institution must respect a series of principles, which we explore below, in order to ensure effective operation in practice and also gain the confidence of stakeholders and victims.

4.3 Recommendations

In order to ensure an effective institution, we set out here the Principles that could apply to a European Ombuds Institution for Corporate Responsibility:

- The Ombuds institution should be an independent organisation and free to access by victims.
- The Ombuds institution should be able to undertake its own investigations into breaches of human rights by corporations by means of an investigatory process, with proper resources and adequate powers to make that investigatory role effective including, over and above the ability to require companies to provide information and documentation (with sanctions for non-compliance) and the possible grant of a right to conduct investigations in situ at business premises (subject to relevant procedures and court supervision).
- The Ombuds institution should be able to examine individual grievances as well as undertake systematic reviews and make general recommendations as to practices of those involved.

- The Ombuds institution should have discretion to determine the exact principles on which remedies are to be awarded, and the appropriate remedies for cases submitted to it.
- In order to make the Ombuds' remedies effective, consideration should be given to allowing for enforcement of ADR decisions and/or financial sanctions for non-compliance.
- The Ombuds institution should be properly resourced by means of a sustainable funding model. The funding model adopted should ensure that it has operational independence and is insulated from governmental and industry influences.
- The existence of the Ombuds institution should not affect the availability of legal remedies through the courts, and the Ombuds process should simply supplement the current dispute resolution system. Where there has been wrongdoing on the part of company officers, then orthodox criminal and civil remedies should be available.

4.4 Conclusion

Establishing an EU Ombuds institution for corporate responsibility would provide an alternative dispute resolution mechanism equipped with relevant expertise and able to play a role both in standard-setting and complaint-handling. It would present a single and highly visible³⁵ initial contact point for victims of corporate human rights abuse across the EU. In such a way, the Ombuds institution would operate in the same way in respect of all corporate players across Europe, whilst avoiding the thorny issues of private international law which often arise in legal proceedings in such cases. The Ombuds institution could be empowered to undertake investigations and fact-finding on an inquisitorial basis instead of the traditionally adversarial nature of court proceedings. Such an intervention could take place following the making of individual complaints but also on the own initiative of the Ombuds institution. As a result of

³³ See, eg, the Canadian Network on Corporate Accountability's 3rd submission to CORE consultations dated 20 November 2020.

³⁴ One possible model could be the Danish Consumer Ombudsman. For further details, see <www.consumerombudsman.dk>.

³⁵ The FRA Report 2020 (FRA, n 2) draws attention to the general lack of information about available remedies to aggrieved individuals, and the FRA's 'Business-Related Human Rights Abuse Reported in the EU and Available Remedies', 2019, 16, details the unimpressive information available in the EU Member States <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf>.

a finding of an infringement, the Ombuds institution must be able to ensure an effective remedy is granted. It is noted there have been some innovations in the approach on the remedial provision of Ombuds institutions and the enforcement thereof in Europe. For instance, in Norway, a decision of the Consumer Disputes Commission (*Forbrukerklageutvalget*) is enforceable if it is not appealed to an ordinary court within four weeks.³⁶

A European Ombuds institution for corporate responsibility could also play a role beyond that of individual complaints handling, so as to undertake a broader, standard-setting role. This would enable systemic problems to be ironed out in advance of complex and costly litigation, potentially facilitating improvements in corporate behaviour and bench-marking expectations.

³⁶ FRA (n 2) 48.

5 Action and Transparency[†]

5.1 Introduction

The European Union (EU) should step up its efforts to prevent and redress business-related human rights abuse, in line with the United Nations Guiding Principles on Business and Human Rights (UNGPs).¹ This chapter considers three types of measures which the EU could take in supporting its Member States in their efforts to implement the UNGPs effectively. While important, these supportive measures cannot substitute for the further development of substantive regulatory and legislative measures by the EU and the Member States to improve access to justice and effective remedies for victims of business-related human rights abuse.

First, the EU should continue to encourage Member States to enact and improve National Action Plans (NAPs) on business and human rights which comply fully with the NAP guidance produced by the UN Working Group on Business and Human Rights. Secondly, the EU should work towards a better and more transparent system for collecting and disseminating human rights-related information on companies and their performance, including information about available State-based and company-based remedies. Thirdly, the EU could make greater use of its convening powers in order to assist Member States in designing robust and coordinated responses to business and human rights challenges, including through the development of an Open Method of Coordination (OMC) on business and human rights. A final part of this section concludes with recommendations for action, with different levels of ambition.

5.2 National Action Plans

One important consequence of the UNGPs' three-pillar 'protect, respect and remedy' framework is that States, as part of their duty to protect, have to assume a proactive role in ensuring corporate respect for human rights at home and abroad – in the EU and externally, including access to remedy. The concrete requirements this entails for the implementation of the UNGPs through NAPs have been drawn up in international guidance on NAPs developed by the UN Working Group on Business and Human Rights.²

NAPs should take stock of each country's existing laws and policies which are relevant to business and human rights, with a view to identifying shortcomings and gaps in the existing regulatory framework. In a forward-looking perspective, NAPs should also contain concrete commitments by governments to address the identified shortcomings and to close regulatory gaps. In both respects, NAPs can play an important role in improving access to justice for business-related human rights abuse in the EU.

5.2.1 Development of National Action Plans

As regards process requirements, NAPs should adopt a rights-based approach based on the UNGPs. The measures and instruments they envisage should be based on tangible evidence, collected through a national baseline assessment, and should respond to challenges in the national context and address country-specific – and EU-related – priorities and particularly important sectors of the national economy. NAPs should be developed and implemented through an inclusive, transparent and accountable process that ensures ambitious, concrete, and targeted actions. They must be regularly reviewed so as to ensure continuous progress and to respond to changing conditions in the global regulatory environment. As

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¹ United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (June 2011) UN Doc A/HRC/17/L.17/31.

² UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (November 2016).

regards content requirements, States should mainstream human rights into all business-related laws and policies, with their NAPs addressing the full scope of the UNGPs. The NAPs should outline actions to implement the UNGPs that are concrete, measurable, achievable, relevant and time-specific – supported by suitable indicators and benchmarks for success.³ To create the necessary leverage between the three pillars, States should adopt a ‘smart mix’ of mandatory and voluntary measures in addressing business and human rights challenges. Finally, closing governance gaps at the global level requires the use of extra-territorial instruments to reach out to corporate practice abroad and to redress extra-territorial business-related human rights abuse.

The EU has played a proactive role in encouraging Member States to develop and implement business and human rights NAPs, and recently stepped up its work in this regard. The EU has yet to present its own NAP. Already in 2011, the European Commission’s new strategy for corporate social responsibility announced an EU Action Plan on Responsible Business Conduct and called upon EU Member States to develop business and human rights NAPs.⁴ This request was restated in the Council of the EU’s 2012 and 2015 Action Plans on Human Rights and Democracy, with the deadline for Member State NAPs being extended to 2017.⁵ The Action Plan on Human Rights and Democracy for 2020-2024 also highlights the importance of NAPs for an effective implementation of the UNGPs, including in the areas of corporate human rights due diligence.⁶

A 2019 Commission Staff Working Document on ‘Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights’ lists among the EU’s priorities in this area ‘encouraging compa-

nies to carry out appropriate due diligence, including with respect to human rights protection along their supply chains’ and ‘pursuing horizontal approaches, including working with Member States on [NAPs]’.⁷ Following the publication of a major study on due diligence through the supply chain in April 2020,⁸ the Commissioner for Justice announced the European Commission’s commitment to introducing rules for mandatory corporate human rights and environmental due diligence.

The EU has also developed guides on the implementation of the UNGPs in the sectors of information and communications technology, oil and gas, and employment and recruitment agencies. In the area of NAPs development, the European Commission has created a High-Level Action Group on Corporate Social Responsibility, where Member States can share experiences on responsible business conduct and discuss progress towards their implementation of NAPs on corporate social responsibility and business and human rights. In 2013, seven peer-review meetings were organised for national governments to enable knowledge exchange on policies and measures related to corporate social responsibility. In 2014, the Commission published a Compendium of national public policies in the area of corporate social responsibility which identified good practices and common approaches among the Member States.⁹ Belgium has since organised several peer-review meetings with European governments on NAPs.¹⁰

³ The lack of concrete indicators and benchmarks has been identified as a main shortcoming of existing NAPs in EU Member States, see Daniel Augenstein, Mark Dawson and Pierre Thielbörger, ‘The UNGPs in the European Union: The Open Coordination of Business and Human Rights?’ 3(1) Business and Human Rights Journal 2018:1.

⁴ European Commission, Communication from the 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) 681 final, 2011).

⁵ Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (2012); Council of the European Union, EU Action Plan on Human Rights and Democracy (2015).

⁶ Council of the European Union, EU Action Plan on Human Rights and Democracy 2020-2024 (2020).

⁷ European Commission, ‘Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress’ (SWD 2019 143 final, 20 March 2019), 7.

⁸ Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, ‘Study on Due Diligence through the Supply Chain – Final Report’, European Commission DG Justice and Consumers, February 2020 <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>.

⁹ European Commission, *Corporate Social Responsibility: National Public Policies in the European Union* (Publications Office of the European Union 2014).

¹⁰ See <<https://www.business-humanrights.org/en/belgium>>.

5.2.2 Content and Quality of National Action Plans

Affirming the EU's support for the UNGPs, it was noted in the Conclusions of the Council of the EU in 2016 that 'EU Member States have taken the lead internationally on developing and adopting NAPs to implement the Guiding Principles or integrating [them] into their national Corporate Social Responsibility (CSR) strategies'.¹¹ At present, 14 Member States (Belgium, the Czech Republic, Denmark, France, Finland, Germany, Italy, Ireland, Lithuania, Luxembourg, the Netherlands, Poland, Spain, and Sweden) have published NAPs on business and human rights, with further plans being under way in Greece, Latvia, Portugal, and Slovenia. At least in terms of quantity, this makes the EU the leading region globally in developing business and human rights NAPs. However, EU Member State NAPs have also been criticised for shortcomings in process and content, although there have been some notable improvements in recent years.

In 2015, the European Network of National Human Rights Institutions noted that 'ongoing NAP processes in some Member States are neither participatory nor transparent, with stakeholders involved weakly or not at all, and civil society organisations in particular frequently lacking even basic information or opportunities to engage in dialogue with government representatives'. As far as content is concerned, the 'published NAPs to date mostly describe historical actions, and lack specific commitments capable of demonstrably improving UNGP implementation at the national level'¹² Many Member States have not yet conducted a national baseline assessment and/or ensured sufficient stakeholder participation necessary for an evidence-based, transparent and accountable NAP process. There are also frequent shortcomings in respect of monitoring of implementation and review. While some of the more recent NAPs especially contain commitments to future action, many of these commitments remain vague and lack sufficient information about concrete steps to be taken, dedicated timeframes, and agencies responsible for their imple-

mentation. Overall, EU Member State NAPs continue to focus heavily on past achievements and voluntary measures at the expense of exploring forward-looking and regulatory options.

The 2020 Council Conclusions call on the European Commission to foster 'development and implementation of [NAPs] in Member States in order to enhance coordination and coherence' and to present 'indicative guidelines in the form of quality criteria and standards for [NAPs] and building structures for peer learning among Member States with regard to their [NAPs]'.¹³

A significant weakness of many NAPs remains that they cover the three pillars of the UNGPs unevenly, with little attention given in particular to the third pillar, on remedy. An insufficient alignment of the 'protect', 'respect' and 'remedy' pillars translates into a failure of the NAPs to adopt a 'smart mix' of voluntary and mandatory instruments that would allow States to use their political and financial leverage fully in incentivising or compelling corporations to respect human rights in their global operations. Many NAPs also focus on pillar two – the corporate responsibility to respect – and less on exploring the full scope of the State duty to protect (pillar one) against corporate human rights abuse. Measures pertaining to pillar two often appear reminiscent of the old 'voluntary' approach to CSR in that they heavily rely on corporate self-regulation and access to non-judicial remedies.

Correspondingly, the vast majority of State actions listed under pillar one are confined to 'soft' measures such as State guidance, awareness raising and incentive schemes and training initiatives. While important, these measures are not sufficient to address the well-documented protection gaps in the domestic and international legal frameworks governing business and human rights and to improve victims' access to remedies for business-related human rights abuse.¹⁴ In its 2016 Conclusions, the Council of the EU noted that 'access to effective remedies for victims of business-related human rights abuses is of crucial importance and should be addressed in NAPs

¹¹ Council of the European Union, Council Conclusions on Business and Human Rights, 10254/16, 20 June 2016.

¹² European Network of National Human Rights Institutions, 'Recommendations for the next EU Strategy on CSR', 2015, 2.

¹³ Council of the European Union, Council Conclusion on Human Rights and Decent Work in Global Supply Chains, 13512/20, 1 December 2020.

¹⁴ On the relationship between 'hard' and 'soft' law approaches to business and human rights in the context of the UNGPs' 'smart mix' of voluntary and mandatory measures, see further Daniel Augenstein, 'Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union' 9(2) Global Policy 2018:254.

[and that] further progress on this third pillar of the Guiding Principles is necessary.¹⁵ However, most EU Member State NAPs still lack concrete commitments to improve access to remedies and to remove legal and practical barriers commonly encountered by victims of business-related human rights abuse seeking redress in the EU.

The UN Working Group Guidance recommends, in line with the UNGPs, that governments should ensure ‘that measures outlined in the NAP take full advantage of the leverage home States have in order to effectively prevent, address, and redress extra-territorial impacts of corporations domiciled within their territory and/or jurisdiction.’¹⁶ Yet to date, most EU Member State NAPs confine themselves to expressing the expectation that corporations should respect human rights in their foreign operations and fail to acknowledge the insufficiency of existing regulatory and judicial mechanisms with extra-territorial effect or remain silent on this issue.

There is some progress in this area, both legislative and court-driven, that ties in with the NAP process. In its 2014 NAP, the Dutch government committed itself to investigating ‘whether the obligations of Dutch companies in relation to CSR are adequately regulated by law, or whether more specific provisions are necessary.’¹⁷ In May 2019, the Dutch Senate adopted the Child Labour Due Diligence Act,¹⁸ which imposes due diligence obligations to prevent child labour in the supply chain of domestic and foreign business enterprises selling goods and providing services to Dutch end-users.¹⁹ However, as the main goal of the Act is consumer protection in the Netherlands, it does not provide for (civil) remedies for victims of child labour in the Netherlands or abroad.

The German NAP, released in 2016, set the goal of at least 50% of German companies with more than 500 employees having implemented human rights

due diligence by 2020. As government monitoring of the NAP’s implementation suggested that the 50% benchmark would not be met, the Federal Ministry for Labour and Social Affairs and the Federal Ministry for Economic Cooperation and Development drafted the cornerstones for a general due diligence supply chain law, which should include a civil liability mechanism.²⁰ The Draft Law presented by the government in March 2021 empowers NGOs and trade unions to represent victims in civil proceedings before German courts. Following protracted negotiations and persistent pushback from the Ministry of Economic Affairs and major business associations, a dedicated provision on civil liability is no longer envisaged.²¹

The 2017 French NAP focuses rather extensively on legal and practical barriers to access to justice and commits to reinforcing human rights due diligence, particularly in sectors and countries at risk of human rights abuses.²² The French Duty of Vigilance Law, adopted prior to the NAP, inserted two new articles into the *Code de Commerce* which impose general human rights and environmental due diligence (vigilance) obligations on large companies with a registered office in France, including subsidiaries of foreign companies. The Duty of Vigilance Act enables (foreign) victims to sue the parent/instructing company in France for human rights and environmental damage in its global supply chain.²³ The conditions for liability flow from the general law of torts, with the claimant bearing the burden of proof for a breach of obligation, damage and causation.

5.3 Transparency of Data and Information – Companies and Remedies

Communicating measures taken to prevent, mitigate and redress human rights risks and impacts is not only important in order for companies to comply with their corporate responsibility to respect. It also helps to enlist the regulatory capacity of investors

¹⁵ Council of the European Union, Council Conclusions on Business and Human Rights, 10254/16, 20 June 2016.

¹⁶ UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’, November 2016, 18.

¹⁷ Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights, April 2014, 28.

¹⁸ *Wet Zorgplicht Kinderarbeid, Kamerdossier* (2016/2017), 34 506. The law has not yet entered into force.

¹⁹ *Ibid.*

²⁰ ‘Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten’, 2020.

²¹ Referentenentwurf des Bundesministeriums für Arbeit und Soziales, Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, 2021, <<https://www.bmas.de/DE/Service/Presse/Pressemitteilungen/2021/bundeskabinett-verabschiedet-sorgfaltspflichtengesetz.html>>.

²² French Government, National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights, April 2017, 32, 48–52.

²³ *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.*

and consumers, and enables governments to gauge the effectiveness of their policies and regulation, including in the area of access to justice. Reporting and transparency requirements discussed in this section should be distinguished from substantive human rights due diligence legislation and from regulatory measures aimed at providing claimants with information necessary to mount or defend (tort) claims in European courts – both of which fall outside the scope of this chapter.²⁴

The 2014 EU Non-Financial Reporting Directive (NFRD)²⁵ has been described as the world's foremost legislation on corporate transparency.²⁶ It amended the EU's Accounting Directive,²⁷ and requires companies with more than 500 employees to include a non-financial statement as part of their annual public reporting obligations. The Directive covers large companies and groups across the EU, including listed companies, banks, insurance companies and other companies as decided nationally. In line with the approach suggested by the UNGPs, reporting should cover 'the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas; and how the undertaking manages those risks.'²⁸

The obligations under the NFRD include four areas: environment, social and employee issues, human rights, and bribery and corruption. With respect to these four sectors, the Directive provides key principles to guide corporate disclosure of non-financial information, including disclosure of companies' business models, policies, outcomes, and risks in order to provide a fair, balanced, and understandable view of

the company.

In 2017, the European Commission published Guidelines to help companies disclose environmental and social information.²⁹ However, companies may decide to use other international, European or national guidelines to draft their statements. In 2019, the Commission committed itself to reviewing the NFRD as part of its strategy to strengthen the foundations of sustainable investment.³⁰ The aim of the review is to examine the scope of a company's presentation of sustainability-related strategic risks to its business model, and the impact of its business model on key sustainability matters. The Commission's Directorate General for Financial Stability, Financial Services and Capital Markets Union has furthermore announced that the reporting dimension of the envisaged EU legal instrument on human rights and environmental due diligence will be incorporated into the Non-Financial Reporting Directive.³¹

5.3.1 Assessment and Reforms

A widely recognised challenge to the effectiveness of non-financial reporting is that companies seek to gain legitimacy with external stakeholders by enhancing the quantity, rather than improving the quality, of disclosed information.³² Furthermore, disclosure tends to be biased towards positive rather than negative information. According to research conducted in 2017, almost 90% of the interviewees agreed that 'the majority of the companies do not publish information that could contribute to tarnishing their reputation.'³³

The NFRD is a rather flexible instrument which obliges Member States to achieve a specific result but leaves them a certain degree of flexibility, including the possibility to go beyond the minimum requirements.

²⁴ On the requirements of substantive due diligence legislation, see Chapter 1 above.

²⁵ European Parliament and Council, Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 22 October 2014.

²⁶ Alliance for Corporate Transparency, 'Research Report: The State of Corporate Sustainability Disclosure under the EU Non-Financial Reporting Directive. The Alliance for Corporate Transparency Project Analysis of Companies Reporting', 2018.

²⁷ European Parliament and Council, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives (2013) 78/660/EEC and 83/349/EEC.

²⁸ European Parliament and Council, Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (22 October 2014) Preamble, paras 3. 60 *Id.* Art 1(1).

²⁹ European Commission, Guidelines on non-financial reporting, OJ C209/1, 20 June 2019.

³⁰ European Coalition for Corporate Justice, 'Moving Forward with the EU Non-Financial Reporting Directive: Enforcement & Review', June 2020, 4.

³¹ *Ibid.*

³² Giovanna Michelon, 'CSR Reporting Practices and the Quality of Disclosure: An Empirical Analysis', 33 *Critical Perspective on Accounting* 2015:59, 60–61.

³³ Olivier Boiral and Jean-Francois Henri, 'Is Sustainability Performance Comparable? A Study of GRI Reports of Mining Organizations' 56 *Business and Society* 2017:283, 294–96. The twelve mining companies came from nine different countries (*ibid.*, 296).

Some provisions can be maintained or dropped in the transposition into national law, such as, for example, the possibility for the company to provide a separate report rather than integrating the non-financial statement into the management report. Besides, the NFRD provides for an 'exit' clause. Member States' implementation of the Directive may allow companies not to disclose information relating to impending developments or matters in the course of negotiation if such disclosure would be seriously prejudicial to the entity's commercial interest. Finally, even if the NFRD references various standards that companies can rely on in their reporting, including the UNGPs and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprise, it does not prescribe the use of common, specific indicators which would ensure a minimum level of comparability. Concerns such as these are intended to be addressed in the current review of the NFRD.

Without adequate and sufficient information, investors and consumers cannot intervene on company policies, for example by using their purchasing power to reward companies that have taken a proactive approach to human rights due diligence. Likewise, governments cannot adequately assess the effectiveness of their policies and legislation, including in the area of remediation and access to justice. Additionally, rights-holders/victims of corporate human rights abuse, will also face even greater challenges. To render corporate human rights transparency effective, the NFRD and implementing national legislation should focus on clear indicators such as human rights due diligence and disclosure in the context of concrete risks and incidents and companies' responses to them.

5.3.2 A Coherent System of Remedies – Available Evidence Base as Guidance

People affected by corporate activities often experience great difficulty in substantiating their claim owing to the unavailability of information about reme-

dies and data in relation to cases. In most EU Member States, this constitutes a considerable barrier. Information and data on the availability and effectiveness of remedies for business-related human rights abuse are important tools aimed at informing victims of options and giving a realistic perspective of time, costs, and success rates. For States, it would be important to establish an evidence-base for how remedies work, what needs improvement, and how better to coordinate various mechanisms. This includes detailed information on judicial and non-judicial remedies, including the National Contact Points (NCPs) established under the OECD Guidelines for Multinational Enterprises. NCPs draw on mediation and are not competent to issue legal binding decisions. This notwithstanding, NCP processes have proven an important tool of conflict resolution in some cases and countries, not least because they are not constrained by rules of jurisdiction that continue to create significant barriers to access to effective civil remedies in EU Member State courts.

Also for companies there would be benefits, underscoring the importance of remedy, both judicial and non-judicial.³⁴ The United Nations Working Group on Business and Human Rights has stressed the importance of identifying 'which mechanisms are appropriate for different situations' and 'robust criteria for choosing the right forum'.³⁵

According to a 2019 FRA report,³⁶ in none of the 30 countries covered by the research, including all the EU Member States, was there government-provided online guidance on how to access remedy in cases of business and human rights abuse. Half of the countries (16 out of 30) had no information available. In the other half, some information was available but it was not explicitly connected with business and human rights cases, did not cover judicial and non-judicial mechanisms, and did not provide specific details of the relevant mechanisms. However, in Belgium an information hub has been established, providing details on access to remedy for business-related human

³⁴ On the importance and role of non-judicial mechanisms, see Chapter 4 above.

³⁵ Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Review of the Strategic Objectives, Activities and Outcomes of the First Three Years', 28 April 2014, A/HRC/26/25/Add.3 <<https://digitallibrary.un.org/record/771603?ln=en>>.

³⁶ European Union Agency for Fundamental Rights (FRA), 'Business-related Human Rights Abuse Reported in the EU and Available Remedies', 12 December 2019. The need for greater information was also underscored in the Agency's 2017 Opinion on access to remedy <<https://fra.europa.eu/en/publication/2017/improving-access-remedy-area-business-and-human-rights-eu-level>>.

rights abuses, as provided for in its NAP since 2017.³⁷

Information about judicial and non-judicial remedies should be accessible, understandable and reliable. States should ensure that they do not erect barriers to prevent cases from being brought before the courts or non-judicial instruments from being used. States should provide information about the availability and effectiveness of remedies. For this reason, States should be called to value the availability of domestic remedies. This is a useful exercise for governments to create a baseline for ensuring access to remedy. In this regard, some promising practices already exist. For instance, the United Kingdom commissioned an independent survey to help understand judicial and non-judicial remedies available to victims of human rights abuse committed by enterprises. As part of its NAP, Italy plans to identify barriers to access to judicial remedy and consider relevant legislative measures to strengthen access to effective remedy.

Visibility of remedies, easier access to information and therefore transparency of the judicial system are not only important in themselves, but are instrumental to obtain a better quality of justice. For this reason, company data and the situation of victims of crime and the protection of their rights have received increasing attention at EU level. The e-Justice portal, developed in 2010 by the European Commission and supported by Member States, provides information on EU and Member State law but no details on access to justice in the context of business and human rights abuses. It aims to be an electronic one-stop shop in the justice sector, targeting different stakeholders at EU level. It offers provision of information, interconnection of national and professional registers/databases, and electronic services (electronic services), thereby improving the effectiveness of proceedings and the timely delivery of justice. Since its launch in 2010, the portal has been constantly expanded with new content, features and modules such as: the European Case Law Identifier (ECLI), the database of the European Court, the interactive tool on fundamental rights which allows users to find the right organisation/non-judicial body to lodge a complaint regarding the alleged violation of their fundamental rights

(it does not include courts and is limited to situations within EU Member States), and the European Judicial Network (EJN) in civil and commercial matters, which provides support for the implementation of EU civil justice instruments in daily legal practice in order to facilitate relations between national judicial authorities through contact points in each Member State and thus helps to facilitate cases cross-border. The e-Justice portal could therefore be developed with a dedicated section related to access to remedy in cases of business-related human rights abuse, at least similar to the section on the environment and access to justice.³⁸

5.4 EU Convening Powers – EU-Led Peer Reviews and the Open Method of Coordination

In its 2017 Opinion on ‘Improving Access to Remedy in the Area of Business and Human Rights at the EU Level’, the FRA recommended that all EU Member States should ‘adopt, implement and review NAPs which implement the UNGPs, including access to remedy’ (Opinion 18). The EU itself should incentivise this development, according to the Opinion, and ‘could encourage faster adoption, greater harmonisation, better comparison between the plans, and stronger peer review on the plans themselves and on the action to which they are committed’. To this end, FRA suggested the development of an OMC – an EU governance instrument to enhance cooperation between the Member States and to direct national policies towards common European objectives. An OMC on business and human rights could help Member States to develop ‘a common understanding of the problems and challenges in implementing the UN Guiding Principles, as well as to build consensus on their practical implementation’. This could contribute to enhancing policy coordination and mutual learning among Member States, including the development of more effective regulatory instruments to prevent and redress extra-territorial business-related human rights abuse. From an EU perspective, an OMC could ‘provide a way to monitor how EU law in the area of business and human rights is implement-

³⁷ See Agreed actions no 2 in the National Action Plan of Belgium; Federal Institute for Sustainable Development, ‘Access to Remedy in Belgium – the United Nations Guiding Principles on Business and Human Rights (UNGP) in Belgium, 2017 <[brochure_access_to_remedy_in_belgium_2017.pdf](https://beta.e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters)> (sdgs.be).

³⁸ See <https://beta.e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters>.

ed and identify areas of potential future action.³⁹ This could contribute to developing a pan-European approach to business and human rights, including European due diligence legislation as announced by the EU Commissioner for Justice and further developed in a European Parliament Resolution of March 2021. The OMC could also support the further development and coordination of non-binding sectoral agreements that exist or are envisaged in several Member States, and further clarify the conditions for its effective operation in relation to human rights due diligence legislation at national and EU level.

Open coordination was introduced in the EU in the 1990s to steer social policy and later spread to other policy domains including education, culture, and health.⁴⁰ The core challenge the OMC was meant to address is similar to the one encountered by the UNGPs NAP process: managing transnational interdependencies while also respecting legitimate national diversity. The OMC offered a governance framework for transnational policy-making which, guided by common European goals and principles, shifted the regulatory focus from principal-agent models of command and control towards more horizontal and reflexive modes of rule creation and rule application. This promised a more responsive form of EU regulation where national governments could shift their policy priorities in the light of new developments and learn from the practices of their neighbours. It should also ensure a balanced consideration of the views and interests of affected stakeholders at home and abroad and prevent a capture of national policy process by particular interest groups through strengthening cross-sectoral and transnational allegiances between different stakeholder groups.

Most OMC processes contain the following four elements, as laid down by the 2000 Lisbon European Council: fixing guidelines for the Union combined with specific timetables for achieving goals in the short, medium and long term; establishing quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors; translating these European guidelines into national and regional

policies by setting specific targets and adopting measures; and periodic monitoring, evaluation and peer review organised as a mutual learning process.⁴¹

The development, implementation and review of EU Member State NAPs would benefit from an OMC on business and human rights insofar as it would enable States to compare national performance, improve collective understanding of evolving shared problems and respond to the practices of their neighbours. As noted above, EU Member States have been slow to adopt a robust evidence-based approach to developing NAPs and specify clear objectives, time frames, indicators and benchmarks to guide their implementation. Part of the OMC's success has been associated with the development of indicators and benchmarks. Indicators enable a better appreciation of the causal relationship between different forms of regulation and social outcomes, thus enhancing States' understanding of the capacities and limitations of various instruments in achieving transnational policy objectives. Measuring the success of a given policy instrument through benchmarks can contribute to identifying best practices between States and enable stakeholders to call governments to account for what they promised in their national plans.

The OMC's success has also been explained by virtue of an infrastructure for States to conduct peer review on the performance of other States. Peer review allows States critically to assess the performance of their neighbours, particularly in circumstances where negative national performance can have externalities for other States. Here, peer review provides a reason for national officials to take seriously both the quality of their NAPs and the outcomes that domestic reform produces over time. Yet peer review also exploits the positive aspects of interdependence, namely that other States are likely to face similar challenges and may have innovative solutions to be learnt from. Here, peer review can create incentives for States to participate in transnational policy processes and enhance their acceptance of transnational policy decisions. Apart from NAP development and implementation, a European peer review process could also facilitate a regular review and update of NAPs. In this

³⁹ European Union Agency for Fundamental Rights (FRA), 'Improving Access to Remedy in the Area of Business and Human rights at the EU Level', April 2017.

⁴⁰ For a more elaborate discussion, including an assessment of the OMC's relative strengths and weaknesses drawn from other policy fields, see Augenstein, Dawson and Thielbörger (n 3).

⁴¹ Lisbon European Council, 'Presidency Conclusions', 23–24 March 2000, para 37.

vein, the Council of Europe recommends that States 'share plans on the national implementation of the [UNGPs], including revised NAPs and best practice concerning [their] development'.⁴² In addition, the European Network of National Human Rights Institutions has called upon the European Commission better to guide Member States through the NAP process by establishing a 'human rights-based, participatory, transparent multi-stakeholder NAP review process at EU level'.⁴³ However, existing best practice on European peer review has not yet been followed up in a systematic manner.

To remedy existing shortcomings in EU Member State NAPs, an OMC on business and human rights should build up a set of common indicators and benchmarks to test the effectiveness of policy instruments and to compare best practices; institutionalise a State-to-State peer review process overseen by a committee within the European Commission or the European Council to enhance transnational policy coordination and mutual learning between States; establish a common timetable for the production and revision of NAPs to ensure a more consistent and attuned NAP process across the EU; and promote multi-stakeholder initiatives and dialogues at the European and national level to facilitate rights of structural entry for civil society actors and to ensure a more inclusive and accountable NAP process. The institutional architecture offered by the OMC could also act as an incentive structure for Member States to deliver on the content of their NAPs, including a proper alignment of the three pillars of the UNGPs, a smart mix of voluntary and mandatory instruments, and an appropriate use of home-State regulation with extra-territorial effects. Specifically with regard to the UNGPs' remedy pillar, an OMC could facilitate dialogue and mutual learning between Member States to address existing practical and legal barriers to access to justice discussed throughout this Report, including access to evidence, burden of proof, jurisdiction, applicable law and collective redress, in the light of authoritative international and European guidance.⁴⁴

In the relationship between the EU and the Member States, an OMC on business and human rights could help to avoid duplication, overlap and inconsistency in the implementation of the UNGPs. At present, the Commission's CSR strategy tends to focus on ensuring coherence between different branches of EU action between international, European and national policies. By establishing a forum of institutionalised cooperation between European and national actors, open coordination could become a central vehicle for delivering policy coherence across the EU. An OMC on business and human rights could also contribute to the identification of policy areas (particularly those with a strong cross-border nexus) where further EU action to implement the UNGPs is needed because purely national approaches are considered insufficient. Depending on the legal form chosen for the new EU instrument on mandatory human rights and environmental due diligence, an OMC could play an important role in its implementation by the Member States, taking into account existing best practices on ensuring access to justice and effective civil remedies.

5.5 Recommendations

In light of the above, the following recommendations with different levels of suggestions are made:

- NAPs in EU Member States are not sufficiently forward looking, there is no 'smart mix' of mandatory and voluntary instruments; insufficient attention is paid to judicial remedies. NAPs in EU Member States have to address these shortcomings, including through conducting a baseline assessment on availability, accessibility and effectiveness of transparent, participatory and inclusive remedies (including costs, times, actual usage in business and human rights contexts). Ideally there should be an obligation set by the EU for its Member States to adopt NAPs in accordance with a given formula. The EU should also adopt an Action Plan in accordance with the same formula.

⁴² Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to the Member States on Human Rights and Business, 2 March 2016, 1.

⁴³ European Network of National Human Rights Institutions, 'Recommendations for the Next EU Strategy on CSR', April 2015, 2–3.

⁴⁴ See, for example: United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, GA Resolution 60/147; European Commission, Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights granted under Union Law, 11 June 2013.

- The Non-Financial Reporting Directive (NFRD) has not yet yielded sufficiently concrete, detailed and comparable information on company performance. The review of the NFRD must address these shortcomings. EU Member States also need to provide accessible, transparent and comparative overviews of data and information on remedies, including costs, times and actual usage in business and human rights contexts. The EU should boost its e-justice portal to ensure that this type of information is available across the EU Member States, and for the EU itself.
- The EU should develop an Open Method of Coordination (OMC) on business and human rights to enhance the implementation of the UNGPs through NAPs. The OMC should:
(a) build upon a set of common indicators and benchmarks; (b) institutionalise a State-to-State peer review process; (c) establish a common timetable for the production and revision of NAPs; and (d) promote multi-stakeholder initiatives and dialogues at the European and national level.

Annex I on Private International Law

Legal provisions referred to in the body of Chapter 3 (Issues of Private International Law)

Brussels Ibis: rules on jurisdiction

Article 4

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Article 5

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular, the rules of national jurisdiction of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1) shall not be applicable as against the persons referred to in paragraph 1.

Article 6

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

Article 7

A person domiciled in a Member State may be sued in another Member State:

(1) ...

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

Article 8

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) ...

Article 63

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat

(b) central administration; or (c) principal place of business.

2. For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place

anywhere, the place under the law of which the formation took place.

3. ...

Lugano Convention

Article 2

1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.

2. Persons who are not nationals of the State bound by this Convention in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a State bound by this Convention may be sued in the courts of another State bound by this Convention only by virtue of the rules set out in Sections 2 to 7 of this Title.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a State bound by this Convention, the jurisdiction of the courts of each State bound by this Convention shall, subject to the provisions of Articles 22 and 23, be determined by the law of that State.

2. As against such a defendant, any person domiciled in a State bound by this Convention may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Article 5

A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

1. ...

2. ...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

...

Rome II: the law applicable to non-contractual obligations

Article 1(2)(d)

2. The following shall be excluded from the scope of this Regulation:

...

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. 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.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a

pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 7

Environmental damage

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.

Article 16

Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 26

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 17

Rules of safety and conduct

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.

See also recital 34 in the preamble: (34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

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