

8 From “too big to be governed” to “not too big to be responsible”?

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8.1 Introduction

Virunga National Park, situated in the Democratic Republic of the Congo (DRC) is Africa’s oldest national park and is home to rare mountain gorillas. In 1994, UNESCO designated the park as a World Heritage Site because of its outstanding diversity of habitats.¹ The park’s territory also contains an oil field, but the DRC’s government has forbidden drilling activities. Congolese Law No 069-041 forbids oil exploration work in the park because it would violate the protected status of the World Heritage Site. The act also determines that forced entry to the park is a criminal offense.

SOCO International PLC is an international oil and gas exploration and production company established in London. SOCO is listed on the main market of London Stock Exchange,² a regulated market as defined in the MiFIR, an EU Regulation on markets in financial instruments.³ SOCO runs business activities in the UK, the DRC, Vietnam, and Angola, and is one of the UK’s 200 largest companies. Despite Congolese Law No 069-041, SOCO obtained a presidential decree to exploit the oil field in Virunga National Park in 2010, and started oil exploration work shortly thereafter.

In 2011, Park Ranger Katembo found SOCO employees in the park preparing to build a test drilling installation. Allegedly, the SOCO staff tried to bribe Katembo, but he refused and, with some effort, forced the SOCO employees to leave. In February 2011, The Virunga National Park Authority filed a complaint with the civil court against SOCO after this incident. Meanwhile, Katembo started to gather documents and covert film reports. In 2013, Katembo was arrested by the DRC’s secret service and tortured to show that SOCO should not be hindered in its activities. Katembo’s footage was used in the documentary *Drillers in the Mist*, which was made by Global Witness and released in 2014. This documentary has raised public attention for the case.

In October 2013, the World Wildlife Fund (WWF) filed a complaint against SOCO at the UK National Contact Point under the OECD Guidelines for Multinational Enterprises because of SOCO’s ignorance of the protected status of Virunga National Park, the intimidation of opponents, and the non-disclosure of information about the potential environmental and health impacts of the oil

exploration work. In 2015, the British newspaper *The Telegraph* published an article about the Church of England and other interest groups protesting against SOCO because of reports of bribery and intimidation of park rangers. As a consequence of these and other actions against SOCO, SOCO agreed with WWF to stop its oil exploration work in Virunga National Park. In November 2015, SOCO retreated from the park. In April 2017, Katembo was awarded with the Goldman Environmental Prize, similar to a green Nobel Prize.⁴

8.2 Research questions

The case of SOCO and Virunga National Park is not an isolated one, but can be placed in a broader context of cases in which large listed companies (hereinafter, LLCs; the concept will be defined in Section 8.3) are linked to fundamental rights infringements. These cases raise many questions, both legal and non-legal. The legal questions are very diverse and relate to such areas as private international law, international human rights law, national criminal law, and national private law. This contribution, in light of the foregoing, aims to link fundamental rights law and national liability law and is directed toward finding a potential new underlying argument for accepting legal responsibility of LLCs for fundamental rights infringements. We are searching for this argument in the economic reality of LLCs and their economic sphere of influence⁵ in our society. Therefore, the central questions in this contribution read as follows:

Can “economic power” provide for a legal basis for holding LLCs responsible for fundamental rights protection, and if so, how?

And, if the answer to the first question is “yes”, the subsequent question is:

Can economically powerful LLCs be held liable both under national private law and national criminal law for not taking responsibility for fundamental rights protection?

These research questions imply at least three limitations. First, we focus on LLCs and exclude other actors that may bear legal responsibilities with regard to fundamental rights protection in the context of economic activities.

A second limitation relates to the norms, rules, and standards that are the subject of our research. We focus on norms, rules, and standards that are usually related to CSR; that is, norms, rules, and standards that balance “economic, social and environmental imperatives” – thus, the triple bottom line, or the 3P (people, planet, and profit).⁶ It therefore encompasses human rights as used and defined in the UNGPs.⁷

Lastly, we focus on violations of prohibitions by the LLCs that result in fundamental rights infringements. Although fundamental rights law also identifies obligations to guarantee fundamental rights standards by effort – the so-called positive duties or obligations –⁸ it is not a generally accepted concept with respect

to private parties like companies in the sense that they are subjected to positive obligations directly. For that reason, we disregard that concept here and only include obligations to respect fundamental right standards.

An overall limitation of our contribution is that, with regard to the law, norms, and rules applicable to companies, we focus on the level of the EU, because those norms and rules are directly or via national implementing measures applicable to companies in all EU Member States. Therefore, our contribution will be of relevance for all EU-based LLCs. With respect to national private law and national criminal law, we use Dutch law as an example.

In Section 8.3, we first define two key concepts in this contribution: LLCs and economic power. It is important to discuss these concepts in detail and contrast them with similar concepts, since the characteristics of the LLCs and the concept of economic power *per se* form a part of our argument to accept that a specific form of power implies a specific responsibility. In Section 8.4, we construct LLCs’ responsibility for fundamental rights protection. We link power to responsibility and transform responsibility into liability. In Section 8.5, we explain how responsibility can be transformed into liability through national laws. Finally, we will answer both research questions in Section 8.6.

8.3 Large listed companies, economic power, and the relation between the two concepts

8.3.1 Large listed companies and economic power

The first research question that was presented in Section 8.2 includes both LLCs and economic power. That gives rise to the question of why we have used LLCs separately since the concept of economic power could already include them. As we will explain in Section 8.4, the concept of economic power is related to a societal and legal responsibility for companies to protect fundamental rights. At the same time – and this is the downside of economic power – it can create immunity for liability in any sense. Immunity means particularly that LLCs cannot be held liable for human rights violations by State or non-State actors for legal and practical reasons. The practical reasons encompass, in any case, the potential factual situation that LLCs have such economic power that neither states nor victims of human rights infringements dare to hold them liable; they are too big to be held responsible (compare the adage: “too big to jail”). It is our assumption that small companies do not have such economic power, which makes it reasonable to focus on large companies. Those companies must also have a specific quality, which is expressed by the listing requirement, as will be explained in Section 8.3.2.

At the same time, however, it is conceivable that not all LLCs have such economic power. One can think of a LLC that is overshadowed in a specific market and in society by another LLC operating in the same branch. Or, a LLC that is completely inward-directed. Furthermore, as our research question already indicates, we will propose in this contribution to use economic power as an underpinning for holding LLCs responsible for fundamental rights protection and,

subsequently, liability for not taking this responsibility. We want to prevent the sheer size of a company from resulting in this responsibility; it's all about how a LLC *acts* and what it *does* with its economic power (including how it neglects this power). That is why we also define “economic power” and, as a consequence, propose a twofold test.

8.3.2 *Large listed companies*

A distinction should be made regarding the kind of entity involved in (an) economic activity(ies) because not all entities that employ business activities can and will have economic power. For that reason, we have developed the following definition of LLCs:

A LLC is a legal entity that runs a business on a large scale and is listed on a financial market as defined in the MiFIR.

This definition of the LLC has a few characteristics: (i) legal entity, (ii) runs a business, (iii) large scale, and (iv) listed on a specific financial market. We will discuss these characteristics in the next section.

1. *A legal requirement: legal entity*

The company must be a legal entity; that is, an entity irrespective of its particular legal form. National law determines the legal forms of companies; it may be the British public limited company (PLC, like SOCO), the French Société Anonyme (SA), the German Aktiengesellschaft (AG), or the Dutch Naamloze Vennootschap (NV), each of which has its own legal requirements. As our definition of LLC should be applicable in multiple countries and therefore not be dependent on local legal requirements, we developed a definition that is indifferent to the legal form.⁹ The legal form of a legal entity is needed for establishing civil and/or criminal liability according to national laws (as we will explain in Section 8.5).

We have deliberately not used the term “enterprise” because we will use this for our definition of economic power (see Section 8.3.4) and we want to distinguish between the definitions of LLC and economic power in order to prevent both definitions from automatically coinciding and thus being indistinct.

2. *A purpose requirement: running a business*

A company only qualifies as a LLC when it runs a business, by which we mean that it employs commercial activities aimed at profit. The activities can encompass the extraction, trade, distribution, and/or storage of raw materials and commodities, the manufacturing of products, the development of products and services, the trade and/or distribution and/or storage of goods, the transporting of people and/or animals, the provision of services, etc., all of which have the

purpose of earning money. With this purpose requirement, we exclude non-profit activities; this is related to our definition of economic power (see Section 8.3.4).

3. An amplitude requirement: large-scale operations

The business that a LLC runs must be on a large scale. We define a large scale by means of the generally accepted criteria that the EC uses. An enterprise is large when:

- Its staff headcount is equal to or greater than 250 employees during the financial year, regardless of revenue, and,
- It has a turnover of more than EUR 50 million and/or a balance sheet total of more than EUR 43 million.¹⁰

These formal criteria have the advantage of being simple to determine; they concern data that each listed company in the EU must publish in its annual financial report.¹¹ Furthermore, they do not depend on the legal form. The size requirement assumes that the large size of the company usually also implies economic power as defined in Section 8.3.4. However, as mentioned before, size and power do not necessarily coincide (see Section 8.3.1).

4. A quality requirement: listed on a financial market

The company must be listed on a financial market as defined by the MiFIR. This listing requirement relates to a certain quality of a company that enables the company to possess and exercise power. When a company is listed or requests admission to trading for its financial instruments, it is oriented toward investors and the general public. An IPO (initial public offering) by which a company’s financial instruments are offered to the general public and a listing is obtained aims to raise capital for the benefit of the company. Therefore, a listed company will invest in branding and visibility. It will continue to do so to obtain a good price for its admitted financial instruments. Stock prices and movements in stock prices are considered to be indicators of a company’s wealth. Stock prices are published in real-time or with a short delay on a daily basis. There will be media coverage in case of events that might influence stock prices. Furthermore, a listing on a financial market, particularly a regulated market, means that a company matters; in other words, the company belongs to the “league” of listed companies, has a certain quality, and can afford the listing.

Finally, several duties are imposed on listed companies, particularly a range of reporting duties. Those duties vary from publishing annual financial reports¹² to making inside information public as soon as possible.¹³ The EU even obliges its Member States to impose on (very) large listed companies that are public-interest entities¹⁴ the general reporting duty of an annual non-financial statement, which must include information on environmental, social, and employee matters, such as the (foreseeable) impact of the business activities on the environment; information on respect for human rights, like how human rights abuses are prevented;

and information on anti-corruption measures and the company's policies in this respect (including due diligence processes).¹⁵ Companies, like SOCO, that are listed on regulated markets active in extractive industries or logging of primary forest industries should annually disclose their payments to governments in the countries where those activities take place.¹⁶ All these duties have the effect that relevant information for pricing mechanisms at the financial markets flow to those markets in order to create a level playing field for investors and contribute to fair, ethical, efficient, and transparent financial markets. This fosters the smooth functioning of those markets, promotes public confidence in those markets, and enhances investor protection.¹⁷

We adhere to financial markets as defined by the MiFIR because this is the EU-wide standard. The MiFIR entered into force on 3 January 2018 and sets uniform standards for all EU financial markets. Due to the legal status of a regulation in EU law, its rules are directly applicable in each EU Member State.¹⁸ Accordingly, the MiFIR's definitions and rules are the same in the EU, which favors the use of these definitions and rules.

The MiFIR defines a financial market as a regulated market, multilateral trading facility, organized trading facility, or trading venue, each with references to other provisions of EU law, setting specific requirements (Article 2(1)(13–16) MiFIR). Its wide scope includes the London Stock Exchange, Euronext Paris, Euronext Amsterdam, and the Frankfurt Stock Exchange. The main markets of these stock exchanges list companies that meet the large-scale criteria already mentioned. However, the stock exchanges also exploit markets on which smaller companies are listed, like the market Euronext Growth (a multilateral trading facility) for small caps (small and medium-sized companies).¹⁹ National law that governs the financial markets in its territory provides the rules for admission to trading on those markets.²⁰ Thus, the listing requirement itself is not defined on the level of the EU, but depends on national law. However, it is also a formal requirement: a LLC is listed when the competent authority for the concerned trading facility has decided to admit the financial instruments issued by the LLC (for instance shares or bonds) to trading on that facility. Consequently, orders in these financial instruments can be placed in the order book and there is a quotation on the market.

We should note that an extension of the listing requirement seems to be reasonable.²¹ In some countries, LLCs can have a legal form that does not allow listing at a financial market, because they cannot issue financial instruments that can be admitted to trading. One of the three largest commercial banks in the Netherlands is Rabobank, which is a cooperative rather than a public company. Taking into account its position on the financial markets in the Netherlands and its meaning for the Dutch society, Rabobank meets all other requirements of a LLC as well as the rationale of the listing requirement. It can also be concluded that Rabobank has economic power (compare Section 8.3.4).

5. Irrespective national or transnational business operations

Our definition of LLC does not include a requirement with regard to transnational aspects of its commercial activities. Consequently, the definition of a LLC

includes a company that operates transnationally as well as a company that only operates within one country. That is different from the commonly used term “multinational enterprise”, a characteristic of which is their international business operations.²² However, LLCs which operate only locally – that is, on the territory of one country – can have economic power within the national borders. Therefore, we are of the opinion that our definition of LLC has added value compared to an ME-like definition. When a LLC does run transnational business operations, it can also qualify as a ME.

8.3.3 Existing legal duties for LLCs

LLCs must comply with a variety of legal duties concerning their business operations. On the international level, there are the duties in non-legally binding instruments like the Ruggie framework, the UNGPs, the OECD Principles of Corporate Governance, and the OECD Guidelines for Multinational Enterprises and the Principles of United Nations Global Compact. For instance, the UNGPs formulate for all business enterprises, including LLCs, the foundational principle that business enterprises should respect human rights (Guiding Principle 11). The rationale of this principle is explained as: “The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.”²³ This rationale is exemplified in the context of Guiding Principle 23:

The responsibility to respect human rights applies in all contexts. It is a uniform standard, reflecting its roots in the universal expectation that enterprises should not harm the dignity of people as they go about their business.²⁴

The general duty to respect human rights is also reflected in the first two principles of United Nations Global Compact²⁵ and the OECD Guidelines for Multinational Enterprises.²⁶ The UNGPs make the general duty more concrete in the subsequent Guiding Principles 12–24. In this respect, it is noteworthy that Guiding Principle 14 has an underlying notion that the business enterprise’s size matters. Guiding Principle 14 reads as follows:

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

The first sentence of the commentary on that principle reads, “The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size.”²⁷ The Interpretative Guide explains that size is related to human rights risks. The line of reasoning is as follows. A larger business enterprise will run larger businesses because it will employ more commercial activities, have more employees, have more business

relationships, have more and more complex value chains, and have more clients or customers than a small business enterprise. Furthermore, a larger business enterprise will probably have a more complex organizational structure, which may hamper decision-making processes, communication, monitoring mechanisms, and oversight possibilities. All these factors may increase the risk of human rights abuse.²⁸

Thus, as a general rule, larger business enterprises carry more responsibility to respect human rights, although it is acknowledged that small business enterprises can be involved in activities that can have a “very high human rights risk profile”, like mining and trading minerals or metals in conflict areas.²⁹ In this sector and operational context, the responsibility to respect human rights is also larger. We can identify a risk-based approach, which is also connected to the severity of the human rights impact. The more severe the consequences, the greater the responsibility to act upon it in terms of the swiftness of the response, the prioritization of the response, the kind of measures to stop the human rights abuses, and the remediation of the consequences.³⁰

At the EU level, many different duties have been laid down in legally binding instruments, some of which are directly applicable to LLCs, like the MiFIR (see Section 8.3.2), and most of them are applicable via national implementing measures, such as the EU directives mentioned in Section 8.3.2. These entail duties concerning reporting and transparency, which are mostly applicable to LLCs regardless of the kind of commercial activities they engage in. Beside those duties, there are many more that are sector-specific.

At a national level, LLCs are bound to a variety of duties laid down in national law. Which duties it concerns depends on the national law, the local situation, the LLC’s type of commercial activities, and the market where the LLC’s products, goods and/or services are offered and/or traded. Many duties in national law concern the implementation of measures of international standards or reflections of those standards³¹ or implementing measures of EU legal instruments like directives. Some of those duties, such as the duties that follow from the criminal offense of modern slavery, are applicable to all LLCs in a country;³² while other duties are only applicable to LLCs active in a certain sector, like commercial banks in the financial sector. This shows that one must be aware of the general and specific norms, rules, and arrangements that can govern the LLC’s commercial activities.

All these duties are applicable to LLCs because their commercial activities interfere with, infringe upon, endanger and/or create risks with regard to the interests of people, the planet, and society. The LLCs are responsible for preventing this because they are in the position to do so and they have the power to take measures. This brings us to our concept of economic power.

8.3.4 Economic power

The definition of economic power that we apply in this contribution is based on a definition by Strange (1975).³³ Power, according to Strange (citing Northedge), is:

the capability of a person or group to make his or its will felt in the decision-making process of another person or group.³⁴

This led Strange to the observation that “wealth gives the state an influence base from which to use either rewards or threats to achieve its own objectives or to impose its will on other states.”³⁵ In terms of economic power of large listed companies, this could express that the economic strength of a company, like a state’s wealth, entails the conditions necessary to be able to use rewards or threats to achieve objectives or impose its will on, for instance, States.

Based on Strange’s definition of economic power, we define economic power as follows:

Economic power refers to wealth, which gives an enterprise an influence base from which to use any means to achieve its own objectives or to impose its will on its surroundings.

This definition includes elements that require further comment. First of all, there is an element of “wealth”. Wealth refers to the value of the capital of the enterprise at a point in time. The capital is the enterprise’s total assets, which includes both tangible and intangible assets, such as buildings and machinery, natural resources, working capital, financial claims, property rights, copyrights, market position, brand, and reputation.³⁶

A second element is “enterprise”, which is any company, irrespective of its legal form, that runs a business, so it must concern commercial activities aimed at gaining profit.³⁷ This element excludes the non-profit sector. By the term “enterprise”, we seek a connection with the UNGPs, which use the term “business enterprise”. The UNGPs themselves do not define “business enterprise”, but the Interpretative Guide to the UNGPs sheds some light on what the term means. It distinguishes enterprises by size (large, medium-sized and small enterprises),³⁸ it is indifferent toward ownership (publicly listed, private owned, State-owned, or a combination),³⁹ and it is indifferent toward legal structures (company, group of companies, parent company, subsidiary, cooperative, franchise model, etc.).⁴⁰ The business enterprise potentially includes organizations from the non-profit sector that we have excluded.⁴¹

The third element of “any means to achieve its own objectives” in our definition implies financial, political, and legal means, both in a positive and negative way. Financial means encompasses not only paying money for certain goods and/or rights, but also offering credit facilities or acting as a guarantee in order to enable another person to acquire credit under more favorable conditions. Political means include two types of influencing the decision-making processes of the administration: (1) influencing impressions and decisions at a political level, like local municipalities or the national politics, and (2) influencing the official channels in order to obtain favorable decisions. Legal means is the use of all kind of legal instruments to a certain end, like filing a tort claim against another person (the State, governmental bodies, other enterprises in the same or another

business, societal institutions, employees, customers, and citizens), or opposing (the conditions of) a permit in administrative proceedings, or reporting a crime to the police. Which kind of legal means is available will depend on the specific circumstances of the case and the availability according to national law.

Lastly, the element of “surroundings” covers the sphere around the enterprise, which includes the State, other enterprises, societal institutions, customers, and citizens. The surroundings do not need to be physically close.⁴² After all, modern communication techniques allow for a span of control that could easily cross borders.

In light of this definition, economic power implies that the economically powerful LLCs assume a particular position in society. That societal position refers to the relationship between the powerful on the one hand and people, planet, and profit on the other. The economically powerful LLCs have an impact on society, people, and planet. The plants of an enterprise provide for employment and economic activities related to the plants, but can also have an ecological footprint and, therefore, consequences for the environment. The decision of where to locate the enterprise’s headquarters may even be coined as a political success by local and/or national governmental bodies.⁴³ The seat of a LLC further determines its legal form and all rights and duties connected to that legal form. The LLC’s business activities are governed by rights and duties that follow from the law applicable to the territory in which the business activities are situated. The effectuation of these rights and duties has a cost, and the LLC’s economic position determines whether and how it can bear those costs. Accordingly, the LLC also has a legal position that is influenced by its economic power, so the LLC’s activities can and will influence or even change the positions, possibilities, and rights of others. However, this will probably not be the main objective of a LLC; its aim of achieving a profit will usually lead the LLC to enhance or improve its own economic position.

A final, crucial element in our research is the *use* of economic power by the LLC. In line with one of the limitations of this research, as explicated in Section 8.2, here we focus on the use of economic power that results in violations of standards by LLCs that imply fundamental rights infringements. These violations can take place precisely because of the existence and use of economic power by the LLCs.

8.4 The triptych of constructing legal responsibility for fundamental rights protection: power – responsibility – liability

The use of economic power establishes responsibility in the sense that economic powerful LLCs, precisely because of their economic power, are expected to act with due care; that is, at least to respect fundamental rights standards. We distinguish between three types of use of economic power.

First of all, there is active use of power, which could include using bribery to obtain a permit. In this case, our definition of economic power means that the LLC’s wealth allows it to utilize its financial means for illegal payments to

representatives of a governmental body in order to obtain a permit that would probably not have been granted otherwise. Another example is a LLC that threatens to move production facilities and/or its headquarters to another city, region, or country, with a loss of (many) jobs, economic activities, and/or tax income for the concerned area, in order to get something beneficial done by local and/or national governments. Secondly, there is passive use of power, which is control and apparent approval. In this case, the LLC’s wealth gives it such a societal and/or economic position that other market participants will follow the LLC and await its (informal) approval. In this way, the LLC is standard-setting in a certain sector or branch. A third and final use of economic power is adopting an indifferent attitude. This means the LLC, feeling comfortable with the position that it is too big to be held responsible, allows the LLC to continue disrespecting fundamental rights standards. Only the LLC’s wealth can allow such an attitude. In the case of SOCO, the indifferent attitude was reflected in the ignorance of the protected status of Virunga National Park; SOCO felt comfortable in its economic position (see Section 8.1).

These three types of use of economic power have a clear impact on governmental bodies, other companies, institutions, and (local) communities, and therefore also affect citizens and/or the environment. In our opinion, it is this impact of economic power that establishes responsibility. In particular, three circumstances can underpin this responsibility. First of all, economic power has *leverage*. When a LLC has economic power it can use it in such a manner that it can take advantage of a kind of “multiplier effect”. If a LLC dominates a sector or branch and is therefore standard-setting, other companies will follow the LLC in ignoring fundamental rights standards, for instance by making use of child labor for the production of goods. Or, when a LLC has the economic power and thus the financial means to bribe government officials at different levels in local and national governmental bodies, it will be probably more successful in obtaining what it wants.

Second, economic power brings *increased risks*. This argument can be found in the UNGPs and its Interpretative Guide, which acknowledges that the business activities of a large enterprise will bring more and/or serious human rights risks (see Section 8.3.3). As the Interpretative Guide states – correctly, in our opinion – the increased risks relate to the size of the enterprise, the number of employees and the “more complex systems and procedures” that are inherent in large companies.⁴⁴ This line of reasoning can be traced back to the Ruggie framework for business and human rights.⁴⁵ In such cases, larger business operations will affect more people and/or more territories, which means there are increased chances of “rotten apples” within the organization, and/or more impediments for effective governance of the organization and/or effective supervision on the daily business operations. Thus, there are more possibilities for infringements of fundamental rights and therefore increased risks regarding the amount, kind, and/or severity of fundamental rights violations.

Third, as has already been implied previously, the effects of the use of economic power can be *severe* in the sense of having serious consequences. The severity of the human rights infringement is considered to be a factor giving rise

to specific duties under the UNGPs.⁴⁶ Also in Dutch tort law, as will be further explained in the next section, the severity of the effects when risks materialize is relevant for the required standard of care. In line with this, and to paraphrase Kool, responsibility means that the economically powerful LLCs accept that society can call them to account “to accept the consequences of [their] irresponsible behaviour”.⁴⁷

Having accepted that power brings responsibility, we need liability to enforce respect for fundamental rights. Only particular behavior is legally relevant; it may involve a crime or a tort. The legal concept of the duty of care, both known in national criminal law and national tort law, can be the vehicle to transform responsibility into liability through a two-step approach. The first step is to accept that responsibility leads to a duty of care; the second, that the violation of a duty of care establishes liability.

8.5 The two-step approach

8.5.1 *The necessity to concentrate on national law*

The line of reasoning presented in Section 8.4 is neither new nor unusual. It has been accepted on an international level in the Ruggie framework for business and human rights, as well as in the UNGPs. However, the Ruggie framework and the UNGPs are not legally binding.⁴⁸ On the contrary, national law provides legally binding examples of this two-step approach. In national tort law, responsibility is translated into a concrete duty of care. Subsequently, the violation of a particular duty of care leads to civil liability. Also, Dutch private law has standards, such as the good employer standard, to address the responsibility of powerful actors. The line of reasoning is visible in criminal law as well. Dutch criminal law entails specific duties of care in criminal offenses, and a general duty of care for the liability of legal persons.

Although other areas of national law could also be relevant to unravel legally relevant responsibilities in the form of duties of care, we have not included them. In particular, company law seems relevant at first sight. However, as is clear from the study by Enneking *et al.*, the rules of Dutch company law are facilitating and set a framework, but include only a few substantive norms.⁴⁹ Furthermore, according to the “stakeholder model”, the rules focus on the company’s interest. In this regard, the interests of shareholders come first, while the interests of employees and other parties who are directly involved under circumstances are relevant as well, but there is no general duty to respect social and environmental interests. In addition, it is not possible for those who suffer from the fundamental rights infringements by the LLCs to rely on the enforcement mechanisms that derive from company law.⁵⁰

8.5.2 *Dutch private law*

When we take a closer look at Dutch private law, the general tort clause provides for a legal basis to hold corporations civilly liable if their conduct breaches an

unwritten standard of due care (Article 6:162[2] Dutch Civil Code, hereinafter DCC).⁵¹ These unwritten standards not only aim to prevent damage to persons or assets, but also aim to prevent damage to other interests. The interests particularly include those protected by fundamental rights provisions. However, as Hartkamp and Sieburgh stressed, it is decisive whether the breach of an interest in light of a particular private law relationship invokes a breach of a duty of care.⁵² Economic power can be a relevant factor in defining the standard of due care, as power brings responsibility in the sense that, as discussed in Section 8.4, the economic powerful LLCs, precisely because of their power, are expected to act with due care. The general tort clause provides a basis for reception of domestic and/or international standards that protect people and the planet.

Situations in which fundamental rights are at stake often involve risky activities, such as oil extraction in the case of SOCO and Virunga National Park. In the context of risks inherent to activities, the aforementioned standard of due care is defined using four criteria: the so-called “cellar hatch criteria”, named after the *Cellar Hatch* case.⁵³ These criteria are the probability that the risk will materialize, the seriousness of the expected damage, the character and benefit of the activities in question, and the burden of taking precautionary measures.⁵⁴ According to Enneking, in the context of so-called foreign direct liability cases,⁵⁵ this test

boils down to an assessment of whether that parent company has exercised due care toward the foreseeable and legally protected interests of the host country plaintiffs, in light of the potential risks inherent in the multinational corporation’s host country activities.⁵⁶

The last criterion can be linked to the use of power by the economic powerful LLCs.⁵⁷ Since we utilize the use of power as a starting point for economically powerful LLCs, we can assume that they are in a position to take precautionary measures. In concrete situations, however, the exact expectations depend on the particular circumstances of each situation.

Following another line of reasoning, one could also accept that the cellar hatch criteria are not necessary to define a standard of due care. A standard of due care could be based more directly on the idea that we expect economic powerful LLCs to act responsibly, which particularly means that they respect fundamental rights standards. Such a standard could be accepted, as stated in Section 8.4, due to the leverage of economic power, the increased risks that are attached to economic power, and the seriousness of the consequences or the severity of the effects of the use of economic power.

8.5.3 Dutch criminal law

Dutch criminal law allows for criminal liability of legal persons. Article 51(1) of the Dutch Criminal Code (hereinafter: DCrimC) determines that criminal offenses can be conducted by natural persons and legal persons. “Conducted” encompasses direct perpetration as well as participation in the offense, such as

co-perpetration and complicity. Legal persons are the entities as defined in Book 2 DCC, such as the already mentioned *Naamloze Vennootschap*. This category of addressees is extended to enterprises without legal personality in Article 51(3) DCrimC, such as partnerships.⁵⁸

To establish criminal liability of legal persons, it is necessary to first determine whether the legal person conducted the criminal offense. As a legal person has no body to kick,⁵⁹ a judge must assess whether the *actus reus* of the offense that was committed by one or more natural persons can be attributed to the legal person. According to the Dutch legislature, this requires the imputation of the acts of natural persons to the legal person.⁶⁰ It has left it to the judiciary to decide under which conditions and/or according to which criteria this imputation should take place.⁶¹ Once the *actus reus* is attributed to the legal person, another process of attribution from natural person(s) to the legal person can be required, namely in case the criminal offense has a *mens rea*-element.⁶²

In the landmark decision *Drifmest*, the Dutch Supreme Court developed a framework with a general standard and subsequent criteria for establishing the *actus reus* of legal persons. According to this decision, the acts (including omissions) of one or more natural persons can be considered as the *actus reus* of the legal person when it is reasonable to impute those acts to the legal person.⁶³ Therefore, the general standard is reasonable imputation. Whether it is reasonable to impute the natural person's act to the legal person depends on the specific circumstance of the case, which also includes the nature of the prohibited act.⁶⁴ The Supreme Court acknowledged that this general standard might lack guidance for legal practice, so it gave subsequent criteria by which judges can decide whether it is reasonable to impute a natural person's act to the legal person. An important factor that a judge can take into account is the question of whether the act took place or was conducted in the sphere of the legal person. If this question can be answered in the affirmative then it is, in principle, reasonable to impute the natural person's act to the legal person.⁶⁵ This so-called sphere-criterion is specified by the Supreme Court in order to provide more guidance. A natural person's act can be considered to belong to the sphere of the legal person when one or more of the following non-cumulative and non-exhaustive criteria are met:

- 1 Was the act committed by a natural person who was an employee of the legal person or worked for the legal person on another basis?
- 2 Does the natural person's act fit into the normal course of business of the legal person?
- 3 Was the natural person's act beneficial for the legal person's business?
- 4 Did the legal person have de facto "power of disposal" over the prohibited act *and* did it accept this act or was it accustomed to accepting the act of similar acts as appeared from the actual course of events? This acceptance includes the situation in which the legal person did not meet the duty of care that could reasonably be expected of the legal person to prevent the prohibited act.⁶⁶

The meaning, inclusiveness, and application of these four criteria have been discussed in the scholarly literature.⁶⁷ The point we want to make is that these criteria do not refer to economic power of a legal person, because the criteria are directed inward: by applying the criteria, a judge can look “inside” the legal person, determine which act(s) of one or more natural persons constitute the prohibited behavior, and then decide whether it is reasonable to impute the act(s) to the legal person. Our argument of economic power is outward-looking: What is the position of the economically powerful LLC in relation to its surroundings? Does it have an influence base from which it can use any means to achieve its own objectives or to impose its will on its surroundings? (See Section 8.3.4.)

However, the framework of the Supreme Court for establishing the *actus reus* of a criminal offense for legal persons is an open, adaptive framework. The criteria are non-exhaustive; the framework is flexible, permits adjustment to the kind of legal person,⁶⁸ and allows for adding new criteria, provided that the imputation of the natural person’s act(s) to the legal person is reasonable. This is the general standard that must be met for establishing criminal liability of an economic powerful LLC. We are of the opinion that the LLC’s economic power can make the imputation more reasonable. Economic power brings responsibility to respect fundamental rights, which means a duty to prevent that illegal conduct that amounts to fundamental rights abuse and falls within the scope of a criminal offense occurs within the sphere of the LLC.

It is obvious that the economic power argument is related to the sphere of a legal person. After all, this argument focuses on the enterprise’s wealth, which allows it to use any means to achieve its own objectives or to impose its will on its surroundings. It concerns its economic sphere of influence. That said, there are two avenues to fit the economic power argument in the framework for establishing *actus reus* of a legal person. First, the economic power argument can be added to the preceding list of four criteria as a new, fifth criterion. In this case, the line of reasoning is that a LLC had economic power and used it in such a way that a fundamental rights abuse occurred (see Section 8.4). Then the act(s) of the natural person(s) that constitute the crime took place within the sphere of the LLC, so it is reasonable to impute those acts to the economic powerful LLC. It can be considered as the perpetrator and it can be held criminally liable (the latter, if the criminal offense’s *mens rea*-element is also met).

Second, the economic power argument can serve as predicate for a duty of care, as meant in the fourth criterion. The line of reasoning is then that the prohibited act(s) of the natural person(s) that constitute the crime can be qualified as accepted by the economically powerful LLC because its economic power establishes a duty of care to prevent the prohibited act(s), which duty can be reasonably expected, because it follows from international standards such as the UNGPs and/or EU law and/or national law (see Section 8.3.3). Furthermore, because of the LLC’s economic power the sub-criterion of the power of disposal is also met, its economic power presumes that this LLC is able to influence its surroundings or has any means to achieve its objectives (see Section 8.3.4). As a result, prohibited act(s) of the natural person(s) can be considered to have

taken place in the sphere of the economically powerful LLC. It is then, in principle, reasonable to impute this act (or these acts) to the LLC. Thus, the second avenue will also lead to the economic powerful LLC as the perpetrator of the criminal offense. It can be held criminally liable (provided the criminal offense's *mens rea*-element is also fulfilled). Both avenues show that Dutch criminal law allows for the reception of international, European, and/or national standards aimed at protecting people and the planet in the framework for establishing the economic powerful LLC's *actus reus* of a criminal offense, and thus paves the way for criminal liability of economic powerful LLCs in case of fundamental rights abuses.

8.6 Closing remarks

As the Spider-Man comic book said, “With great power comes great responsibility”.⁶⁹ SpiderMan feels the duty to fight crime and evil because of his specific powers, which he wants to use to save people and society. It is this basic thought that can be transposed to the duty of business enterprises to respect fundamental rights, one of the pivotal Guiding Principles of the UNGPs (see Guiding Principles 11 and 14). This duty was at stake in the SOCO and Virunga National Park case, a relatively random example of a large UK company doing business in extracting oil in the DRC despite the World Heritage Site status of Virunga National Park, and allegedly involved in bribing governmental officials and violent intimidation of park rangers. Reflections on the UNGPs, partly in combination with this case, brought us to the following first central research question: “Can ‘economic power’ provide a legal basis for holding large listed companies responsible for fundamental rights protection and, if so, how?”

In order to answer this research question, we developed three definitions. First, we delineated the categories of business enterprises to a specific category in order to operationalize the duty to respect fundamental rights in the context of economic power. To that end, we have defined and confined ourselves to large listed companies, or LLCs. These are legal entities that run a business on a large scale and are listed on a financial market as defined in the MiFIR. Such LLCs can have economic power, because both the size requirement and the listing requirement in the LLC's definition are closely connected to our definition of economic power. We have defined economic power as referring to wealth, which gives an enterprise an influence base from which to use any means to achieve its own objectives or to impose its will on its surroundings. However, it is conceivable that some LLCs do not have economic power; for that reason, both definitions must be distinguished, although some requirements are connected.

Similar to the Spider-Man adage, we developed the line of reasoning that the use of economic power by economically powerful LLCs establishes responsibility in the sense that these LLCs – precisely because of their economic power – are expected to act with due care; that is, to at least respect fundamental rights standards. Economic power can be used in three ways: actively, passively, and by adopting an indifferent attitude toward fundamental rights infringements.

In order to enforce respect for fundamental rights, liability of economically powerful LLCs is needed. In our opinion, the legal concept of the duty of care, both known in national criminal law and national tort law, can be the vehicle to transform responsibility into liability, through a two-step approach. The first step is to accept that responsibility leads to a duty of care, and the second is that the violation of a duty of care establishes liability. This two-step approach is our answer to our subsequent research question for this contribution: “Can economically powerful large listed companies be held liable both under national private law and national criminal law for not taking responsibility for fundamental rights protection?” In order to demonstrate how this liability under national private law and national criminal law can be established, we explained, both for Dutch private law and Dutch criminal law, how the economic power argument in case of economic powerful LLCs can be assimilated in existing frameworks and criteria for establishing liability. Two avenues to this end are sketched for both private law and criminal law. Civil liability and criminal liability can thus be the final piece in the power – responsibility – liability triptych.

Notes

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- 1 See <<https://virunga.org/>> and <<https://whc.unesco.org/en/list/63>>.
 - 2 See the information on the website of the London Stock Exchange <www.londonstockexchange.com/exchange/prices-and-markets/stocks/summary/company-summary-chart.html?fourWayKey=GB00B572ZV91GBGBXSSMM> accessed 18 August 2019.
 - 3 See Regulation (EU) No 600/2014 of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, [2014] OJ L 173/84, Article 2(1)(13).
 - 4 The description of the SOCO – Virunga National Park case is based on information available on several websites: OECD Watch, ‘WWF vs SOCO’ <www.oecdwatch.org/cases/Case_307> accessed 18 August 2019; UK National Contact Point for the OECD Guidelines for Multinational Enterprises, ‘Final Statement Following Agreement Reached in Complaint from WWF International against SOCO International Plc’ (July 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/330392/bis-14-967-uk-ncp-final-statement-following-agreement-reached-in-complaint-from-wwf-international-against-soco-international-plc.pdf> accessed 18 August 2019; Global Witness, ‘Virunga: UK Company Bankrolled Soldiers Accused of Bribery and Violence in Quest for Oil in Africa’s Oldest National Park’ (10 June 2015) <www.globalwitness.org/en/campaigns/democratic-republic-congo/soco-in-virunga/>; Joshua Alter, ‘April 2013: A Responsibility to Preserve: Protecting Virunga National Park from Oil Drilling, Poaching and Armed Groups’ (16 April 2013) <<https://savevirunga.com/2013/04/16/a-responsibility-to-preserve-protecting-virunga-national-park-from-oil-drilling-poaching-and-armed-groups/>> accessed 18 August 2019; Martin Fletcher, ‘Soco Chief under Fire over Reports Oil Firm “Violently Intimidated Opponents” of Exploration

in Congo' (12 June 2015) <www.telegraph.co.uk/news/worldnews/africaand-indianocean/11668711/Soco-chief-under-fire-over-reports-oil-firm-violently-intimidated-opponents-of-exploration-in-Congo.html> accessed 18 August 2019; 'Profiel Rodrigue Mugaruka Katembo' (24 April 2017) *De Volkskrant*; and the former official park site <<https://virunga.org/archives/legal-action-by-iccn-against-soco/>> (no longer available).

- 5 The "economic sphere of influence" is inspired by the sphere of influence concept, which is commonly used in the CSR discourse; see, for instance, John Ruggie, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Clarifying the Concepts of "Sphere of influence" and "Complicity": Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (15 May 2008) UN Doc A/HRC/8/16, 3–6. However, in this chapter we have narrowed it down to the economic power of a LLC.
- 6 United Nations Industrial Development Organization, 'What Is CSR?' <www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr> accessed 18 August 2010.
- 7 UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) ['Guiding Principles on Business and Human Rights'], Guiding Principle 11; and OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, [2012] HR/PUB/12/02 ['UNGPs Interpretative Guide'], 9.
- 8 See, for instance, the landmark decision ECtHR, Case of *Öneriyildiz v Turkey*, App no 48939/99 (30 November 2004) and Laurent Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016).
- 9 As is common practice with such definitions. See, for instance, the use of the term "business enterprise" in the UNGPs (see Section 8.3.4) and the definition of an "enterprise" in the EU; see Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] OJ L 124/36, Article 1.
- 10 Cf. Commission Recommendation (n 9), Article 2(1).
- 11 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, [2004] OJ L 390/38 ['Transparency Directive 2004'], Article 4, as amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, [2013] OJ L 294/13 ['Transparency Directive 2013'], Article 1(3).
- 12 Transparency Directive 2004 (n 11), Article 4, as amended by Transparency Directive 2013 (n 11), Article 1(3).
- 13 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing

- Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, [2014] OJ L 173/1 [‘MAR’], Article 17.
- 14 That is, companies with an average number of at least 500 employees during the financial year and listed on a regulated market, as well as banks, insurance companies, and designated public-interests entities; see Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups, [2014] OJ L 330/1 [‘Disclosure of Non-Financial Information Directive’], Article 1(1). There is an extension for parent organizations; see Article 1(3). This threshold is twice as high as our threshold of 250 employees (see Section 8.3.2).
 - 15 Disclosure of Non-Financial Information Directive (n 14), consideration (7) of the preamble and Article 1(1).
 - 16 Transparency Directive 2013 (n 11), Article 1(5).
 - 17 Transparency Directive 2004 (n 11), considerations (1) and (2) of the preamble; Transparency Directive 2013 (n 11), considerations (3), (8) and (29) of the preamble; MAR (n 13), considerations (2)–(4), (8), (23)–(24), (31), (58) and (63) of the preamble; MiFIR (n 3), considerations (1), (3), (5), (8), (14), (23), (46) and (48) of the preamble.
 - 18 According to the TFEU, Article 288, which reads in this respect: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”.
 - 19 See Euronext, ‘Choosing Your Market’ <www.euronext.com/en/raise-capital/how-go-public/choosing-market> accessed 18 August 2019.
 - 20 See Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, [2014] OJ L 173/349, Article 18(2) for multi-lateral trading facility and organization trading facility and Article 51(1) for regulated markets.
 - 21 A more technical remark is that a systematic approach must follow the extension of the listing requirement in the MAR, namely that financial instruments for which a request for admission to trading on a financial market has been made are equated with those financial instruments listed at such financial market; see MAR (n 13), Article 2(1)(a) and (b).
 - 22 See this description of MEs in the OECD Guidelines for Multinational Enterprises: “They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways”. OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011), 17.
 - 23 Guiding Principles on Business and Human Rights (n 7), commentary to Guiding Principle 11.
 - 24 UNGPs Interpretative Guide (n 7) 77.
 - 25 Principle 1 reads: “[b]usinesses should support and respect the protection of internationally proclaimed human rights”, and Principle 2 reads that businesses “make sure that they are not complicit in human rights abuses”; see United Nations Global Compact, ‘The Ten Principles of the UN Global Compact’ <www.unglobalcompact.org/what-is-gc/mission/principles> accessed 18 August 2019.
 - 26 Chapter IV, first duty reads: “[r]espect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”, see OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011), 31.
 - 27 Guiding Principles on Business and Human Rights (n 7) 15.

- 28 UNGPs Interpretative Guide (n 7) 19–20.
- 29 *Ibid.* 20.
- 30 See Guiding Principles on Business and Human Rights (n 7), Guiding Principles 14 and 24, as well as UNGPs Interpretative Guide (n 7) 19–20, 23, 33, 40, 50, 79, 82–4, particularly page 19: “The severity of a potential adverse human rights impact is the most important factor in determining the scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights”.
- 31 Cf. UNGPs Interpretative Guide (n 7) 77: “The responsibility to respect human rights is itself often reflected – at least in part – in laws and regulations”.
- 32 Cf. the contribution by Schaap in this volume.
- 33 Susan Strange, ‘What Is Economic Power and Who Has It?’, (1975) *International Journal* 207.
- 34 *Ibid.* 210. See also Frederick Samuel Northedge (ed.), *The Use of Force in International Relations* (Faber & Faber 1974) 12.
- 35 Strange (n 33) 210.
- 36 Based on Frank J. Fabozzi and Pamela Peterson Drake, *Finance: Capital Markets, Financial Management, and Investment Management* (John Wiley & Sons 2009) 449–50.
- 37 Compare the contribution by Fasterling in this volume, who defines the “business enterprise” not from a legal perspective, but by means of an activity-centered concept of the business model.
- 38 A large enterprise has more activities, more employees, more relationships, more clients, probably operates cross-border, and has a more complex organization and governance structure, with more formal internal control and oversight systems, and often with divisions or departments, than a small enterprise, while a small enterprise has more informal processes and management structures and may have fewer than 10 staff, as can be derived from the UNGPs Interpretative Guide (n 7) 19–20, 29, 46–7, 70.
- 39 UNGPs Interpretative Guide (n 7) 21–2.
- 40 *Ibid.* 22, 32.
- 41 We deviate from the definition of “business enterprise” of the Guiding Principles on Business and Human Rights, which can also include non-profit associations; see the contribution by Fasterling in this volume (Chapter 2).
- 42 Cf. Ruggie (n 5) 6.
- 43 See, for instance, the positive reaction of the Dutch Prime Minister Mark Rutte to Unilever’s decision to concentrate its headquarters in Rotterdam: Jonathan Guthrie, ‘Unilever Has Chosen to Protect Itself from British Capitalism: The Netherlands Is Friendlier to Establish Business That the UK Neglects’, *Financial Times* (16 March 2018) <www.ft.com/content/d6807a36-284a-11e8-b27e-cc62a39d57a0> accessed 18 August 2019. However, in October 2018 Unilever revoked its decision, see Leila Abboud et al., ‘Unilever Backs Down on Plan to Move Headquarters from UK’, *Financial Times* (5 October 2018) <www.ft.com/content/7c1cabf4-c864-11e8-ba8f-ee390057b8c90> accessed 18 August 2019.
- 44 UNGPs Interpretative Guide (n 7) 19 and, for an explanation, Section 8.3.3.
- 45 Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ [2008] UN doc A/HRC/8/5, 14 ff.
- 46 Guiding Principles on Business and Human Rights (n 7), Guiding Principles 14, 17(b), 21, 24; and UNGPs Interpretative Guide (n 7) 8, 19, 50, 83.

- 47 Renée Kool, ‘(Crime) Victims’ Compensation: The Emergence of Convergence’, (2014) *Utrecht Law Review* 14, 16.
- 48 See, for instance, OHCHR, ‘Frequently Asked Questions about the Guiding Principles on Business and Human Rights’ [214] UN doc HR/PUB/14/3, 8–9; Liesbeth Enneking et al., *Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen. Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles (with a summary in English)* (Boom uitgevers 2016) 64, 72–3.
- 49 Enneking et al. (n 48) 607 ff.
- 50 Ibid.
- 51 DCC, Article 6:162 reads as follows (emphasis added):
- 1 A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.
 - 2 Except where there are grounds for justification, the following are deemed tortious: the violation of a right and *an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.*
 - 3 A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.
- See Sterre van der Hell et al., *Warendorf Dutch Civil and Commercial Law Legislation: Section 1 CC Bk 6 General Provisions (art. 162–168)* (Wolters Kluwer 2015).
- 52 Arthur S. Hartkamp and Carla H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht: 6. Verbintenissenrecht: Deel IV. De verbintenis uit de wet* (Wolters Kluwer 2015) 75.
- 53 Dutch Supreme Court, *Coca-Cola v Duchateau* NJ 1966, 136.
- 54 Hartkamp and Sieburgh (n 52) 58; see also Ivo Giesen et al., ‘How Dutch Tort Law Responds to Risks’, in Matthew Dyson (ed.), *Regulating Risk through Private Law* (Intersentia 2018) 176 ff.
- 55 Defined by Enneking as: tort-based civil liability claims brought against parent companies of multinational corporations before courts in their Western society home countries for harm caused to the people- and planet-related interests of third parties (local employees, neighbors, local communities, etc.) in developing host countries as a result of the local activities of the multinational corporations involved. See Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing 2012) 92.
- 56 Ibid. 233.
- 57 Cf. Sylvie Bleker-van Eyk, *Multinational Enterprises and Human Rights: A Report by the Dutch Sections of Amnesty International and Pax Christi International, Utrecht* (Amnesty 1998) 63.
- 58 Basically, only the sole proprietorship is not included. See François Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in Jan Eijsbouts et al. (eds.), *Maatschappelijk verantwoord ondernemen: Handelingen Nederlandse Juristen-Vereeniging 2010–1* (Wolter Kluwer 2010) 132–3.
- 59 Inspired by the adage of Lord Chancellor of England Edward: “it has no soul to be damned, and no body to be kicked”, see John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment’, (1981) 79 *Michigan Law Review* 386.
- 60 *Parliamentary Papers II* 1975/76, 13655, No 3, 8, 14; Kristen (n 58) 133. See also the contribution by Schaap in this volume.

- 61 Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, para. 3.2.3.
- 62 *Parliamentary Papers II* 1975/76, 13655, No 3, 14, 19; *Parliamentary Papers II* 1975/76, 13655, No 5, 2; Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, para. 3.5; Kristen (n 58) 133, 138–9. See also the contribution by Schaap in this volume.
- 63 Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, para. 3.3.
- 64 *Ibid.*, para. 3.4.
- 65 *Ibid.*
- 66 *Ibid.*
- 67 See for instance Kristen (n 58) 134–7; Jaap de Hullu, *Materieel strafrecht* (Wolters Kluwer 2018) 173–9; Bram Meyer et al., ‘Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence: A Comparison of the Dutch and English Legal Frameworks’, (2014) 10 *Utrecht Law Review* 37, 46–9. See also the contribution by Schaap in this volume.
- 68 Marjan Groenouwe and Esther Baakman, ‘Changing Ideas on Corporate Criminal Liability’, in Ferry de Jong et al. (eds.), *Overarching Views of Crime and Deviancy* (Eleven International Publishing 2015) 283; de Hullu (n 67) 178.
- 69 Stan Lee, *Amazing Fantasy* (Marvel 1962). It is said (see Quote Investigator, ‘With Great Power Comes Great Responsibility’ <<https://quoteinvestigator.com/2015/07/23/great-power/#note-11700-1>> accessed 18 August 2019) that this quote’s origins can be found in a French decree from 8 May 1793 promulgated by the *Convention Nationale* during the French Revolution: “qu’une grande responsabilité est la suite inseparable d’un grand pouvoir”, *Collection Générale des Décrets rendu par la Convention Nationale* (Chez Baudouin 1793), 72.

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