2 Judicial remedies

The issue of applicable law

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2.1 Introduction

This chapter addresses the issue of applicable law, thus dealing with the question of under what circumstances the national rules of tort law of the EU Member States would be applied in cases brought before EU Member State courts against EU-based internationally operating business enterprises in relation to the harmful impacts of their activities – or those of their subsidiaries or business partners – on people and the planet in non-EU host countries. In addition, it also addresses some of the main practical and procedural barriers that host country victims of corporate human rights and environmental abuse may encounter when seeking to get access to remedy before EU Member State courts.

This chapter will start out with a general overview in section 2 of the legal context within which the issue of applicable law is set. The issue of applicable law is largely determined by EU law in the form of the Rome II Regulation, which will be discussed in section 3. The issue of practical and procedural circumstances is largely determined by the national rules of civil procedure of the country in which a particular case is brought. Although a full comparative study of relevant procedural rules in the different EU Member States falls outside of the scope of this report, section 4 will provide an indication of the main thresholds. At the end of each section, the findings will be discussed and put into the context of relevant provisions of the UN Guiding Principles (UNGPs). This chapter will close up with an overall conclusion in section 5.

2.2 Legal context

With an increasing number of liability cases being brought before EU Member State courts against EU-based companies in relation to the harmful impacts of their activities on people and the planet in non-EU host countries, the issue of access to justice before EU Member State courts in a business & human rights context has gained significance.

2.2.1 Foreign direct liability and beyond[1]

Over the past two decades, Western societies around the world have witnessed a growing trend towards transnational civil liability claims against internationally operating business enterprises in relation to harm caused to people and the planet in the course of their operations – or those of their subsidiaries or supply chain partners – in developing host countries. These so-called foreign direct liability cases are typically initiated by host country citizens who, often with the help of home country based NGOs, turn to courts in the Western society home countries of the internationally operating business enterprises involved in search of an adequate level of protection of their human rights, their health and safety, and their local environment.

In many of these cases, plaintiffs seek to hold accountable the Western society based parent companies of multinational corporations, often together with any local (sub-)subsidiaries that were in charge of carrying out the harmful operations in question. In more recent cases, claims have also been directed at, for instance, Western society based retailers in relation to the harmful consequences of the operations of foreign (sub-)contractors in their supply chains. Another key feature of these cases is that the claims put forward are generally not only aimed at securing financial compensation for harm suffered by past activities, like more garden-variety tort cases. Instead, they are often also, and sometimes especially, aimed at: first, trying to get the internationally operating business enterprises involved to exercise a higher level of care for the local inhabitants and local environment in their future operations in the host countries involved and to persuade their subsidiaries or supply chain partners into doing the same; second, trying to create transparency and debate in the Western society home countries of the internationally operating business enterprises involved with respect to the detrimental impacts that the operations of 'their' companies may have on people and the planet in developing host countries.

Up until now, the vast majority of these foreign direct liability cases have been brought before US federal courts on the basis of the Alien Tort Statute

1 This section is largely based on: Liesbeth F. H. Enneking et al., Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen, Report of a study commissioned by the Dutch Ministries of Security & Justice and Foreign Affairs, The Hague, Boom Juridische uitgevers, 2016, report (in Dutch) and executive summary (in English) accessible at https://www.wodc.nl/onderzoeksdatabase/2531-maatschappelijk-verantwoord-ondernemen-in-het-buitenland.aspx; Liesbeth F. H. Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' 1 *Utrecht Law Review* (2014) 44–54; Liesbeth F. H. Enneking, *Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (2012) Eleven International Publishing: The Hague.

(ATS).[2] This ancient US federal statute, which was 'rediscovered' in the 1980s by human rights activists, turned out to provide a legal basis for civil claims before US federal courts in relation to violations of public international law norms perpetrated around the world. It has been hailed by human rights activists as a much-needed accountability mechanism for human rights violations perpetrated in developing societies where victims' chances of obtaining (enforceable) remedies may be compromised by poorly functioning legal systems, corruption and/or favouritism.[3]

Initially, the ATS was mainly used as a basis for civil claims against individual perpetrators of international human rights violations or international crimes, like Karadzic and Marcos. From the mid-1990s onwards, however, it has also become a popular basis for civil liability claims against corporate actors in relation to their alleged involvement in human rights violations perpetrated in host countries.[4] The result of this development so far is that over 150 ATS-based foreign direct liability claims have been brought before the US federal courts against a wide range of multinationals with a basis or at least a presence in the US, for their alleged involvement in international human rights abuses perpetrated in countries such as Burma, South Africa, Ecuador, Nigeria, and Sudan.[5] High-profile examples include claims against a large group of multinationals including General Motors, IBM and DaimlerChrysler for their alleged involvement in the human rights violations perpetrated by the South African Apartheid regime, and the claims against oil multinational Shell for its alleged involvement in the human rights violations perpetrated by the Nigerian military regime against environmental activists in the Ogoniland region of the Niger Delta in the mid-1990s.[6]

But foreign direct liability cases have also, and increasingly so, been brought before US state courts and before courts in other Western societies like Canada, the UK, Sweden, Italy, and the Netherlands. In the absence of an ATS equivalent outside the US (federal) legal system, these claims are often based on general principles of tort law and the tort of negligence in particular. As a consequence, the claims in these non-ATS-based foreign direct liability

2 28 United States Code §1350. This statute, which has famously been referred to as a 'legal Lohengrin', since 'no one seems to know whence it came' (*IIT v Vencap, Ltd.*, 519 F.2d 1001 (2nd Cir. 1975) (Friendly, J., at 1015)) – or, more particularly: what exactly the 1789 framers had in mind when they enacted it – provides: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.

3 See in more detail, for example, Enneking 2012, *op. cit.*, pp. 77–87, 277–278.

4 *Ibid.*, pp. 77–83.

5 See, for instance, Jonathan C. Drimmer and Sarah R. Lamoree, 'Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions', 2 *Berkeley Journal of International Law* (2011) 456–527, 465.

6 See in more detail and with further references: business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa and https://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa, respectively.

cases tend to revolve not primarily around alleged violations of international (human rights) norms, but more often around alleged violations of non-written norms pertaining to proper societal conduct and due care with respect to health and safety, labour standards and the environment. In countries such as Belgium, France and Switzerland, similar cases have presented themselves in the form of criminal proceedings initiated at the instigation of victims and NGOs.[7]

A 2015 comparative study on the duties of care of Dutch companies in the field of international corporate social responsibility revealed that, since the early 1990s, at least 35 foreign direct liability cases have been pursued before courts in the six countries investigated (Belgium, France, Germany, the Netherlands, the UK, and Switzerland).[8] Similar cases have been reported in a number of other countries that fell outside the scope of this study including, for instance Sweden,[9] which means that the number of these cases pursued so far before EU Member State courts is likely to be around 40 in total.

Well known examples include the civil claims that were brought before the High Court of Justice in London by a large group of Ivorian citizens following the Probo Koala toxic waste dumping incident,[10] and the claims against Shell by Nigerian farmers and the Dutch NGO Milieudefensie in relation to damage caused by oil spills in the Ogoniland region of the Niger Delta that are currently pending before the Hague Court of Appeals.[11] It should be noted that of these 35 cases, only three have resulted in a final judicial decision on the merits in which the defendant companies were held liable. Many of the other cases have either been dismissed at an early stage of the proceedings, often due to lack of jurisdiction or lack of sufficient evidence substantiating the claims, or settled out of court (see Figure 2.1).

These foreign direct liability cases play a crucial role in exploring the hard law edges of international soft law instruments like the UN Policy Framework on Business and Human Rights and the accompanying UNGPs.[12]

Their significance flows from the fact that we are living in a globalizing world in which the production processes of corporate actors are increasingly becoming transnational affairs, but where adequate regulatory mechanisms to deal with

7 See in more detail, for example: Enneking *et al.* 2016, *op. cit.* pp. 23–29 *et seq.*; Enneking 2012, *op. cit.* pp. 87–91.

8 Enneking *et al.* 2016, *op. cit.* pp. 35–44, 163–164, 190–193, 224–231, 265–275, 315–316, 439–442.

9 See, in more detail on the Swedish case: Rasmus Klocker Larsen, 'Foreign direct liability claims in Sweden: Learning from "Arica Victims KB" v "Boliden Mineral AB"?', 4 *Nordic Journal of International Law* (2014) 404–438.

10 See in more detail and with further references: https://business-humanrights.org/en/trafigura-lawsuits-re-côte-d'ivoire.

11 See in more detail and with further references: https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria.

12 See in more detail: Enneking *et al.* 2016, *op. cit.* pp. 23–24, 427–432, 450–453.

Country	Corporate Law	Civil Law	Outcomes	Criminal Law	Outcomes	Totals
Belgium	0	0	n/a	1	• 1 dismissed	1
Germany	0	3	• 1 out-of-court settlement • 2 ongoing	2	• 1 status unclear • 1 prosecutor ends investigation	5
France	0	2	• 1 compensation granted • 1 dismissed	8	• 1 status unclear • 1 prosecutor ends investigation • 1 prosecutor ends investigation, claim settled out of court • 3 ongoing • 2 ongoing with joint civil claim	10
UK	0	13	• 6 out-of-court settlements • 1 partly settled, partly ongoing • 2 dismissed • 4 ongoing	0	n/a	13
Switzerland	0	0	n/a	2	• 2 prosecutor ends investigation	2
Netherlands	0	2	• 1 compensation granted (partly) • 1 partly dismissed, partly ongoing	2	• 1 conviction • 1 dropped	4
Totals	0	20		15		35

Figure 2.1 Overview of relevant cases[1]

[1] Derived from: Enneking *et al.* 2016, *op. cit.* p. 440.

these internationally operating business enterprises and the impacts of their worldwide activities are lacking. In a world with an international legal order that is still premised on the traditional idea of sovereign nation states, domestic public law regulations in principle remain territorially confined. At the same

time, international treaties are few and far between and are usually either confined to a very specific subject matter, or broad but vague. And although soft law instruments and self-regulatory mechanisms such as corporate codes of conduct may strike a chord with corporate leaders in the field of international corporate social responsibility, they are less well suited to deal with corporate laggards in this context due to the lack of a mandatory nature and/or adequate enforcement.

This leaves the field of private law, and that of tort law in particular, as an important mechanism to ensure that internationally operating business enterprises take seriously their responsibility to minimize the risk that the activities they undertake in the pursuit of profits will detrimentally affect people and planet elsewhere. One of the big advantages of relying on private law mechanisms in this context is that potential concerns by the states involved over extraterritorial infringements of one another's sovereignty are dealt with through the field of private international law. However, the role that national systems of tort law may play in promoting socially responsible behaviour by internationally operating business enterprises and business respect for human rights is, in the end, strongly dependent on the feasibility for the victims of irresponsible business practices of successfully pursuing foreign direct liability claims.[13]

An analysis of the claims pursued so far shows that the feasibility of these cases is determined by four main factors: 1) whether the home country court seized of the matter has jurisdiction to hear the claim; 2) which national system of tort law the court will apply in determining the validity of the claim; 3) what the conditions for liability are that are connected to the legal basis on which the claim is brought; 4) to what extent the procedural rules and practical circumstances in the forum country are conducive to the pursuit of this type of litigation.[14] This report will address the issue of applicable law as well as that of practical and procedural circumstances in the forum country. In doing so, its focus is on foreign direct liability cases pursued on the basis of tort law. A further discussion of the feasibility, applicable law, and practical and procedural circumstances in cases pursued on the basis of the criminal law falls outside the scope of this report – and of this project.

2.2.2 Private international law and extraterritoriality[15]

As has been mentioned, the point of departure in today's international legal order of sovereign nation states remains that each state, in principle, has the supreme authority to prescribe and enforce rules and regulations with respect to actors and activities within its territory. However, as a result of growing global interconnectedness, actors and activities are increasingly situated in

13 See in more detail: Enneking 2012, *op. cit.* pp. 443–521.
14 *Ibid.*, pp. 129–203.
15 This section is derived from: Enneking 2012, *op. cit.* pp. 137–140.

transnational rather than domestic contexts and are thus potentially subject to the authority of more than one state. The resulting competing claims to regulatory authority by different states with respect to those actors and activities raise questions of international jurisdiction. These questions may be subdivided into questions of: adjudicative jurisdiction (referring to a state's authority to have its courts adjudicate on disputes and render judgments in an international context); prescriptive jurisdiction (referring to a state's authority to apply its laws in an international context); and enforcement jurisdiction (referring to a state's authority to enforce compliance with its laws in an international context).[16]

In line with the idea that the contemporary international legal order is made up of different sovereign nation states each with exclusive authority over actors and activities within their territories, the jurisdiction of states to exercise any of these types of international jurisdiction over actors and activities outside their territory (extraterritorially) is limited. In theory, these limitations are defined either by the field of public international law where public law rights and obligations are concerned, or by the field of private international law where private law rights and obligations are concerned. These two fields of law are of a very different nature. Whereas the former justifies international jurisdiction in spatial terms with a strong focus on territoriality and state sovereignty, the latter focuses on connecting factors between the private actors and activities in question and the different states involved.

Furthermore, the field of public international law revolves around state interests and as such tends to be highly politicized, while the traditional and still popular basic assumption in the field of private international law, in Europe at least, is that this field of law is apolitical, due also to the fact that the domestic systems of private law that it is concerned with are assumed to be relatively free of state intervention and insulated from public interests. According to Michaels, this traditional view can be traced back to Von Savigny's conception that private law is apolitical and should as such be sharply distinguished from the field of public law. He argues that this traditional conception of private international law as an essentially value-neutral, apolitical field of law as originally developed by Von Savigny cannot adequately deal with the contemporary challenges of globalization.[17]

In practice, the two fields are also closely interconnected. The more blurred the boundary between public law and private law becomes, for instance where

16 See in more detail, for instance: Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, 2009, accessible at https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf; Gary P. Born and Peter B. Rutledge *International Civil Litigation in United States Courts*, (2007) Wolters Kluwer Law & Business: Austin, TX, (4th ed.) 1–217.

17 R. Michaels, *Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization*, Duke Law School Faculty Scholarship Series, no. 15, 2005. Accessible at http://ssrn.com/abstract=796228.

private law and civil disputes are given a more 'public' character because they are applied by the government and/or by private actors themselves to enforce public laws, promote public policies, protect public interests or facilitate societal change more generally, the more principles of public and private international law come together.[18] Thus, the question may be raised of whether (the issues sought to be resolved through) the field of private international law may not under certain circumstances be rather 'public' in both character and consequences. Symeonides argues in this respect that

> the word 'private', which echoes the private-public law distinction prevalent in Europe, assumes that the cases that fall within the scope of this subject are garden-variety private-law disputes that implicate only the interests of the litigants and not the interests of the states having contacts with the case. If this were true, these cases would not differ from intra-state cases which are always governed by forum law. Precisely because of their multistate dimension, conflicts cases implicate the laws of more than one state, which may embody different objectives, values, or policies. Although these states are not the actual disputants as they would be in a public international law dispute, it is unrealistic to assume that they are wholly indifferent to the way these conflicts cases are resolved.[19]

In fact, the idea of the field of private international law as an apolitical, neutral field of law that does not involve state interests has long been abandoned in the US, in favour of an approach that recognizes that the conflicting interests involved in this field go far beyond the interests of the parties directly involved in a transnational private law dispute and concern also societal, public and ultimately state interests.[20] Meanwhile, also in Europe there is a growing awareness of and sensitivity to the broader, more public implications of the role of private international law in transnational private law disputes, even though the consideration of these implications remains much less overt than in the US.[21]

With respect to the future role of public interests in the field of private international law, Symeonides predicts:

> As we proceed down the path of the twenty-first century, we can expect that states will, even more boldly, assert their interest in multistate private-law disputes.[22]

18 Similarly, J. A. Zerk, *Multinationals and Corporate Social Responsibility* (2006), Cambridge University Press: Cambridge, 104–142.

19 S. C. Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', 5 *Tulane Law Review* (2008) 1741–1799 (hereinafter: Symeonides 2008a).

20 See, in more detail: Symeonides 2008a, *op. cit.* pp. 1784–1794.

21 *Ibid.*

22 *Ibid.*, p. 1794.

The resulting confluence of public and private international law may result in complex issues that challenge existing paradigms in both fields of law.[23] An example is the growing reliance on civil procedures before domestic courts to address international crimes such as genocide, crimes against humanity, war crimes, torture, slavery, and terrorism. This tendency has the potential of causing conflict with (the harmonization of) domestic civil procedural rules, and raises questions with respect to the lawful exercise of universal (civil) jurisdiction where the domestic legal order in which the claim is brought has little or no connections to the actors or activities in question.[24]

Dubinsky argues in this respect:

> In attempting to adjudicate claims arising out of severe and systematic human rights abuses, domestic courts are trying to fill an enforcement gap, a task for which they were not designed.[25]

He suggests that in order to tackle these issues, a set of common principles of procedural law (including private international law) should be developed that would be applicable to the adjudication of civil claims pertaining to grave human rights violations, no matter where those claims would be brought.[26]

Foreign direct liability cases, due to their transnationality and distinct public interest nature, are a clear example of cases that lie at the plane of intersection between both areas of law. Accordingly, despite the fact that these cases are essentially concerned with private law disputes over the private interrelationships between the host country plaintiffs and the defendant companies, they also tend to raise issues of international adjudicatory and prescriptive jurisdiction and extraterritoriality. After all, home country courts are typically asked in these cases to exercise authority over actors and activities that predominantly lie outside the territorial ambit of those home countries, by exercising jurisdiction over foreign direct liability claims and by, where possible, determining them on the basis of home country tort standards. This may be controversial where this is perceived by the host countries involved as an 'interference in their sovereign rights to regulate corporations within their own borders, and to pursue their own economic, social and cultural interests'.[27]

23 For a more detailed discussion, see A. Mills, *The Confluence of Public and Private International Law* (2009) Cambridge: Cambridge University Press.

24 For a more detailed discussion, see P. R. Dubinsky, 'Human Rights Law Meets Private Law Harmonization: The Coming Conflict', 1 *Yale Journal of International Law* (2005) 211–318.

25 *Ibid*., p. 302.

26 *Ibid*., pp. 312–317.

27 D. Augenstein (2010) *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union*, Report of a study prepared for the European Commission by the University of Edinburgh. Accessible at http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf. In fact, issues of extraterritoriality have been raised in various foreign direct liability

This means that even though the exercise of jurisdiction by home country courts over foreign direct liability claims or the adjudication of those claims on the basis of home country tort principles may be firmly based on applicable rules of private international law, issues of extraterritoriality may remain. Zerk has noted in this context that

> [s]uperficially, a court may only be deciding a dispute between private parties. In reality, though, judicial approaches to problems posed by multinationals in the private law sphere will reflect a set of principles and assumptions, conscious or unconscious, about the appropriate distribution of risk, reward and responsibilities between the different actors involved. But, as well as having a regulatory context, case law on matters of private international law also has regulatory consequences to the extent that it affects the balance of risks and rewards against which the investment decisions of multinationals are subsequently made. In this sense, even the act of deferring to the courts of another state, for whatever reason, is a 'regulatory' act.[28]

Accordingly, underlying issues of sovereignty and extraterritoriality play a prominent role in providing the socio-political context of foreign direct liability cases and the background to private international law-related issues such as the determination of the applicable law in these cases.

2.2.3 Discussion

One of the main focal points of the debates in the EU Member States on access to judicial remedy for victims of corporate human rights abuses is the contemporary trend towards foreign direct liability cases: transnational (civil) liability claims against internationally operating business enterprises in relation to harm caused to people and the planet in the course of their operations – or those of their subsidiaries or supply chain partners – in developing host countries. Over the past two decades, the prevalence of this type of litigation before EU Member State courts has strongly increased, from a mere handful of cases in the 1990s to a total of around 40 cases pursued in various EU Member States up until now – and counting.

The significance of these cases lies in the role they may play in promoting international corporate social responsibility and in fostering corporate respect for human rights, as set out in the UNGPs, while at the same time providing a potential redress mechanism for victims of corporate environmental or human

cases, including for instance the Bhopal litigation (*In re Union Carbide gas plant disaster at Bhopal, India in December 1984*, 634 F.Supp. 842 (SDNY 1986), p. 862–867) and the Apartheid litigation (*In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (SDNY 2009), p. 276–286).

28 Zerk 2006, *op. cit.* p. 114.

rights abuse. They typically originate in developing host countries where legal standards relating to the protection of human rights, the environment, health and safety, and labour circumstances are not very strict or not very strictly enforced. These cases make it possible for individuals and communities who have suffered harm as a result of the activities of internationally operating business enterprises in these host countries to turn to courts in the Western society home countries of those business enterprises in order to obtain a more adequate level of protection of their people and planet related interests.[29]

What plays an important role in these cases is that legal procedures before local host country courts are often problematic, regardless of the merits of the claims involved. Reasons for this may be for instance that the local judiciary is not independent, that there is a fear of persecution, that the individuals or communities involved face discrimination, that the host country legal system is not equipped to effectively deal with complex legal claims, that it would be difficult to locally enforce a court verdict, etc. This means that getting access to judicial remedies before home country courts is often crucial for the victims' chances of addressing and obtaining redress for infringements of their environmental and human rights interests as a result of activities carried out by or for EU-based internationally operating business enterprises in the host countries involved.[30]

Whether these foreign direct liability cases can play a role in providing victims of corporate human rights and environmental abuse with access to judicial remedies before EU Member State courts is dependent on a number of factors that determine the feasibility of these cases. These include, *inter alia*, what law is to be applied in determining the validity of the claims, and whether there are barriers inherent in the procedural rules and practical circumstances in the EU Member States that may prevent these cases from being pursued, regardless of their merits.[31] This report focuses on the second and the fourth of these factors; the first is dealt with in the report on jurisdiction, while the third is (partly) dealt with in the report on standards of care.

2.3 Applicable law[32]

Once it has been established that the court before which a foreign direct liability claim has been brought has jurisdiction to hear the matter, the question arises

29 Enneking *et al.* 2016, *op. cit.* pp. 27–28; Enneking 2012, *op. cit.* pp. 107–117.
30 *Ibid.*
31 Enneking *et al.* 2016, *op. cit.* pp. 27–28; Enneking 2012, *op. cit.* pp. 132–137.
32 This section is largely derived from: Enneking 2012. See also L.F.H. Enneking,' The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation', 2 *European Review of Private Law* (2008) 283–311.

on the basis of which legal norms the transboundary civil claim should be adjudicated. After all, transnational litigation inevitably presents questions of applicable law (or conflict-of-law) where two or more states are able to prescribe substantive rules of conduct regulating the private actors and activities in dispute. Accordingly, courts dealing with transnational civil disputes need to select, on the basis of the domestic rules of private international law that apply in the forum country, which of the legal systems of the states connected to the transnational civil dispute should govern the claims. Rules of private international law may also flow from non-domestic sources of law, such as the EU's many regulations on the law applicable to civil disputes in various subject matter areas.

In principle, different conflict-of-law regimes may apply depending on the characterization of the transnational claims in dispute as tort claims, contractual claims, or otherwise. In this report, the focus will be on applicable law issues in foreign direct liability cases pursued on the basis of tort law. Due to these cases' strong connections to the host country (since they typically pertain to harm caused to people and planet in the host country as a result of activities carried out there), it is not at all a given that the home country courts adjudicating foreign direct liability claims will be able to do so on the basis of home country substantive norms on tort law. In fact, in many of these cases the home country courts involved will have to formulate their judgment with respect to the alleged wrongfulness of the corporate conduct in question – as well as with respect to its legal consequences – on the basis of foreign (often host country) rules of tort law.

2.3.1 Rome II Regulation: general rule

In foreign direct liability cases brought before courts of the EU Member States, the issue of applicable law is largely determined by EU law in the form of the Rome II Regulation.[33] This regulation provides a mandatory and exhaustive regime of unified rules on applicable law in cases of non-contractual liability (hereinafter, tort) involving events giving rise to damage that have occurred on or after 11 January 2009.[34] Pursuant to its principal aim of realizing uniformity

33 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), *OJEU* L199/40 (31 July 2007). Note that the Regulation covers torts occurring within and outside the EU alike and may as such also lead to the application of the law of a non-EU Member State; it's geographical scope is universal (Art. 3 Rome II Regulation).

34 Tort claims brought before EU Member State courts after 11 January 2009, but pertaining to events giving rise to damage that occurred before 11 January 2009, fall outside the temporal scope of the Rome II Regulation and are governed by the domestic rules on applicable law in tort cases of the forum country; the same is true for tort claims that have been initiated before 11 January 2009. See ECJ Case C-412/10, 6 September 2011, [2011] ECR I-11603 (*Homawoo v GMF*). A further discussion of domestic rules on applicable law in tort cases in the various EU Member States falls outside the scope of this report. See, for a brief discussion of relevant Dutch rules, for instance, Enneking 2012, *op. cit.* pp. 223–224.

in the choice of law decisions by the courts of the EU Member States,[35] the Regulation provides a relatively neutral 'system of tightly written black-letter rules with relatively few escapes and little room for judicial discretion' that is focused on jurisdiction-selection (conflicts justice) rather than content-oriented law selection (material justice).[36]

The Rome II Regulation takes as its point of departure the applicability of the *lex loci damni*, a specification of the traditional *lex loci delicti* rule. Consequently, it is the law of the country in which the damage occurs that in principle applies under the Regulation, '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'.[37] On the basis of this general rule, it is the tort law of the host country that will in principle be applicable in foreign direct liability cases that are brought before EU Member State courts. This rule in principle also applies if the tort in question is a transboundary tort, in the sense that the act (or omission) giving rise to the damage is located in one country (the *Handlungsort*) whereas the harm resulting from that act (or omission) is located in another country (the *Erfolgsort*).[38]

There are a number of matters that in particular fall within the scope of the law that is applicable on the basis the Rome II Regulation's rules. These include:

> a) the basis and the extent of liability, including the determination of persons who may be held liable for acts performed by them; b) the grounds for exemption from liability, any limitation of liability and any division of liability;

35 See recital 6 Rome II Regulation: 'The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'.

36 See, for a critical appraisal S. C. Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity', 1 *American Journal of Comparative Law* (2008) 173–222, 178–186) (Symeonides 2008b).

37 Art. 4(1) Rome II Regulation. According to the Explanatory Memorandum to the Commission's proposal for the Rome II Regulation, this choice for the *lex loci damni* as the Regulation's starting point is justified by the concern for certainty in the law, as well as by the consideration that 'the modern concept of the law of civil liability [. . .] is no longer [. . .] oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates' (COM(2003) 427, p. 12). It is further asserted that this rule 'strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability' (Recital 16 Rome II Regulation). See, critically, Symeonides 2008b, *op. cit.* pp. 186–192, and (with a focus on foreign direct liability cases) Enneking 2008, *op. cit.* pp. 309–310.

38 Art. 4(1) Rome II Regulation. The classic example of a transboundary tort case is the Mines de Potasse case, which concerned the pollution of the river Rhine by chlorides from French potassium miners, causing environmental harm to Dutch farmers located downstream from their operations. ECJ Case C-21/76, 30 November 1976, [1976] ECR 01735 (*Bier/Mines de Potasse d'Alsace*).

> c) the existence, the nature and the assessment of damage or the remedy claimed; d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; f) persons entitled to compensation for damage sustained personally; g) liability for the acts of another person; h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.[39]

In addition, where the law that is applicable to a claim under the Rome II Regulation 'contains rules which raise presumptions of law or determine the burden of proof', those will also be applicable.[40]

There are two general escape clauses that accompany the Rome II Regulation's general rule of applicability of the *lex loci damni*.

The first pertains to the situation that 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.[41] In such a situation, the law of the country of the joint habitual residence shall be applied to the case. However, this situation is unlikely to arise in foreign direct liability claims that are brought by host country victims against Western society-based internationally operating business enterprises.[42] It may in theory play a role in claims that would be brought by these victims before EU Member State courts against (only) host country-based companies, but in such cases, leaving aside the question whether the court would have jurisdiction to hear the claim,[43] this rule would not lead to a different outcome (i.e. applicability of host country tort law).

The second pertains to the situation that 'it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected' with a country other than the one in which the damage has arisen and other than the one in which (if relevant) the parties have their joint habitual residence.[44] In such a situation, the law of this other country shall be applied to the case. Whether it would be possible in foreign direct liability cases to successfully argue that such a closer connection to another country – notably the EU Member State that is the home country of the corporate defendant involved – exists is unclear, however. The example of such a 'manifestly closer relationship' that is provided by the Regulation itself, 'a pre-existing relationship between the parties,

39 Art. 15 Rome II Regulation.
40 Art. 20(1) Rome II Regulation.
41 Art. 4(2) Rome II Regulation.
42 Similarly, G. Van Calster, *European Private International Law* (2013) Hart Publishing: Oxford, 439.
43 See in more detail on this matter the report on Jurisdiction.
44 Art. 4(3) Rome II Regulation.

such as a contract, that is closely connected with the tort/delict in question',[45] is unlikely to play a role in foreign direct liability cases.[46] Especially considering the fact that, in line with the Regulation's general aim of providing for certainty as to the applicable law and predictability concerning the outcome of litigation, this provision will have to be interpreted and applied restrictively.[47]

In addition, the Rome II Regulation leaves open the possibility that the parties to a foreign direct liability case that is brought before an EU Member State court jointly designate the law that is to be applied to the claims on the basis of an agreement entered into after the event giving rise to the damage occurred.[48] In reality, the chances that parties to a foreign direct liability case will agree on the law that is to be applied to the case seem slim, especially in those cases where circumstances such as the level of protection of the victims and the level of damages will vary widely according to the law that is applied to the case, as will often be the case in this context. At the same time, to the corporate defendants involved the application of foreign (host country) tort law by these courts may carry with it the additional benefit that any judgment on the issue of liability in favour of the plaintiffs would not create binding and/or useful precedent under the tort law of the EU Member State where they are based.

2.3.2 Rome II Regulation: special rule on environmental damage

Furthermore, the Regulation contains a number of special provisions for specific types of torts that deviate from the general rule of *lex loci damni*. Of these provisions, the special rule on environmental damages is likely to be especially relevant in the context of foreign direct liability cases.[49] On the basis of this rule, the tort victim in a transboundary tort case that arises out of environmental damage or damage sustained by persons or property as a result of such damage, is presented with the option of choosing the applicability of the law of the *Handlungsort* (*lex loci actus*) instead of that of the *Erfolgsort* (*lex loci damni*).[50] According to the Regulation, environmental damage in this sense should be understood as meaning

> adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural

45 *Ibid*.

46 Similarly, Van Calster 2013, *op. cit.* p. 240; Enneking 2008, *op. cit.* p. 307.

47 Similarly, but in more detail, Peter Huber (ed.), *Rome II Regulation: Pocket Commentary* (2011) European Law Publishers: Munich, Sellier, 99–104; Enneking 2008, *op. cit.* pp. 300–302.

48 Art. 14 (1) (a) Rome II Regulation.

49 This special rule is not subject to either the common domicile exception (Art. 4(2)) or to the closer connection exception (Art. 4(3)); it does, however, leave open the possibility of a choice of law on the basis of Art. 14. See Huber 2011, *op. cit.* pp. 202–203, 214.

50 Art. 7 Rome II Regulation.

> resource or the public, or impairment of the variability among living organisms.[51]

In contrast to the Rome II Regulation's overall tendency towards policy neutrality, the special rule on environmental damage has been inspired by objectives of environmental protection policy, in combination with the concern that 'the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries'.[52] In its original proposal for the Regulation, the Commission justified the inclusion of this special rule on environmental damage as follows:

> Considering the Union's more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the "polluter pays" principle.[53]

This particular rule may be of significance for future foreign direct liability cases, at least those that involve environmental damage as specified in the Regulation, provided they can be constructed as transboundary tort claims in which the event giving rise to the damage in the host country has taken place in the home country of the corporate defendant. This may be the case for instance if a claim can be made that the home country-based parent company or retailer took decisions, made demands or implemented policies that eventually resulted in the environmental damage being caused in the host country, or failed to exercise adequate supervision over the host country activities where it could and should have done so.[54] It has been suggested that such an interpretation is in line with the notion of operator responsibility and the accompanying definition of operator in the EU Environmental Liability Directive.[55]

51 Recital 24 Rome II Regulation.

52 Explanatory Memorandum, *op. cit.* p. 19.

53 *Ibid.*, pp. 19–20.

54 Similarly: Enneking 2008, *op. cit.* pp. 212–218, 304–307.

55 Carmen Otera García-Castrillón, 'International Litigation Trends in Environmental Liability: A European Union – United States Comparative Perspective', 3 *Journal of Private International Law* (2011) 551–581, 571–572). See also Van Calster 2013, *op. cit.* pp. 173–174.

In these situations, the special rule on environmental damage would give the host country victims the option of choosing application of home country tort law, which may involve more relevant precedents, higher regulatory standards, stricter liabilities, more liberal rules on presumptions of law or on shifting the burden of proof, higher damages awards, etc. However, the question has been raised as to whether the environmental damage rule would indeed be applicable to these particular types of claims, or whether its scope is limited to more 'classic' cases of transboundary environmental damage such as may arise for instance from river pollution or an explosion at a chemical factory.[56] The real issue here seems to be whether this rule pertains only to situations of local conduct that result in transboundary environmental damage which is felt in a neighbouring country, or also to situations of transboundary conduct that results in local environmental damage in some far away (non-EU) country. Or, put in another way: do non-EU environmental interests also fall within the scope of Rome II's environmental policies?

Although the Commission proposal does indeed speak of 'neighbouring countries', there is nothing in the text of the provision itself that supports this narrow interpretation. In fact, such a narrow interpretation does not seem to be in line with the Rome II Regulation's universal application, nor with the environmental damage rule's main aim, which is to raise the overall level of environmental protection and of making the polluter pay.[57] As is stated in the Regulation itself:

> Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.[58]

In the end, the choice provided to environmental tort victims by Art. 7 for the law of the *Handlungsort* rather than the *Erfolgsort* is not meant to benefit the victims as such, but to

> promote the interests of the respective countries and of the Union as a whole in deterring pollution. Applying whichever of the two laws subjects

56 See, for instance, A. G. Castermans and J. A. Van Der Weide, *The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights*', Report of a study prepared for the Dutch Ministries of Economic Affairs and Foreign Affairs, 15 December 2009. Accessible at http://ssrn.com/abstract=1626225, p. 53.

57 See Arts 3 and 7 Rome II Regulation and Explanatory Memorandum, *op. cit.* pp. 9–10, 19–20.

58 Recital 25 Rome II Regulation.

> the polluter to a higher standard promotes this interest. Giving the victim a choice is simply the vehicle for ensuring this result.[59]

Whether and how the special rule on environmental damage may play a role in future foreign direct liability cases is a question that may eventually have to be answered by the ECJ, which has yet to render a decision on the interpretation and the scope of application of this rule.

2.3.3 Rome II Regulation: relevant exceptions

Apart from those cases that may be brought under the special rule for environmental damage, the Rome II Regulation's general rule of *lex loci damni* will in most cases result in the applicability of host country tort law in foreign direct liability cases. Nonetheless, there are a number of ways in which home country legal rules and standards that are relevant to the issue in dispute may find application even in foreign direct liability cases that are decided on the basis of host country rules of tort law.

2.3.3.1 Overriding mandatory provisions

First of all, there is the possibility under the Rome II Regulation for the EU Member State court seized of a matter to apply so-called overriding mandatory provisions (or, public order legislation, *règles d'application immédiate*) of the law of the forum that are relevant to the subject matter in dispute, irrespective of the law that governs the claim.[60] According to the ECJ, overriding mandatory provisions can be defined as

> national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.[61]

Accordingly, these provisions typically include domestic regulations of a (semi-) public law nature that intervene in private legal relationships in order to protect the public interest, such as anti-trust regulations, monetary regulations, labour regulations (such as rules on working hours and working conditions),

59 Symeonides 2008b, *op. cit.* pp. 205–206.

60 Art. 16 Rome II Regulation.

61 ECJ Cases C-369/96 and C-376/96, 23 November 1999, [1999] ECR I-8453 (*Arblade*). See also Art. 9 (1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

environmental regulations and rules of criminal law.[62] They may also include rules that flow from non-domestic legal sources, like certain provisions of substantive EU law[63] or of public international law, potentially also including certain provisions on the protection of fundamental/human rights.[64]

The extent to which such existing overriding mandatory provisions will be relevant in foreign direct liability cases brought before EU Member State courts remains to be seen. First of all, this exception may according to the text of the Rome II Regulation itself only be applied 'in exceptional circumstances'.[65] At the same time, in line with the contemporary international legal order's state-centred and territorially-based nature, mandatory public law regulation of actors and/or activities outside a state's territory remains an exception.[66] Still, if an EU Member State were to impose, for example, statutory duties for locally based internationally operating business enterprises with respect to the people and planet related impacts of their activities in host countries, such duties could be considered to be overriding mandatory provisions that should find application in foreign direct liability cases brought before the courts in those EU Member States.

Van Hoek states in this respect that

> if the country in which the court sits imposes statutory duties on its corporations with regard to extraterritorial compliance with human rights standards, such duties may override the otherwise applicable law.[67]

She adds to this:

> Some statutes may not stop at prescribing an extraterritorial duty of care, but may stipulate that violation of that duty will lead to civil liability towards the victims, in which case the civil law liability will be based on a mandatory overriding provision as well.[68]

62 See, for instance, Huber 2011, *op. cit.*, pp. 354–356. See also L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer, Kluwer, 2013, pp. 69–70.

63 Compare ECJ Case C-381/98, 9 November 2000, [2000] ECR I-9305 (*Ingmar/Eaton*). See also, more recently but within the scope of contractual obligations (Rome I Regulation): ECJ Case 184–12, 17 October 2013 (*Unamar/Navigation Maritime Bulgare*).

64 See, for instance, with a focus on the European Convention on Human Rights: A. A. H. Van Hoek, 'Transnational Corporate Social Responsibility: Some issues with regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of their Suppliers', in: Frans Pennings *et al.* (eds.), *Social responsibility in labour relations: European and comparative perspectives*, Alphen aan den Rijn, Kluwer Law International, (2008) p. 147–169. Compare also, within the scope of contractual obligations (Rome I Regulation): Laura M. Van Bochove, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law', 3 *Erasmus Law Review* (2014) 147–156, 150.

65 Recital 32 Rome II Regulation.

66 Compare Augenstein 2010, *op. cit.* p. 72.

67 Van Hoek 2008, *op. cit.* p. 166.

68 *Ibid.*

The hypothetical scenario set out by Van Hoek in 2008 may well become reality at some point in the near to medium-term future. In various European countries legislative initiatives have recently been put forward that seek to transform some of the soft law norms from the UNGPs into mandatory provisions on corporate duties of care in relation to human rights and the environment abroad. In France, there is fierce debate over a legislative proposal on a legal duty of due care (*devoir de vigilance*) for large French business enterprises with regard to people and planet related risks connected with the activities of their subsidiaries, subcontractors and suppliers.[69] In Switzerland, a popular legislative initiative has been put forward requesting an amendment of the Swiss Federal Constitution that would introduce a legally obligatory binding '*responsabilité des entreprises*' for Swiss business enterprises relating to the impact on people and the planet of their own activities and of the activities of business enterprises controlled by them.[70]

The constitutional amendment proposed in the Swiss popular initiative contains a specific provision stating that the provisions dealing with corporate obligations and liabilities 'apply irrespective of the law applicable under private international law'.[71] This provision is meant to ensure that the Swiss legislator would be required to design the constitutional amendment on *responsabilité des entreprises* as an overriding mandatory provision.[72] This is a necessary provision, since on the basis of the applicable Swiss conflict-of-law regime the law applicable to a foreign direct liability claim brought before a Swiss court would in principle be the law of the host country rather than Swiss tort law.[73] Like the Rome II Regulation, however, the Swiss regime provides for the possibility that the court may apply overriding mandatory provisions that are relevant to the subject matter in dispute, irrespective of the law that governs the claim.[74]

Also in Germany, there is debate on the desirability of and possibilities for introducing in German law a statutory duty of care for corporate actors in the human rights context. In a recent study commissioned by a number of German NGOs, a group of German legal experts have set out in detail how such a

69 *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, no. 708, 23 March 2016, adopted with modifications by the Assemblée Nationale in second reading. Accessible at http://www.assemblee-nationale.fr/14/ta/ta0708.asp.

70 Swiss Coalition for Corporate Justice, *Initiative Multinationales Responsables*, 21 April 2015. Accessible at http://konzern-initiative.ch/initiativtext/?lang=en. It is reported on the website that the initiative has within a year of its launch gathered the number of signatures that is necessary in order for it to be submitted to the Swiss Federal Council and Parliament. They can either accept or reject the amendment or draft a counter-proposal. As long as the initiative is not retracted, it will be put to the popular vote.

71 *Ibid*., proposed Art. 101a(2)(d).

72 *Ibid*., explanation of proposed Art. 101a(2)(d).

73 Arts 132, 133(1) and 133(2) *Loi fédérale de droit international privé*. See, in more detail, Enneking *et al.* 2016, pp. 326–327.

74 Art. 18 *Loi fédérale de droit international privé*.

provision could take shape within the German legal system.[75] In this study, ample attention is paid to the fact that such a provision should be shaped as a mandatory overriding provision in order to ensure its applicability in tort cases relating to human rights related harm arising in a host country.[76]

2.3.3.2 Rules of safety and conduct

A further way in which home country legal rules and standards that are relevant to the issue in dispute may find application even in foreign direct liability cases that are decided on the basis of host country rules of tort law, is through the Rome II Regulation's provision on rules of safety and conduct. This provision states that whenever the applicable law is not the law of the country in which the event giving rise to the damage occurred, a court should still take account of 'the rules of safety and conduct which were in force at the place and time of the relevant event'.[77] According to the Explanatory Memorandum, this provision 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.[78]

Examples include local traffic regulations or, more relevant in the context of foreign direct liability cases, rules on safety and hygiene in the workplace.[79]

The provision on rules of safety and conduct may play a role in foreign direct liability cases before EU Member State courts dealing with the liability of EU-based parent companies for harm caused to human and environmental interests in non-EU host countries, as it allows the court to take into account home country behavioural standards that may be stricter than those in the host country, even when the law of the host country is applicable to the case.[80] Taking account of the rules of safety and conduct of the home country is not the same as applying them, however. They should be taken into account by the court as a matter of fact and insofar as is appropriate, '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'.[81]

75 Remo Klinger *et al.*, *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht*, March 2016. Accessible at https://germanwatch.org/de/download/14745.pdf.
76 *Ibid.*, pp. 71–76.
77 Art. 17 Rome II Regulation.
78 Explanatory Memorandum p. 25.
79 Compare Van Hoek 2008, *op. cit.* p. 166.
80 Compare Symeonides 2008b, *op. cit.* pp. 211–215.
81 *Ibid.*

Accordingly, home country rules on safety and hygiene in the workplace are not applied as such, but for instance used to determine an employer's duty of care vis-à-vis his employees.[82] Similarly, it seems that the provision on rules of safety and conduct does not create an opportunity to replace the applicable rules on tort law of the *lex loci damni* with any (stricter) liability rules applicable at the place where the events giving rise to the damage occurred that would pertain specifically to the conduct in dispute. Van Hoek notes in this respect that

> it seems clear that Article 17 should not be construed in such a way as to contain a special rules on the tortiousness of the behaviour based on the *lex locus actus* [i.e. home country tort law]. Such *depeçage* would run counter to Article 15 of the Regulation which provides that all major elements of tortious liability (the tortiousness of the act as such, liability and exceptions thereto, the assessment of damages etc.) are covered by the law applicable on the basis of Article 4 ff.[83]

The provision on rules of safety and conduct may also cover unwritten rules pertaining to proper social conduct, guidelines and soft law norms.[84] This is important, as it opens up the possibility that EU Member State courts dealing with foreign direct liability claims against EU Member State-based companies take account of behavioural standards of safety and conduct that flow from instruments like the UNGPs and the OECD Guidelines for Multinational Enterprises.[85] In addition, the provision may potentially also be used by EU Member State courts dealing with foreign direct liability cases to take into account any domestic rules of criminal law that pertain to the extraterritorial violations of human or environmental interests that are at issue in the cases brought before them.[86] Examples of such provisions are those criminalizing the direct or indirect participation by companies in modern slavery at home and abroad as exist in Dutch law,[87] or those criminalizing the participation by private military and security companies (PMSCs) in human rights abuses committed in armed conflicts abroad as exist in Swiss law.[88]

82 *Ibid*.
83 *Ibid*.
84 See, in more detail, Enneking 2012, *op. cit*. pp. 220–222.
85 *Ibid*.
86 Van Hoek 2008, *op. cit*. p. 166.
87 See, in more detail, A.-J. L.M. Schaap, *Chocolade met een Bittere Nasmaak – De Strafrechtelijke Aansprakelijkheid van Nederlandse Ondernemingen voor Moderne Slavernij*, blog, Utrecht Centre for Accountability and Liability Law, 21 June 2016. Accessible at http://blog.ucall.nl/index.php/2016/06/chocolade-met-een-bittere-nasmaak-de-strafrechtelijke-aansprakelijkheid-van-nederlandse-ondernemingen-voor-moderne-slavernij/; Enneking *et al.* 2016, *op. cit*. pp. 146–147.
88 See, in more detail, Enneking *et al.* 2016, *op. cit*. pp. 336–337.

Van Hoek notes in this respect, however, that

> in those cases, reliance on Article 16 [on overriding mandatory provisions] might be preferred as that provision allows for outright application of the forum's mandatory provisions. Moreover, Article 16 allows such application in all circumstances in which the rules of the forum claim application whereas Article 17 only refers to rules of the *locus actus* and hence is incapable of covering all cases in which there is criminal jurisdiction within the forum.[89]

2.3.3.3 Public policy

Finally, under the Rome II regime EU Member State courts may by way of exception refuse to apply a provision of host country tort law in foreign direct liability cases brought before them, where (the application of) the provision in question is manifestly incompatible with fundamental principles and values of the legal order (*ordre public*) of the forum.[90] This may provide an important minimum guarantee (or 'emergency brake')[91] in foreign direct liability cases that are brought before EU Member State courts but governed by host country law, especially since fundamental human rights principles, whether ensuing from international or domestic law, are considered to be part of the public policy of the forum.[92] As such, it is conceivable that, under this provision, EU Member State courts will for example refuse to apply provisions of host country law that would condone child labour or amount to serious violations of (international) human rights norms.[93]

The actual extent of this role for the public policy exception in foreign direct liability cases brought before EU Member State courts is not unlimited, however. First of all, the use of the public policy exception is meant to remain exceptional; its application in a particular case may be subject to review by the ECJ. The fact that, in the eyes of the court seized of the matter, the applicable rules of the host country are wrong as to their substance and conclusion, is not a sufficient reason for invoking public policy, not even if the incorrectness is manifest.[94] There has to be a conflict with fundamental legal principles for the court seized of the matter to be allowed to refuse to apply a host country regulation on the basis of the public policy exception, and apply its own law instead.[95] The ECJ, for example, found such conflict in a case in which a defendant's

89 Van Hoek 2008, *op. cit.* pp. 166–167.
90 Art. 26 Rome II Regulation.
91 Castermans & Van der Weide 2010, *op. cit.* p. 54.
92 See, in more detail for instance, Augenstein 2010, *op. cit.* pp. 72–73; Van Hoek 2008, *op. cit.* pp. 167–168.
93 Augenstein 2010, *op. cit.* p. 73; Van Hoek 2008, *op. cit.* pp. 167–168.
94 ECJ Case C-38/98, 11 May 2000, [2000] ECR I-02973 (*Renault/Maxicar*).
95 Compare recital 32 Rome II Regulation and Explanatory Memorandum, *op. cit.* p. 28. See also, in more detail, Enneking 2008, *op. cit.* pp. 306–307.

right to defend himself before his court of origin, as recognized by the European Convention on Human Rights, had been manifestly breached.[96]

It should be noted, however, that where it comes to the norms ensuing from international human rights conventions, account needs to be taken of the fact that international conventions in principle apply only within the territories of their Member States. Whether they could be applied 'extraterritorially' to actors and/or activities in non-Member States is disputable. The question may be raised, therefore, as to what role for instance the substantive human rights norms laid down in the European Convention on Human Rights (ECHR) (as opposed to procedural norms like Article 6 ECHR) could play in relation to the determination of the applicable law in foreign direct liability cases brought before EU Member State courts that pertain to human rights violations perpetrated in non-European host countries. Van Hoek asserts in this respect that

> when the application of foreign law leads to a result which is unacceptable if measured against the standards (rather than the rules) of the ECHR, the public policy exception intervenes and *lex fori* is applied instead. If the applicable foreign law does not provide a remedy for gross violations of human rights taking place within the territory, this would be a violation of such a Convention standard.[97]

Still, in the particular context of foreign direct liability cases, where application of host country law may lead to fundamentally different outcomes with respect to standards of care in relation to the protection of human and environmental interests, including fundamental human rights standards, the public policy exception may well prove instrumental.[98]

2.3.4 Discussion

In foreign direct liability cases brought before EU Member State courts, the issue of applicable law is largely determined by EU law in the form of the Rome II Regulation. The EU Member States' national rules on conflict-of-law in tort cases will in principle only play a role in those foreign direct liability cases that fall outside the temporal scope of the Rome II Regulation due to the fact that they pertain to events giving rise to damage that occurred before 11 January 2009. As time progresses, however, more and more of these cases will fall within the temporal scope of the Rome II Regulation.

Under the rules set out in the Rome II Regulation, foreign direct liability claims brought before EU Member State courts will in most cases be decided not on the basis of home country tort law but on the basis of the rules on

96 ECJ Case C-7/98, 28 March 2000, [2000] ECR I-01935 (*Krombach/Bamberski*).
97 Van Hoek 2008, *op. cit.* p. 167.
98 See also Augenstein 2010, *op. cit.* p. 76.

non-contractual liability that apply in the host country. This is likely to be different only where the case pertains to environmental damage (or to damage sustained by persons or property as a result of such damage) and where the event giving rise to the damage can be said to have taken place in the home country of the corporate defendant (where relevant decisions have been taken, group policies have been imposed, supervision of host country activities should have taken place, human rights due diligence should have been exercised, etc). In that case, the victim is presented with the option of choosing the applicability of the law of the home country instead of that of the host country.

The possibility of pursuing foreign direct liability cases in the EU Member States on the basis of home country tort law is of fundamental importance. It determines whether EU Member States can deploy their national systems of tort law as a much needed regulatory instrument that can promote international corporate social responsibility and, more in particular, corporate respect for human rights by EU-based internationally operating business enterprises operating in developing host countries. At the same time, it also determines the possibilities for host country based individuals and communities who have suffered harm as a result of the activities of EU-based internationally operating business enterprises to ensure, through this type of litigation, that the level of protection of their environmental and human rights interests is adequate and not fundamentally different from that afforded to those living in the EU home countries of the business enterprises involved.[99]

The law that is applicable to a foreign direct liability case covers issues such as the standard of liability, the available remedies, the calculation of damages as well as rules determining the burden of proof. This means that the development in EU Member States of statutory provisions or case law with respect to duties of care for internationally operating business enterprises in relation to human and environmental interests in non-EU host countries will only have meaning and effect if those provisions and precedents may find application in foreign direct liability cases brought before EU Member State courts. It also means that the remedies or levels of damages or alleviations of the burden of proof that may be afforded to EU citizens and communities in litigation over violations of environmental and human rights norms will only be available to victims from non-EU host states in foreign direct liability cases if home country tort law is applied in foreign direct liability cases brought before EU Member State courts.[100]

In the end, this is thus a matter of justice and fairness, as is also expressed by one of the British legal counsel of a large group of Ivorians who sought to hold the Anglo-Dutch Petroleum trader Trafigura liable before an English

99 See, in more detail, Enneking 2012, pp. 134–135, 137–140, 152–155, 301–307, 504–521; Enneking 2008.

100 *Ibid*.

court for the harm caused by the Probo Koala toxic waste dumping incident in 2006:

> Although the events took place thousands of miles away, it is right that this British company is made to account for its actions by the British courts, and made to pay British levels of damages for what happened. A British company should act in Abidjan in exactly the same way as they would act in Abergavenny.[101]

However, it is also – and increasingly so – a matter of policy, as is underlined by the growing willingness among European policymakers to consider the introduction of legal norms to promote international corporate social responsibility and corporate respect for human rights in host countries by 'their' internationally operating business enterprises.[102] This is exemplified by the ongoing debates on the introduction of statutory human rights due diligence obligations for internationally operating business enterprises – combined with the possibility of civil liability for violations thereof – in France, Switzerland and – more recently – Germany.[103] These developments have in turn prompted the launch of a green card initiative by members from eight EU Member State Parliaments calling for the EU-wide introduction of a duty of care towards individuals and communities whose human rights and local environment are affected by the activities of EU-based companies.[104]

At the same time, EU Member State courts are demonstrating an increasing willingness to consider the possibility that the parent company of a corporate group may owe a duty of care towards third parties (workers, neighbours, communities) whose environmental, human rights and/or health and safety related interests are negatively affected by the operations of its subsidiaries, and that it may be liable in case of a breach of that duty. This is evidenced by the case of *Chandler v Cape*, a 2012 English case in which a parent company of a corporate group was held liable, both at first instance and on appeal, for asbestos-related injuries suffered by

101 See, with further references, Enneking 2008, pp. 284–285.

102 See, in more detail, Enneking *et al.* 2016, pp. 157–343.

103 *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, no. 708, 23 March 2016, adopted with modifications by the Assemblée Nationale in second reading, accessible at http://www.assemblee-nationale.fr/14/ta/ta0708.asp; Swiss Coalition for Corporate Justice, *Initiative Multinationales Responsables*, 21 April 2015 accessible at http://konzern-initiative.ch/initiativtext/?lang=en; Klinger *et al.* 2016, *op. cit.* See, in more detail, Enneking *et al.* 2016, pp. 236–237, 330–332.

104 See, for instance, ECCJ, *Members of 8 European Parliaments support duty of care legislation for EU corporations*, 31 May 2016, accessible at http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations; Sherpa, *Parlimentarians from all the EU commit to strengthen the social responsibility of multinational companies*, 18 May 2016, accessible at https://www.asso-sherpa.org/parliamentarians-from-all-the-eu-commit-to-strengthen-the-social-responsibility-of-multinational-companies.

an employee of one of its subsidiaries as it was considered to have breached a duty of care owed to the employee.[105] It is also evidenced by the judgments of the Hague District Court and the Hague Court of Appeal in the Dutch Shell Nigeria case, as both courts held, in response to the corporate defendants' assertion that the claims against the parent company were 'evidently without merit', that parent company liability was a possible scenario also in the case at hand.[106]

These developments in (prospective) legislation and case law in a number of the EU Member States underline the importance of having the possibility of applying home country tort law in foreign direct liability cases brought before EU Member State courts. The Rome II Regulation's special rule on environmental damage may provide a basis for this. However, this basis is not only uncertain, due to the fact that it remains unclear for now whether it may be relied on in foreign direct liability cases, but also very narrow, as it would only be available in cases involving environmental damage or damage sustained by persons or property as a result thereof.

As a consequence, the application and enforcement through foreign direct liability cases of any legal norms developed in the EU Member States to promote international corporate social responsibility and corporate respect for human rights in host countries, remains dependent on the applicability of one of the Rome II Regulation's other exceptions. The exceptions as regards overriding mandatory provisions of the law of the forum country and as regards the public policy of the forum country could potentially be relevant in this regard. According to the Regulation, however, these are only to be applied in exceptional circumstances,[107] which means that they can only play a limited role in this context. The same is true for the provision on rules of safety and conduct that are in force at the place of the event giving rise to liability, as these rules need only be taken into account by the court as a matter of fact and insofar as the court deems appropriate.

With respect to the two exceptions mentioned, it should be noted that the Committee of Ministers of the Council of Europe in its 2016 Recommendation on human rights and business has recommended:

> Member States should apply such legislative or other appropriate measures as may be necessary to ensure that their domestic courts refrain from

105 *Chandler v Cape plc* [2012] EWCA Civ 525. See, in more detail for instance, Siel Demeyere, 'Liability of a Mother Company for its Subsidiary in French, Belgian, and English Law', 3 *European Review of Private Law* (2015) 385–413; Enneking *et al.* 2016, *op. cit.* pp. 292–296.

106 See, for instance: The Hague District Court, 30 December 2009, ELI:NL:RBSGR:2009:BK8616 (oil spill near Oruma), paras. 3.2-3.3; The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (oil spill near Oruma), para. 4.4; The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:2015:3588 (oil spill near Oruma), paras, 2.1-2.8.

107 Recital 32 Rome II Regulation.

> applying a law that is incompatible with their international obligations, in particular those stemming from the applicable international human rights standards.[108]

A more structural solution may lie in an extension of the scope of the Rome II Regulation's special rule on environmental damage to human rights related damage as well as, possibly, health and safety related damage. After all, many of the policy rationales prompting the introduction of the special rule on environmental damage can be said to also exist – or even more so – with respect to these types of damage if they are caused by the operations of EU-based business enterprises. Also in these cases, the exclusive connection to the place where the damage is sustained would mean that a victim from a low-protection host country would not enjoy the higher level of protection that may be available in the EU Member State home countries of the business enterprises involved.[109]

Extending the scope of the special rule on environmental damage in this way would be crucial to enabling EU (Member States') policies aimed at contributing to raising the general level of protection not only with respect to environmental matters but also with respect to human rights and health and safety related matters. In light of the fact that also in cases resulting in human rights related damage or health and safety related damage, the author of the damage (unlike other torts or delicts) generally derives an economic benefit from his harmful activity, the focus of the special rule on environmental damage alone may even seem arbitrary.[110] A broader possibility of discriminating in favour of the person sustaining the damage in this broader category of cases would thus strongly contribute to the realization of EU (Member States') policies on international corporate social responsibility and business respect for human rights.

2.4 Procedural rules and practical circumstances[111]

A factor that tends to have a crucial impact on the feasibility of foreign direct liability claims is formed by the relevant procedural rules and practical circumstances under which these claims can be brought before Western society home country courts.

One of the features that is characteristic of foreign direct liability cases is that the parties to these cases are typically unevenly matched, as the corporate defendants are usually in a much better position than the host country plaintiffs with respect to both information and finances. The fact that there is typically

108 Council of Europe Committee of Ministers, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business, no. 40.

109 Compare Explanatory Memorandum, *op. cit.* pp. 19–20.

110 *Ibid.*

111 This section is largely derived from: Enneking *et al.* 2016, *op. cit.*; Enneking 2012, *op. cit.*

little transparency with respect to the often complex group and operational structures of the multinational corporations involved, and also on the way in which their international operations are actually coordinated, controlled, managed and/or supervised, may significantly hamper host country plaintiffs seeking to hold them accountable. At the same time, the fact that the host country plaintiffs usually only have very limited financial means at their disposal from which to finance these often complex, expensive and drawn-out legal procedures, tends to put them at a significant disadvantage vis-à-vis their corporate opponents.[112]

Consequently, there are a number of issues that tend to be of particular relevance in this context. These include: 1) the financial aspects of bringing foreign direct liability claims, also considering their typical complex and drawn-out nature; and the availability of expert legal and practical assistance; 2) the possibilities for bringing collective actions; 3) circumstances relating to the collection of evidence and burden of proof.[113] As matters of evidence (with the exception of rules which raise presumptions of law or determine the burden of proof)[114] and procedure fall outside the material scope of the Rome II Regulation,[115] these issues are largely determined by the procedural rules and practical circumstances of the EU Member State where the foreign direct liability case is brought.

2.4.1 General observations

The fact that, up until now, foreign direct liability cases have nowhere been as prevalent as in the US, is sometimes explained as resulting from the fact that the litigation cultures in other Western societies are, by comparison, less conducive to this type of litigation.[116] The US legal culture of adversarial legalism and its tradition of public interest and impact litigation, accompanied by plaintiff-friendly rules of civil procedure and litigation practices, are unique to the US and unlikely to be found elsewhere.[117] In fact, the US litigation culture is often depicted outside the US as being excessive and something to be avoided rather than welcomed. Disadvantages that are commonly perceived to be associated with it include: over-precaution, which may lead to high costs for potential

112 See, in more detail, Enneking 2012, *op. cit.* pp. 114–116.

113 Enneking *et al.* 2016, *op. cit.* pp. 111–126; Enneking 2012, *op. cit.* pp. 136–137 *et seq.*

114 Art. 22(1) Rome II Regulation.

115 Art. 3 Rome II Regulation.

116 See, for instance, Beth Stephens, 'Translating *Filártiga*: a Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations', 1 *Yale Journal of International Law* (2002) 2–57, 17–34.

117 Enneking 2012, *op. cit.* pp. 191–194; Ulrich Magnus, 'Why is US tort law so different?', 1 *Journal of European Tort Law* (2010) 102–124, 119–120; Stephens 2002 *op. cit.* pp. 24–27; Robert A. Kagan, *Adversarial Legalism: The American Way of Law*, Cambridge MA, Harvard University Press, 2001.

tortfeasors, deterrence of economically valuable activities and restraints on innovation; abuse of civil procedures for unmeritorious claims, which may lead to high societal costs and so-called 'blackmail settlements'; insurance issues; and high transaction costs.

Generally speaking, a public interest related litigation infrastructure similar to the US model has failed to materialize in Europe, where public issues have tended to be addressed through societal dialogue and government intervention rather than through civil litigation. As a consequence, law firms specializing in public interest cases have remained exceptions and of the numerous European NGOs involved in issues of international corporate social responsibility, only a few are seeking to address issues of corporate wrongdoing in this respect through litigation rather than through dialogue with businesses and governments. Overall, the combination of procedural and practical features of civil litigation systems in the EU Member States tends to be less favourable to plaintiffs in foreign direct liability cases than is the case in the US.[118]

2.4.2 The financing of claims, collective redress and access to evidence

Notwithstanding the fact that the European civil law systems are often said to be converging, differences in legal culture between the different countries remain quite pervasive.[119] This also means that the extent to which procedural rules and practical circumstances in the EU Member States are as conducive to the pursuit of foreign direct liability claims as the US civil litigation system, varies from country to country. However, the general picture is that none of the EU Member States features a combination of procedural rules and practical circumstances that is as conducive to the pursuit of foreign direct liability cases as the US civil litigation system.[120]

Compared to the other European systems, the UK legal system at this point seems most conducive for this type of litigation, which (at least partly) explains why up until now the far majority of (tort law based) European foreign direct liability claims have been pursued there.[121] Features that render English courts a desirable forum for plaintiffs seeking to pursue foreign direct liability claims include the possibility for plaintiffs to enter into contingency fee arrangements with their legal representatives, the availability of collective redress

118 See, in more detail, Enneking 2012, *op. cit.* pp. 194–197.

119 See, for instance, C. C. Van Dam, 'Who is Afraid of Diversity? – Cultural Diversity, European Co-operation and European Tort Law', 2 *King's Law Journal* (2009) 281–308.

120 J. Zerk, *Corporate Liability for Gross Human Rights Abuses*, Report prepared for the Office of the UN High Commissioner on Human Rights, 2014. Accessible at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, pp. 79–87; Enneking 2012, pp. 194–202.

121 Compare Enneking *et al.* 2016, *op. cit.* pp. 439–442.

mechanisms such as the group litigation order and the representative action, and relatively liberal rules on disclosure and discovery of evidence.[122]

In most European civil law systems, the losing party to a lawsuit must bear the costs of the winning party, a circumstance that may restrain prospective plaintiffs from initiating novel or otherwise risky civil cases. Furthermore, contingency fee arrangements are not permitted in most European civil law countries; instead, lawyers tend to charge fixed fees. This does bring with it the advantage, however, that lawyers are unlikely to refuse potential cases on the basis that they are unlikely to result in large damages awards. Also, as a counterbalance to the rule on litigation costs and the unavailability of contingency fees, many European civil law systems provide legal aid to poor plaintiffs who need financial assistance in order to be able to bring their claims, at least where those claims have a reasonable prospect of success. In some countries, however, legal aid is only available to residents or nationals of the forum state, which excludes plaintiffs in foreign direct liability cases.[123]

Furthermore, corollaries to the US-type class action, in which a single procedure may represent a group of claims and/or defendants (if those can be said to form a class and to be affected in almost the same way) in such a way as to allow for a reduction of costs and risks and/or to provide incentives to pursue even those tort cases that involve such small amounts of damages that they would not be pursued separately, are unavailable in most European legal systems. However, the possibilities for collective redress in Europe have expanded significantly in recent years. Most European legal systems now provide for some form of collective action, in the sense that representative organizations may pursue civil litigation on behalf of a group of persons or certain interests and/or in the sense that multiple claims or defendants may be bundled into one procedure.[124] Still, in many countries the availability of collective actions is restricted to particular subject matter areas that are often not relevant in foreign direct liability cases (like consumer law or competition law), or entail restrictions as to standing and available remedies.[125]

Finally, discovery rules in most European legal systems generally do not offer plaintiffs the same broad possibilities for requesting information from the defendants as do the rules on pre-trial discovery in the US. A general procedural duty to present all documents that are requested by the other party on the basis

122 See, in more detail, Enneking *et al.* 2016, *op. cit.* pp. 299–301; Zerk 2014, pp. 194–202.

123 See, in more detail, Enneking *et al.* 2016, *op. cit.* pp. 111–126, 179–182, 213–215, 256–258, 299–301, 333–335; Zerk 2014, pp. 194–202; Magnus 2010, *op. cit.* pp. 112–115.

124 See in more detail, for example, Christopher Hodges, *The reform of class and representative actions in European legal systems* (2008) Hart: Oxford

125 See, in more detail: Enneking *et al.* 2016, *op. cit.* pp. 111–126, 179–182, 213–215, 256–258, 299–301, 333–335; Zerk 2014, pp. 194–202; Magnus 2010, *op. cit.* pp. 115–116.

of their potential relevance to the case does not exist in most European civil law systems. Instead, parties may under certain conditions have a right to request disclosure of documents and/or courts may order such disclosure where considered necessary. However, these possibilities for document disclosure tend to be quite restrictive, meaning that the possibilities for plaintiffs in foreign direct liability cases brought before EU Member State courts to get access to relevant documents that are not in their own hands remain (very) limited, at least in the civil law systems.[126]

2.4.3 The role of Article 6 ECHR

It is important to point out the role that the right to a fair trial, which is protected by Article 6 of the ECHR, may potentially play a role in foreign direct liability cases brought before EU Member State courts. This provision applies to any civil (or criminal) procedure initiated before an EU Member State court, regardless of whether it is a purely domestic procedure or whether the procedure has international aspects. It entails an obligation on the Member States to ensure that civil trials within their territories are accessible, fair and speedy, which obliges them for instance to ensure that (civil) litigants have a right of access to their courts that is both effective and practical. The European Court of Human Rights (ECtHR) has stated in this respect:

> Article 6 §1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 §1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.[127]

Article 6 may act as a minimum threshold when it comes to the length (duration) of civil proceedings and when it comes to the costs involved. It has for instance been interpreted by the ECtHR to encompass an obligation, under certain circumstances, to enable plaintiffs in civil cases to acquire legal aid.[128]

126 See, in more detail, Enneking *et al.* 2016, *op. cit.* pp. 111–126, 179–182, 213–215, 256–258, 299–301, 333–335; Zerk 2014, pp. 194–202; Magnus 2010, *op. cit.* p. 116–117. See also, with a focus on impediments to transparency in Dutch foreign direct liability cases: Enneking 2013, *op. cit.*

127 European Court of Human Rights, 21 February 1975, 18 Eur.Ct.H.R. (Ser. A) 1975 (*Golder/United Kingdom*).

128 See, for instance, European Court of Human Rights, 9 October 1979, 32 EurCtHR (Ser. A) 1979 (*Airey/Ireland*), where the Court held, inter alia, that '[a]rticle 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance

Furthermore, it also imposes duties on the ECHR Member States to make sure for instance that their domestic rules on evidence do not in practice violate the equality of arms principle that ensues from Article 6. According to the ECtHR:

> each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.[129]

It should be noted, however, that the Member States are left with a margin of appreciation as to how to achieve these results, which means that not all limitations to access to court or equality of arms are automatically incompatible with the Convention.

It seems that Article 6 ECHR may potentially provide an important minimum guarantee to host country plaintiffs in foreign direct liability cases who find that certain features of the systems of civil procedure in the European home countries where they bring their claims seriously hamper their right to a fair trial. This may be the case for instance where excessively high litigation costs, the unavailability of affordable legal assistance or legal aid, or the evidentiary rules of the forum make it practically impossible for them to pursue their claims. These factors gain significance in light of the inequality of arms that typically exists between the host country plaintiffs in these cases and their corporate opponents as regards financial scope, level of organization, and access to relevant information.[130]

Illustrative of the role that Article 6 ECHR may play in this respect is a UK defamation case between a multinational corporation and NGO campaigners. In this case, the ECtHR held that the state had a responsibility to ensure equality of arms between the parties to the dispute and that, in light of the disparity between the respective levels of legal assistance enjoyed by the parties to this particular case, the state's refusal to grant legal aid to the NGO campaigners imposed an unfair restriction on their ability to present an effective defence.[131]

In the Dutch Shell Nigeria case, Article 6 ECHR was raised by the plaintiffs in relation to their limited possibilities for obtaining evidence that was in the hands of their corporate opponents under the relatively strict Dutch civil procedural regime on the production of exhibits. The court refused to accept their argument, however, holding that the restrictions of the Dutch regime are in

proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case' (p. 15).

129 European Court of Human Rights, 27 October 1993, [1993] ECHR 49 14448/88 (*Dombo Beheer/The Netherlands*), para. 33.

130 See, in more detail, Enneking 2012, pp. 114–116.

131 European Court of Human Rights, 15 February 2005, [2005] ECHR 103 (*Steel and Morris/United Kingdom*), paras 59–71.

principle compatible with Article 6 ECHR and the equality of arms principle, except where special circumstances dictate otherwise. According to the court, the plaintiffs failed to prove the existence of such special circumstances under which a deviation from the regular application of the Dutch regime on the production of exhibits was warranted.[132]

2.4.4 Discussion

Since they fall outside the material scope of the Rome II Regulation, the issue of procedural rules and practical circumstances is mainly determined not by EU law but by the national procedural rules and litigation practices that are in place in the EU Member State countries where foreign direct liability cases are brought before a court. The issue is of crucial importance, however, as it determines whether victims will in practice have any chance of successfully pursuing a foreign direct liability case before an EU Member State court.[133]

According to the UNGPs, states are under an obligation to

> 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.[134]

The UNGPs stress that many of such barriers 'are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise'.[135]

An example of a legal barrier, according to the UNGPs, is the situation that 'claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim'.[136] As regards practical and procedural barriers that may prevent victims of corporate human rights abuse from getting access to judicial remedies, the UNGPs give four specific examples:

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

132 See, for instance, The Hague District Court, 14 September 2011, ECLI:NL:RBSGR: 2011:BU3535 (oil spill near Oruma), para. 4.16. See also, in more detail, L. F. H. Enneking, 'Multinationals and Transparency in Foreign Direct Liability Cases', 3 *The Dovenschmidt Quarterly* (2013) 134–147.

133 See, in more detail, Enneking 2012, pp. 136–137, 187–191, 307–309.

134 Principle 26 UN Guiding Principles, *op. cit.*

135 Commentary Principle 26 UN Guiding Principles, *op. cit.*

136 *Ibid.*

2. claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
3. there are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
4. State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.[137]

Considering the focus of this book on procedural rules and practical circumstances that are likely to pose the main barriers for access of victims of corporate human rights (and environmental) abuse to civil law remedies before EU Member State courts, the criminal law related fourth example will be left aside here. The other three examples of practical and procedural barriers that may prevent victims of corporate human rights (and environmental) abuse from getting access to judicial remedies, however, all appear to be present to some extent in many of the EU Member States. Especially in foreign direct liability cases, where there is typically a significant inequality of arms as regards financial scope, level of organization and access to relevant information between the plaintiffs (victims from non-EU and mostly developing host countries) and their corporate opponents (large EU-based internationally operating enterprises), this significantly affects the feasibility of successfully pursuing these cases before EU Member State courts.

In many of the EU Member States, significant thresholds exist with respect to the costs associated with the pursuit of these often complex cases, often in combination with limited (or no) possibilities of entering into contingency fee agreements (or similar outcome-related fee arrangements) with legal representatives, and limited (or, for non-nationals, no) availability of legal aid. In addition, the options for pursuing collective actions (i.e. group actions or representative actions) in this particular context tend to be limited (except perhaps for claims dealing with environmental harm), whereas restrictive rules on document disclosure tend to make it very difficult (if not impossible) for the plaintiffs in these cases to furnish the court with the evidence needed to substantiate their claims.

It should be noted that the Committee of Ministers of the Council of Europe in its 2016 Recommendation on human rights and business has recommended with respect to these particular procedural and practical thresholds, that:

> Member States should consider adopting measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims; Member States should consider possible

137 *Ibid.*

> solutions for the collective determination of similar cases in respect of business-related human rights abuses; Member States should consider revising their civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims' claims of business-related human rights abuses, with due regard for confidentiality considerations.[138]

All in all, none of the EU Member states features a combination of legal culture, procedural rules and practical circumstances that is as conducive to the pursuit of foreign direct liability cases as the US civil litigation system. The UK legal system at this point seems most conducive for this type of litigation, which (at least partly) explains why the far majority of (tort law based) European foreign direct liability claims have so far been pursued before English courts. In procedures before any of the EU Member State courts, the right to a fair trial as laid down in Article 6 ECHR may potentially provide an important minimum guarantee where excessively high litigation costs, the unavailability of affordable legal assistance or legal aid, or the evidentiary rules of the forum make it practically impossible to pursue foreign direct liability cases.

However, not all limitations on the access to court are automatically incompatible with the Convention, which means that courts will probably only under (very) special circumstances consider restrictive procedural rules or practical circumstances to be in violation of Article 6 ECHR. It should be noted, however, that the Committee of Ministers of the Council of Europe in its 2016 Recommendation on human rights and business has recommended in this respect:

> When alleged victims of business-related human rights abuses bring civil claims related to such abuses against business enterprises, Member States should ensure that their legal systems sufficiently guarantee an equality of arms within the meaning of Article 6 of the European Convention on Human Rights. In particular, they should provide in their legal systems for legal aid schemes regarding claims concerning such abuses. Such legal aid should be obtainable in a manner that is practical and effective.[139]

Still, the existence in most EU Member States of procedural rules and practical circumstances that render the pursuit of foreign direct liability cases very difficult or, in some cases, even impossible is a matter of serious concern when it comes to ensuring access to justice in EU Member State courts for victims of corporate human rights and environmental abuse by EU-based internationally operating

138 Council of Europe Committee of Ministers, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business, nos. 39, 42, 43.

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

business enterprises. It is an issue that needs to be addressed not just at the level of the individual Member States but also at the EU level, if the EU is serious about realizing EU policies or supporting EU Member States' policies on international corporate social responsibility and business respect for human rights. And even though EU competences in the field of civil procedural law are inherently limited, EU involvement in this field is not unprecedented, as there have been various attempts over the past years to strengthen the enforcement role of the Member States' systems of civil law in fields such as competition law and consumer law.[140]

A relevant outcome is the Commission's 2013 initiative on collective redress, which seeks to promote national redress mechanisms for the enforcement of EU law in, among other areas, the field of environmental protection.[141] This raises the question of to what extent the EU considers the promotion of international corporate social responsibility and business respect for human rights by EU-based internationally operating business enterprises in non-EU host countries an EU matter and a priority at this point in time. If so, the reduction of practical and procedural barriers in the EU Member States that may lead to a denial of access to justice before EU Member State courts for victims of corporate human rights and environmental abuse, regardless of the merits of the claims, should be one of its main priorities in the years to come.

2.5 Conclusions and recommendations

One of the main focal points of the debates in the EU Member States on access to judicial remedies for victims of corporate human rights abuses is the contemporary trend towards foreign direct liability cases: transnational (civil) liability claims against internationally operating business enterprises in relation to harm caused to people and the planet in the course of their operations – or those of their subsidiaries or supply chain partners – in developing host countries. Over the past two decades, the prevalence of this type of litigation before EU Member State courts has strongly increased, from a mere handful of cases in the 1990s to a total of around 40 cases pursued in various EU Member States up until now – and counting.

Whether these foreign direct liability cases can play a role in providing victims of corporate human rights and environmental abuse with access to judicial remedies before EU Member State courts is dependent on a number of factors that determine the feasibility of these cases. These include, among others, the question of what law EU Member State courts should apply in determining the validity of these claims, and the question of whether there are barriers inherent in

140 See, in more detail, Enneking 2012, *op. cit.* pp. 307–309.

141 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, *OJEU* L 201/60 (26 July 2013).

the procedural rules and practical circumstances in the EU member States that may prevent these cases from being pursued, regardless of their merits. In foreign direct liability cases brought before EU Member State courts, the issue of applicable law is largely determined by EU law in the form of the Rome II Regulation. Under this Regulation, foreign direct liability claims brought before EU Member State courts will in most cases be decided not on the basis of home country tort law but on the basis of host country tort law. This is likely to be different only where the case pertains to environmental damage (or to damage sustained by persons or property as a result of such damage) and where the event giving rise to the damage can be said to have taken place in the home country of the corporate defendant. In that case, the victim is presented with the option of choosing the applicability of the law of the home country instead of that of the host country.

Current developments in (prospective) legislation and case law in various EU Member States underline the importance of having a broader possibility to apply home country tort law in foreign direct liability cases brought before EU Member State courts. The solution may lie in an extension of the scope of the Rome II Regulation's special rule on environmental damage to human rights related damage as well as, possibly, health and safety related damage. Many of the policy rationales prompting the introduction of the special rule on environmental damage can be said to also exist – or even more so – with respect to these types of damage if they are caused by the operations of EU-based business enterprises. Extending the scope of the special rule on environmental damage in this way would be crucial to realizing EU (Member States') policies on international corporate social responsibility and business respect for human rights.

Apart from the possibilities that may be offered by (an extended version of) the Regulation's special rule on environmental damage, the application and enforcement through foreign direct liability cases of any legal norms developed in the EU Member States to promote international corporate social responsibility and corporate respect for human rights in host countries, remains dependent on the applicability of one of the Rome II Regulation's other exceptions. The exceptions as regards overriding mandatory provisions of the law of the forum country and as regards the public policy of the forum country could potentially be relevant in this regard. Their role remains limited, however, as these provisions are only to be applied in exceptional circumstances. Furthermore, the potential role in this context of the provision on rules of safety and conduct is also limited, as these rules need only be taken into account by the court as a matter of fact and insofar as the court deems appropriate.

As concerning the issue of applicable law, it is therefore recommended that:

- Future case law by the ECJ and the Member State courts on the application in civil liability cases involving people and planet related harm in non-EU host States as a result of the operations of EU-based internationally operating business enterprises, of the Rome II Regulation's special rule on environmental damage, should be closely monitored.

- Future case law by the ECJ and the Member State courts on the application in civil liability cases involving people and planet related harm in non-EU host States as a result of the operations of EU-based internationally operating business enterprises, of the Rome II Regulation's exceptions on overriding mandatory provisions and public policy and the provision on rules of safety and conduct, should be closely monitored.
- Where necessary, action should be taken at the EU level and/or at the level of the individual Member States to prevent the application of these provisions from hampering the realization of EU (Member States') policies on international corporate social responsibility and business respect for human rights.
- The possibility of extending the scope of the Rome II Regulation's special rule on environmental damage to human rights-related damage as well as, possibly, health and safety related damage should be seriously considered.
- Further research should be conducted into the ways in which such an extension could be formulated so as to promote the realization of EU (Member States') policies on international corporate social responsibility and business respect for human rights.

In foreign direct liability cases brought before EU Member State courts, the issue of procedural rules and practical circumstances is determined by the national procedural rules and litigation practices that are in place in the countries where these cases are brought. According to the UNGPs, states are under an obligation to consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedies. This is an important provision as, in many of the EU Member States, the pursuit of foreign direct liability cases is likely to be very difficult due to the costs associated with the pursuit of these often complex cases, limited options for pursuing collective actions, and restrictive rules on document disclosure. In combination with the fact that these cases are characterized by the inequality of arms as regards financial scope, level of organization and access to relevant information between the plaintiffs and their corporate opponents, this may render the pursuit of these cases impossible in practice.

This is an issue that needs to be addressed not just at the level of the individual Member States but also at the EU level, if the EU is serious about realizing EU policies or supporting EU Member States' policies on international corporate social responsibility and business respect for human rights. EU involvement in the field of civil procedural law in order to promote private law enforcement of EU norms is not unprecedented in fields such as consumer law and competition law. With this in mind, the reduction of practical and procedural barriers in the EU Member States that may lead to a denial of access to justice before EU Member State courts for victims of corporate human rights and environmental abuse, regardless of the merits of the claims, should be one of the EU's main priorities in the years to come.

As concerning the issue of procedural rules and practical circumstances, it is therefore recommended that:

- Civil liability cases before EU Member State courts involving people and planet related harm in non-EU host states as a result of the operations of EU-based internationally operating business enterprises, should be closely monitored so as to identify any procedural rules or practical circumstances that may lead to a denial of justice for victims of corporate human rights or environmental abuse, regardless of the merits of the claim.
- In doing so, the absence of new or further claims in one or more of the Member States, at a time when the prevalence of this type of litigation is strongly on the increase, should be interpreted as an indication that procedural and practical barriers exist in those Member States that render the pursuit of such claims impossible altogether.
- Where necessary, action should be taken by the individual Member States as well as at the EU level to prevent procedural rules and practical circumstances, especially those relating to costs, collective redress and access to evidence, from resulting in a denial of justice for victims of corporate human rights or environmental abuse.