



HUMAN RIGHTS OBLIGATIONS OF TRANSNATIONAL CORPORATIONS IN TORT LAW

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1. INTRODUCTION

The involvement of corporations in human rights violations has a long history but it is only fairly recently that human rights became an issue of concern for the corporate world¹. Over the past decades, transnational corporations (TNCs)² have come under increasing public scrutiny for their involvement in human rights violations, particularly in developing countries. One may think of child and slave labour in the supply chain, cooperation with violent or corrupt regimes, and grand scale environmental pollution, resulting in violations of human rights such as the right to a clean and safe environment, to work, to food, to water, to health and to life.

Recently, 'carbon majors' (big fossil fuel corporations) have come under scrutiny for their alleged involvement in human rights violations through their contribution to climate change³. The mining, agri-business, oil & gas and dam-building industries are also associated with a specific type of human rights violations: violations of the human rights of those who seek corporate accountability for environmental pollution in extractive sectors. In 2015, every week three Environmental Human Rights Defenders – individuals who use their human rights (such as the freedom of speech, freedom of association, freedom of assembly, freedom to participate in decision-making, the right to work) to protect the environment – are killed according to the 2016 Global Witness report 'On Dangerous Ground'⁴. Most of these victims come from Central and South America and almost 40% of the victims belong to indigenous groups. Unfortunately, these numbers from Global Witness only reflect the worst form of violence against Environmental Human Rights Defenders: murder.

Non-lethal forms of violence against Environmental Human Rights Defenders, such as intimidation, assault, unlawful detention, violations of privacy and family life, limitations of the freedom of speech, freedom of assembly, freedom of association, shrinking of the democratic space, displacements and limitations of access to natural resources and ecosystems, sexual violence, and the media branding Environmental Human Rights Defenders as 'terrorists', take place in countries all over the world.

Legal protection for (potential) victims of human rights violations perpetrated by TNCs, such as Environmental Human Rights Defenders, is poor. There exist few binding rules that regulate the behaviour of internationally operating corporations. Public international law protects the freedom of trade through the 1948 General Agreement on Tariffs and Trade and since 1995 through the World Trade Organisation, but it hardly regulates the way companies use this freedom⁵.

¹ Cees van Dam, "Tort Law and Human Rights: Brothers in Arms. On the role of Tort Law in the Area of Business and Human Rights" in: *Journal of European Tort Law*, no. 2, 2011, p. 221-254 on p. 225.

² A transnational, or multinational, corporation has its headquarters in one country and operates wholly or partially owned subsidiaries in one or more other countries. The subsidiaries report to the central headquarters.

³ In 2016 the Philippine Commission on Human Rights started an investigation of the responsibility of 47 gas, oil and coal companies for human rights violations or threats of violations resulting from the impact of climate change: <http://www.climatechangenews.com/2016/07/27/oil-majors-summoned-to-philippines-human-rights-inquiry/>.

⁴ <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground/>.

⁵ Cees van Dam, "Tort Law and Human Rights: Brothers in Arms. On the role of Tort Law in the Area of Business and Human Rights" in: *Journal of European Tort Law*, no. 2, 2011, p. 221-254 on p. 221.

Although WTO members are entitled to regulate trade to protect public morals, human, plant and animal health and welfare, and to conserve exhaustible natural resources, this right to regulate or limit trade is subject to strict conditions, particularly if the object of protection is outside the State's territory⁶. International law only provides a few rules that directly apply to the liability for damage caused by corporations. They mainly concern environmental damage, such as the strict liability of the operator of a nuclear plant and the strict liability of the owner of a ship causing oil pollution⁷. From the corporate side, corporations have been successful in establishing international arbitration mechanisms such as the International Centre for Settlement of Investment Disputes (ICSID), an independent affiliation of the World Bank, which can hold national governments accountable when they violate corporate rights and privileges.

International human rights law and international criminal law offer few binding rules for TNCs. The United Nations Guiding Principles on Businesses and Human Rights and the Organisation for Economic Co-operation and Development (OECD) guidelines do provide elaborate guidance with regards to the obligations of businesses to respect human rights, but they are not binding. These principles ask corporations to respect human rights and to act with due diligence to avoid infringement of human rights. They function more as voluntary guidelines or self-regulation, and cannot be enforced directly in courts of law.

Human rights protection offered by domestic law is not sufficient either. Corporate activities are regulated mainly by domestic law but, especially in the developing world, domestic laws can be weak and governments may not be strong enough to enforce them against powerful companies. The result is that the disadvantages of a globalised economy disproportionately harm the least powerful countries and the most vulnerable people⁸. With other words, the social and ecological costs of our global economy are carried by the least resilient among us. Also, in western countries specific regulation with respect to corporate behaviour abroad is rare. The regulation mainly concerns reporting obligations about the corporation's sustainability policy, including its policy regarding human rights (the so-called due diligence reports: the steps a company must take to become aware of, prevent and address adverse human rights impacts⁹).

Giving the current absence of a binding international framework for corporate accountability¹⁰ this article will examine the role national tort law can play in firstly, establishing a duty of care for TNC's to respect human rights, and secondly, in establishing the liability of TNCs in case these human rights are violated. Tort law is the body of rights, obligations and remedies that is applied by courts in civil proceedings (disputes between private parties) to provide relief and compensation for persons who have suffered harm from the wrongful acts of others. A tort claim can be

⁶ WTO rules only allow for two types of measures to protect human rights against extra-territorial corporate abuse: first, conditions imposed upon preferential trade under free trade agreements and preference regimes that aim at ensuring human rights and environmental protection in third countries in which European corporations operate; second, trade restrictions preventing corporations from exporting or importing goods harmful to human rights and the environment. Cees van Dam, *Tort Law and Human Rights*, p. 224.

⁷ Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960 and Vienna Convention on Civil Liability for Nuclear Damage 1963. Cees van Dam, *Tort Law and Human Rights*, p. 225.

⁸ Cees van Dam, *Tort Law and Human Rights*, p. 226.

⁹ Radu Mares, '“Respect” human rights: Concept and convergence', in: Robert C. Bird, Daniel R. Cahoy and Jamie Darin Prenkert (eds.), *Law, Business and Human Rights. Bridging the Gap* (Cheltenham: Edward Elgar, 2014), p. 3-47, no. 56.

¹⁰ An Intergovernmental Working Group is currently exploring the contents of a binding human rights treaty for TNC's and other business enterprises, authorized by the UN Human Rights Council. The Working Group will have its third session in October 2017.

successful if the defendant breaches a duty of care it owes with respect to the claimant's rights and interests. The courts establish this duty of care on the basis of facts of the case and perceived societal expectations¹¹.



Photo: Neil Palmer

¹¹ Cees van Dam, 'Enhancing Human Rights Protection: A Company Lawyer's Business', Inaugural Lecture Rotterdam School of Management (Rotterdam, 2015), p. 11.

2. PROTECTION OF INDIVIDUAL RIGHTS IN DOMESTIC TORT LAW: AN INTRODUCTION

At the national level, fundamental rights were and are protected by written and unwritten constitutions. Early examples were the English Magna Carta (1215) and the Bill of Rights (1689), although these protected the nobility, rather than citizens, against the King¹². The Age of Enlightenment strengthened the idea that all men have fundamental rights, as was particularly demonstrated by the United States Declaration of Independence (1776) and the French Declaration on the Rights of Man and of the Citizen (1789). In the 19th century, similar developments occurred in other countries on the European continent: the protection of fundamental rights became a central feature in the constitutions of the European nation-states.

After the horrors of the Second World War, the universality of fundamental rights was acknowledged in the United Nations Universal Declaration of Human Rights in 1948, followed in 1966 by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (together known as the International Bill of Human Rights). While the 18th and 19th century fundamental right declarations and codes mainly protected white males, since only they were recognized as having full-fledged legal personality, the Universal Declaration of Human Rights and the International Bill of Human Rights acknowledged that all human beings, regardless of race, sex, color, religion or nationality, are endowed with inherent dignity and that they have equal and inalienable rights. These international human rights documents influenced the further development of fundamental rights at the national level.

Traditionally, human rights are considered to be the citizen's shield against the State as the biggest

(and most threatening) power in society. The fundamental and human rights protected in national constitutions and international human rights treaties therefore focus on the vertical relationship between individuals (and in some instances, collectives such as indigenous peoples) and the State¹³.

However, nowadays many corporations are as strong as or even stronger than States and humans need to be protected not only against the power of the State but also against the power of the market¹⁴. What has happened in the past few decades is that **internationally recognized human rights, such as the right to life, to human dignity, to health, to equal treatment, to privacy, and to freedom and safety, as well as the freedoms of religion, of expression, and of association, have been invoked in tort law disputes between private parties**. Under national tort law, corporations have a duty of care to not cause harm to individuals (either through actions or omissions), and infringements of individual's

¹² Cees van Dam, "Human Rights Obligations of Transnational Corporations in Domestic Tort Law", in: Human Rights and Business, Direct Corporate Accountability for Human Rights (pp. 475-497). Oisterwijk: Wolf Legal Publishers, on p. 481.

¹³ Cees van Dam, Tort Law and Human Rights, p. 225.

¹⁴ Ibidem.

The Age of Enlightenment strengthened the idea that all men have fundamental rights.

human rights can result in material or immaterial damage that can be attributed to the corporations' failure to fulfill its duty of care.

Because of this development, tort law and human rights law now virtually protect the same rights¹⁵ and victims of human rights violations caused by TNCs can seek redress through national tort law. This means that **tort law is currently one of the main instruments for holding transnational corporations to account for their involvement in human rights violations.**

Corporations are obliged not to infringe (rather, to respect) the individual's rights to life, physical integrity, health, privacy, property and other rights, whether they operate at home or abroad. Given that most corporate human rights violations seem to take place outside of the home State (the country where the TNC has its seat), the next paragraph explores the options and obstacles that overseas victims of corporate human rights violations face in seeking access to justice. Section 4 then continues to explore the contents of corporate human rights obligations under domestic tort law.

¹⁵ Cees van Dam, Human Rights Obligations of Transnational Corporations in Domestic Tort Law, p. 484.

3. SEEKING ACCESS TO JUSTICE

3.1 INTRODUCTION

Victims of human rights violations need to look carefully at which jurisdiction provides them with the best prospects for a successful claim, both from a procedural and a substantive point of view, and which courts will be willing to develop its tort law for cases between private parties in line with the increasing body of conventions and case law protecting human rights. If a tort claim is successful, then the corporation will be obliged to compensate for the harm suffered by individuals as a consequence of the violation of their human rights. Also, successful tort-cases send a strong signal to the corporate world that careless behavior resulting in infringements of human rights will be punished. This signal can help to prevent future human rights violations by creating a social and legal climate in which profit no longer is allowed to come at the expense of people and planet.

There are however a few specific challenges with regards to domestic tort litigation against transnational corporations for damages resulting from human rights violations: fact-finding, funding and procedural problems.

3.2 FACT-FINDING AND FUNDING

Fact-finding is perhaps the most practical problem

of litigation against TNCs. Firstly, the harm is often suffered in a country with a weak infrastructure and it can be problematic to get to the area where the human rights violations took place¹⁶. Secondly, there may be communication problems when the victims do not have modern means of communication like telephones and access to the internet or are not able to write. Communication and reporting cultures may differ from what is common in Western countries. Also, victims may not feel free to speak out, either because of fear of the corporation or of the government¹⁷.

Thirdly, collecting evidence is time-consuming and costly, particularly when there are many victims. In the *Trafigura*-case for example the claimants' lawyers recruited and trained dozens of staff to interview almost 30,000 potential victims¹⁸.

Finally, the claim of victims is often not that the corporation actively caused damage but that it was indirectly involved in human rights violations committed by others, such as the State or other companies. It may be difficult to find evidence supporting such claims and to link the corporation's behavior to the human rights violations that were committed. These problems contribute to the high costs involved in preparing claims against TNCs. Victims often rely on NGOs to finance fact-finding missions. Crowdfunding of such missions and of

¹⁶ Cees van Dam, *Human Rights Obligations of Transnational Corporations in Domestic Tort Law*, p. 486.

¹⁷ *Ibidem*.

¹⁸ In the *Trafigura*-case, one of *Trafigura*'s ships, the *Probo Koala*, tried to dispose of its toxic waste in Amsterdam. When this appeared to be too expensive the ship sailed to the Ivory Coast where the waste was sold to *Societe Tommy*, which dumped the waste at 18 places outside the capital Abidjan causing death and personal injury to thousands of people. *Societe Tommy* was established after the *Probo Koala* had left Amsterdam. It was allegedly well known that there was no capacity in the Ivory Coast to process this waste. In 2006, the High Court in London agreed to hear a group action against *Trafigura* by about 30,000 claimants. In September 2009, the parties reached a settlement agreement in which *Trafigura* agreed to pay each of the 30,000 claimants approximately \$1,500. In 2008, three French victims filed a complaint against *Trafigura* in Paris alleging corruption, involuntary homicide and physical harm leading to death. The French prosecutor decided not to prosecute because there was no clear link to the French legal order, since the two French *Trafigura*-directors had no real connection to France, the company had no seat in France and because of the criminal cases pending in other countries. In the Netherlands, *Trafigura* was fined 1 million euro by a Dutch court in 2010 in a criminal case for illegally exporting tons of hazardous waste to West Africa, and for concealing the dangerous nature of the waste when it was initially unloaded from a ship in Amsterdam. For more information on the *Trafigura*-case, see Amnesty International's and Greenpeace Netherlands' joined report "The Toxic Truth": <http://www.greenpeace.org/international/en/publications/Campaign-reports/Toxics-reports/The-Toxic-Truth/>.

litigation against TNCs seems to be an emergent possibility. In legal systems allowing success fees or contingency fees (no cure no pay), law firms may be prepared to pre-finance the fact-finding costs in the hope that they will be able to get them back in a settlement or court case¹⁹.

3.3 PROCEDURAL PROBLEMS

3.3.1 Forum

If the victim files a claim against a European-based company (such as a parent of a subsidiary that violated human rights), this will usually be before a European court. In order for the European forum to have jurisdiction a link is required between the forum and the claim. An example is the English Cape-case about a claim against a parent company domiciled in the UK by employees in its South African subsidiary for health damage caused by exposure to asbestos. The House of Lords held that the English court had jurisdiction to hear the claim. It did so after it established that there was evidence to support the allegation that the parent company's own negligence was a cause of the harm²⁰.

In the Dutch case of Nigerian farmers and Milieudefensie v. Shell Plc (parent) and Shell Nigeria (subsidiary), the District Court was competent to hear the case against the parent company as its seat was in The Hague. The Court held that it was also competent to hear the case against Shell Nigeria because the claims against parent and subsidiary were linked in such a way that for reasons of efficiency they could be heard jointly²¹. In December 2015, the Court of Appeals in The Hague also ruled that the parent company Shell can be taken to court in the Netherlands for the effects of the oil spills in Nigeria and that it is effective to combine these proceedings against the parent company with those against the Nigerian subsidiary.

In the USA, the US Alien Tort Statute (ATS) has become the basis for dozens of cases against companies for involvement in human rights violations. So far, none of these cases have led to a victory for claimants, although two settlements were reached in the Unocal-case and the Ken Saro-Wiwa-case²². In the Unocal-case, Burmese villagers sued energy company Unocal for alleged complicity in human rights violations by the Burmese military, Unocal's partner in a gas pipeline joint venture. In 2005, a confidential settlement was reached in which Unocal agreed to compensate the victims²³. In the Wiwa-case, claimants alleged that Shell had been complicit in supporting military operations against the Ogoni people, actively pursuing convictions and executions of nine Ogoni, including by bribing witnesses against them; Shell settled the case in 2009 by paying 15.5 million dollar²⁴.

However, the recent decision of the US Supreme Court in *Kiobel v. Royal Dutch Shell, Plc*, has considerably limited the possibility to bring cases that do not have a clear link with the USA. The US Second Circuit Court of Appeals ruled that customary international human rights law does not recognise the liability of corporations, and consequently TNCs cannot be liable under the ATS. The US Supreme Court in 2013 ruled that the presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute contradicts that presumption. The presumption against extraterritoriality is a canon of statutory interpretation that provides that when a statute gives no clear indication of an extraterritorial application, it has none. **This decision considerably limits the possibility of cases that do not have a clear link with the US.** However, if these limitations do not apply the US procedural system provides for a number of advantages for claimants, such as punitive damages and that all parties bear their own costs. Moreover, the US-style class actions make it

¹⁹ Cees van Dam, Human Rights Obligations of Transnational Corporations in Domestic Tort Law, p. 486.

²⁰ Ibidem, p. 487.

²¹ Ibidem.

²² Ibidem, p. 487.

²³ <https://business-humanrights.org/en/unocal-lawsuit-re-myanmar#c9309>.

²⁴ <http://www.earthrights.org/legal/wiwa-v-royal-dutchshell>.

possible to file a claim on behalf of a group of people that do not have to be identified. For example, the US Khulumani-case concerned a lawsuit against dozens of companies 'on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damages as a result of apartheid'²⁵.

In the USA, as in the majority of the common law systems, courts can resort to the doctrine of forum non-conveniens. **This concept provides a right to decline jurisdiction if the court finds that there is an alternate better forum to hear the case.** For example, the victims of the 1984 Bhopal gas accident attempted to sue the American parent company, which held majority equity shares in the culpable Indian chemical plant. India had presented a claim of 'monolithic multinational' and argued that due to the difficulties in finding the answerable entity of the monolithic multinational, the victims should have the right to sue in the forum of the location of its central decision-making authority which was the United States. The court of the United States of America, however, declined jurisdiction and pointed to the Indian court as being a more suitable forum for deciding the case²⁶. This proves how difficult it is for the foreign victims to sue the parent company of the subsidiary in countries where the doctrine of forum non-conveniens can easily be invoked in cases of extraterritorial damage.

However, in Canada, with the exception of Quebec also a common law-country, the power of the forum non-conveniens doctrine seems to be declining. On June 8th 2017, the Supreme Court of Canada declined to hear an appeal by the Vancouver-based mining company Tahoe Resources Inc. in a Canadian lawsuit brought by several Guatemalan men for injuries they suffered during the violent suppression of a peaceful protest at Tahoe's mine in Guatemala. Earlier this year, the British Columbia Court of Appeal

rejected efforts by Tahoe to dismiss the case, and the Supreme Court's decision leaves that judgment intact, clearing the case to go to trial in Canada. As is customary, the Supreme Court did not provide reasons for refusing to hear Tahoe's petition, but the British Columbia Court of Appeal ruled in January that the case should remain in British Columbia as a result of several factors, including the evidence of systemic corruption in the Guatemalan judiciary, that pointed away from Guatemala as a preferable forum for the case. This Court of Appeal concluded that "there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state²⁷." Factoring in the reality of corruption of the judiciary of the host State (the State where the human rights violations are committed) when deciding if the home State (the State where the parent company is situated) has jurisdiction, promises to open the door for more tort-cases against Canadian corporations for human rights violations abroad.

Although the number of tort-cases against corporations for human rights violations abroad has risen considerably in the past two decades, the total number remains low. This stresses the need, as stated in the United Nations Guiding Principles, and specifically in the third pillar of 'access to remedy', to remove the practical and procedural barriers that make it hard for aggrieved parties to bring their legitimate claims against parent companies in the countries where they have their seat²⁸.

3.3.2 Applicable Law

If a claim is filed against a company before a European court, the applicable law is determined by the EU Rome II-regulation. The main rule is that this is the law of the country where the damage

²⁵ <https://business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa>.

²⁶ Cees van Dam, Tort Law and Human Rights, p. 225.

²⁷ In October 2016, Eritrean plaintiffs also overcame a forum non-conveniens challenge in their slave labour lawsuit against Vancouver-based Nevsun Resources Ltd. That lower court ruling is now on appeal and will also be heard by the BC Court of Appeal, in September 2017. <http://www.cci.ca/news/supreme-court-canada-declines/>.

²⁸ Liesbeth Enneking e.a., Duties of care of Dutch business enterprises with respect to international corporate social responsibility. A comparative and empirical study of the status quo of Dutch law in light of the UN Guiding Principles, Executive Summary, Utrecht, december 2015, p. 10.

occurs, which will usually be the law of the country of the victim rather than the law of the country of the company's seat²⁹.

However, there are a few exceptions to this main rule³⁰:

- Firstly, if the tort is manifestly more closely connected with another country, the law of that country can be applied (art. 4 (3) Rome II regulation). It could be argued that failure of supervision of a subsidiary by a parent is manifestly more closely connected with the country where the parent took its management decisions. The applicable law would then be the law of the country of the parent's seat. It is however likely that this article may only be invoked in exceptional cases.
- Secondly, in the case of environmental damage, the victim has a choice between the law of the place where the damage occurred and the law of the place where the event giving rise to the damage occurred (article 7). This event could, for example, be the active participation of a European parent in causing damage by its subsidiary abroad.
- Thirdly, the application of a foreign law provision may be refused if this is manifestly incompatible with the forum's public policy (ordre public) (art. 26). It is not entirely clear how this exception will work out in practice, but it can arguably be applied if a foreign domestic rule undermines human rights, such as allowing child labour.
- Fourthly, 'mandatory provisions' of the law of the forum remain applicable irrespective of the law otherwise applicable to the dispute (art. 16). These are 'national provisions compliance with which is crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith

by all persons on the territory of that Member State and all legal relationships within that State'. Required however is to have a connecting factor between the claimant and the state exercising jurisdiction.

In the *Milieudefensie vs. Shell*-case, the District Court in The Hague decided on the basis of the Rome II-regulation that Nigerian law was to be applied to the case. The disadvantage of applying foreign law such as Nigerian law, is that the court will usually follow the jurisprudential status quo, which makes the interpretation static rather than dynamic. **As was the case in *Milieudefensie vs. Shell*, the court will not develop foreign law as it could do with the forum's law and this is usually disadvantageous for claimants because tort liability of TNCs for involvement in human rights violations is a new area in which there is hardly any precedent.**

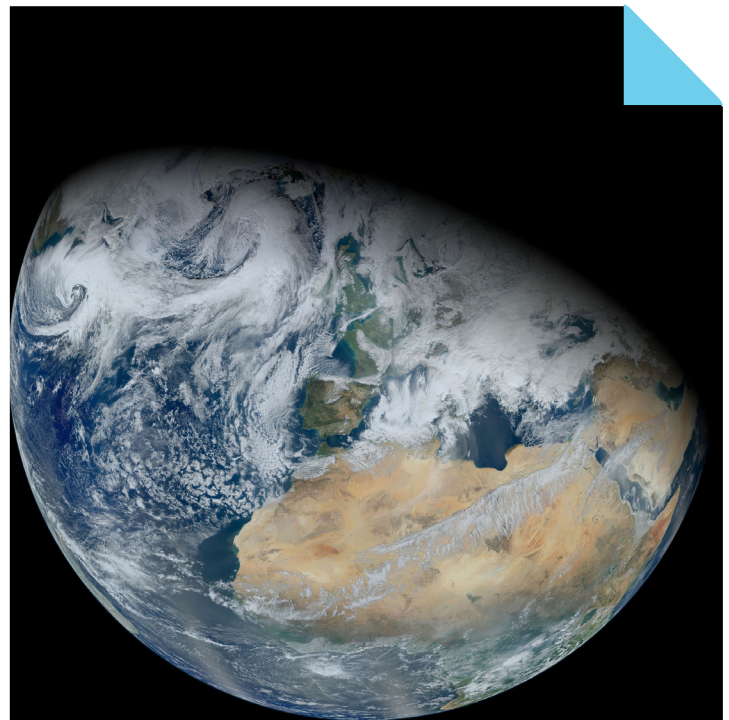


Photo: NASA

via: <https://business-humanrights.org/en/report-on-legal-duty-of-care-of-dutch-companies-operating-internationally-government-response>.

²⁹ Cees van Dam, *Tort Law and Human Rights*, p. 231.

³⁰ *Ibidem*, p. 231 and 232.

4. THE CONTENTS OF CORPORATE HUMAN RIGHTS OBLIGATIONS UNDER DOMESTIC TORT LAW

4.1 INTRODUCTION

After having discussed the formal requirements for an international tort claim in a domestic court, the next question is which substantive human rights obligations arise for TNCs on the basis of domestic tort law. Although the applicable law is most relevant for more technical or procedural aspects such as disclosure, limitation periods and the levels of damages, this is much less the case when it comes to the standard of care. In most legal systems, the basic rule for liability is that of the *bonus pater familias*³¹.

Although this basic rule may be slightly differently framed, it requires proof of the same facts. Moreover, many developing countries retained the legal systems that were imposed by the former colonial powers (e.g., French colonies in Africa base their legal systems on the French Code civil and former Commonwealth countries base their systems on the common law of England). Therefore the standard of care in tort law can be seen as a universal rule that applies between people, businesses and public bodies. It is the universal standard for decent human (and corporate!) behaviour³². The standard of care is differently framed in the various jurisdictions: in common law, the tests consists of two elements: duty of care and breach of duty, in German law, three (*Tatbestand*, *Rechtswidrigkeit*, *Verschulden*) and in French law, one (*faute*). **However, the common feature is whether the defendant has acted like a 'reasonable man'.** In the framework of claims against corporations for involvement in human

rights violations, **the main issue is liability for omissions, that is, whether a corporation has a duty to prevent a third party (like its subsidiary or business partner) from causing harm**³³.

Because tort liability of TNCs for involvement in human rights violations is a new area in which there is hardly any precedent, courts need to rely strongly on general principles of tort law with respect to the standard of care. What is the acceptable corporate behaviour is also informed by developments in the area of soft law, self-regulation, governmental policies and investor's preferences. For example, if a predominant part of an industry voluntarily sets higher standards for example in its code of conduct, this will generally have an upward effect on what can be expected from a corporation with regard to its standard of care³⁴. These developments shaping the company's standard of care are explored in the next paragraph.

4.2 DEVELOPMENTS IN SOCIETY SHAPING THE COMPANY'S STANDARD OF CARE

4.2.1 Soft law

Over the past decades, international organisations have developed various soft law instruments such as guidelines, principles and frameworks to help TNCs avoid the risk of being involved in human rights violations³⁵:

- In 1976, the Organisation for Economic Co-operation and Development (OECD) issued the

³¹ Cees van Dam, *Tort Law and Human Rights*, p. 237.

³² *Ibidem*.

³³ *Ibidem*.

³⁴ *Ibidem*, p. 237 and 238.

³⁵ *Ibidem*, p. 238 and 239.

first Guidelines for multinational companies (revised in 2000). The OECD's Committee on International Investment and Multinational Enterprises interprets these Guidelines, and National Contact Points handle complaints about corporate non-compliance with the guidelines.

- In 1977, the International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. It deals with equal treatment, wages, health and safety, the promotion of employment, rights for labour organisations and the right to complain. The ILO's Committee on Multinational Enterprises supervises compliance and adjudicates disputes.
- John Ruggie has developed the '**Protect, Respect and Remedy**'-framework and provided Guidelines to operationalize it. The Framework consists of the State's duty to protect, the corporation's duty to respect, and access to remedies. His work resulted in the **Guiding Principles on Business and Human Rights (UNGPs)**, which the UN Human Rights Council adopted in 2011. According to the UNGPs, States are under a duty to state clearly that they expect all business enterprises within their territory and/or jurisdiction to respect the human rights of third parties, also where activities take place abroad. In the event of activities of internationally operating business enterprises in risky contexts elsewhere, such as conflict-affected areas, the home States of these business enterprises are under a duty to take on an even more active role³⁶. Business enterprises have an independent responsibility to prevent their activities from having negative consequences for the human rights of third parties as far as possible, and to remedy possible violations. This responsibility applies regardless of the location of the activities and of the local regulatory context; it also covers

the negative human rights consequences that are linked directly to the activities, products or services of the business enterprise through business relationships³⁷. According to the UNGPs, those affected by business-related human rights abuses should have adequate access to effective remedies, including judicial grievance mechanisms.

There are three functions of these soft law instruments. The first function is to make companies aware of their responsibilities and to help them shape policies with regard to respecting human rights. Another function is to illustrate how enforceable rules could look and their likelihood of being workable. In the words of Ruggie, soft law is an intermediate stage on the path leading to mature law. Finally, soft law instruments play a role in assessing the standard of care for TNCs, particularly the duty of corporations to respect human rights under the Ruggie Framework³⁸.

4.2.2 Self-regulation

Self-regulation is often part of broader Corporate Social Responsibility (CSR) policies that focus on the 'triple P': profit, people (human rights and social issues) and planet (respect for the environment)³⁹. Although a corporation is not bound by self-regulation as such, codes of conduct reveal what can be considered to be proper corporate behaviour in a certain industry and this has an impact on the way the standard of care in tort law is shaped. **The binding aspect of self-regulation is that a company can be liable if it does not do what it says that it does.**⁴⁰ For example, the EU Unfair Commercial Practices Directive bans a company from issuing false information about its products or services if this deceives the average consumer and is likely to cause him to buy a product or service which he would not have done otherwise. An example would be a company that does not comply with a code

³⁶ Liesbeth Enneking e.a., Duties of care of Dutch business enterprises with respect to international corporate social responsibility, Executive Summary, p. 17.

³⁷ Ibidem.

³⁸ Cees van Dam, Tort Law and Human Rights, p. 239.

³⁹ Ibidem, p. 240.

⁴⁰ Ibidem, p. 241.

of conduct against child labour to which it has undertaken to be bound⁴¹.

4.2.3 Governmental Policies

In a number of countries, such as the UK, Germany, France, the Netherlands and Belgium, governmental and parliamentary initiatives show commitment to working on improving corporate respect for human rights. Some governments link the procurement of services and goods to compliance with ILO Treaties and OECD Guidelines⁴². For example, the aim of the Dutch government is to have sustainability as an important standard for all purchases and investments. By linking procurement with human rights, governments in a way 'buy' social justice and help to enlarge the market for sustainable and fair goods and services. Such policies contribute to the development of the standard of care in tort law when it comes to corporate respect for human rights⁴³. However, neither the Netherlands nor its neighboring countries under present law have a specific statutory provision to the effect that business enterprises are under a general obligation to exercise due care toward people and the planet in host States with

regard to their own activities or with regard to those of their subsidiaries or supply chain partners.

Nonetheless, some interesting developments have taken place the past few years with regards to specific statutory obligations to exercise due care:

1. Most recently, in February 2017 the Dutch Parliament adopted the Child Labour Due Diligence Bill. If this bill is approved by the Dutch Senate, the law would require companies to identify whether child labour is present in their supply chains and – if this is the case – develop a plan to combat it⁴⁴.
2. In the United Kingdom, the Companies Act 2006 obliges company directors to take into consideration the impact of their company activities on the community and the environment. (section 172 (1)(d) Companies Act 2006). The United Kingdom in 2016 also adopted the Modern Slavery Act, which requires companies domiciled or doing business in the UK to report on the measures they take to prevent slavery or human rights trafficking in their supply chains⁴⁵.



⁴² Cees van Dam, Tort Law and Human Rights, p. 241 and p. 242.

⁴³ Cees van Dam, Tort Law and Human Rights, p. 242.

⁴⁴ <http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection>.

⁴⁵ Ibidem.

3. In February 2017, France adopted a corporate duty of vigilance law that might offer more substantial obligations for corporations to ensure it does not violate human rights or the environment. The law, which only applies to the largest French companies, will make the latter assess and address the adverse impacts of their activities on people and the planet, by having them publish annual, public vigilance plans. This includes impacts linked to their own activities, those of companies under their control, and those of suppliers and subcontractors with whom they have an established commercial relationship. When companies default on these obligations, the law empowers victims and other concerned parties to bring the issue before a judge. Judges can apply fines of up to € 10 million when companies fail to publish plans. Fines can go up to € 30 million if this failure resulted in damages that would otherwise have been preventable. Despite being a major achievement, French civil society organisations argue the law's text could have been more ambitious. The law's scope is limited, only covering around 100 large companies. The burden of proof still falls on the victims – who often lack the means to seek justice – further accentuating the imbalance of power between large companies and victims of abuse. Furthermore, if damages are incurred despite a parent company having implemented an adequate vigilance plan, the company will not be liable: a company is not required to guarantee results, but only to prove that it has done everything in its power to avoid damages⁴⁶.
4. Switzerland recently adopted the “Loi fédérale sur les prestations de sécurité privées fournies à l'étranger”, which contains a legal obligation for private military and security companies

and their officials and employees to prevent direct participation in armed conflicts abroad and certain severe human rights abuses as part hereof. Also, a popular initiative on the introduction of a legally binding ‘responsabilité des entreprises’ for Swiss business enterprises resulted in enough signatures to organize a referendum on mandatory corporate human rights due diligence for activities by Swiss businesses and business enterprises controlled by them⁴⁷.

5. In the spring of 2016, representatives of eight national parliaments called upon the European Commission to consider legislation to implement a human rights due diligence duty of care for European companies⁴⁸.

4.2.4 Investors and civil society

Major investors like pension funds and investment funds also increasingly set standards for corporations in which they invest. According to the European Social Investment Forum, the percentage of CSR proof investments increased to over 15% in 2008.⁴⁹

With regards to civil society, human rights organisations for a long time now have been trying to influence company policies regarding sustainability and human rights. More and more they do this by becoming stakeholders and shareholders and speaking at stakeholders/shareholders meetings, and by being in direct contact with corporate directors and policy makers. An increasing number of corporations now actively seek to benefit from human rights organisations' knowledge about the risks of being involved in human rights violations and how to prevent them⁵⁰.

⁴⁶ Ibidem.

⁴⁷ <http://konzern-initiative.ch/?lang=en>.

⁴⁸ The Parliaments of Estonia, Lithuania, Slovakia and Portugal, the UK House of Lords, the Dutch House of Representatives, the Italian Senate, and the French National Assembly. See European Coalition for Corporate Justice, Members of 8 European Parliaments support duty of care legislation for EU corporations, 18 May 2016: <http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations>. See <https://christophepremat.files.wordpress.com/2016/05/signature-statement.pdf> for the French text of the Declaration.

⁴⁹ See www.eurosif.org.

⁵⁰ Cees van Dam, Tort Law and Human Rights, p. 243.

4.3 THE STANDARD OF CARE FOR TNCs IN TORT LAW: THE REASONABLY ACTING CORPORATION-TEST

To determine if a TNC has neglected its duty of care towards individuals, such as Environmental Human Rights Defenders, we have to compare the behaviour of the TNC with the behaviour that can be expected from “a reasonably acting corporation”. This standard of care in tort law, influenced by the above described developments in soft law, self-regulation, governmental policies and investors and civil society, can be divided in four components: 1) knowledge of the TNC of the risk of being involved in human rights violations 2) balancing risk and care 3) the responsibility of parent companies for human rights violations perpetrated by their subsidiaries and 4) the responsibility of TNCs for human rights violations perpetrated by their suppliers.

1. Knowledge

The first question to be answered is whether the corporation knew about the risk of being involved in violating human rights or ought to have known it. **This knowledge may refer not only to the company’s own violation of human rights, but also its involvement in violation by others, such as business partners or governmental officials.** It is not only the corporation’s factual knowledge that is relevant, **but also what a reasonably acting corporation should have known about the risk.**⁵¹ Practically speaking, this means that a corporation must gather relevant information on the internet and from international and human rights organizations and government bodies. In more risky areas it will need to do research in the relevant country and scrutinize its own business relationships. **Often, a corporation must conduct risk assessments with regards to the involvement in human rights violations of its subsidiaries, suppliers, customers and (other) business partners. The higher the**

likelihood of such violations the more research needs to be done and the less important it will be that this research is burdensome, time-consuming and costly.⁵²

2. Balancing risk and care

If the corporation concludes, or ought to have concluded, that there is a risk of being involved, directly or indirectly, in a human rights violation, it is bound to take appropriate steps to prevent this from happening and to redress the harm that has already occurred.⁵³ The level of risk can be determined by (1) the seriousness of the expected damage and (2) the probability that an accident will happen. The level of care can be broken down into (3) the character and benefit of the conduct and (4) the burden of precautionary measures.⁵⁴ **Article 2:102 of the Principles of European Tort Law (PETL)** holds that the higher the value of an interest, the more extensive its protection: life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection and extensive protection is granted to property rights. **This means that precautionary measures will not easily be found to be too burdensome or costly for a company to take if they prevent human rights from being violated.**⁵⁵

In many situations the corporation’s involvement in human rights violations occurs indirectly through its business partners, particularly subsidiaries, co-ventures, customers and suppliers. This raises the question of whether a company has a duty to prevent those with which it has business dealings from violating human rights. Article 4:103 of the Principles of European Tort Law holds in this respect: **‘A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side**

⁵¹ Cees van Dam, Tort Law and Human Rights, p. 244.

⁵² Ibidem.

⁵³ Ibidem, p. 245.

⁵⁴ Ibidem, p. 245 and 246.

⁵⁵ Ibidem, p. 246.

point towards such a duty'. In other words: such a duty is imaginable.⁵⁶

However, this 'negligence liability' for acts of others is a rather underdeveloped area of tort law. An important question is whether the corporation has authority over the business partner. However, even if it has not, this does not mean the corporation cannot do anything. Precautionary measures can also imply the refusal to purchase or to supply goods or to do so other than under controlled conditions. It is also conceivable that a corporation has factual control over a business partner, for example because of its market power. In such a situation it will be able to prevent the business partner from acting in a certain way, for example, via provisions in the contract. If the violation of human rights is at stake, it is clear that the corporation's freedom not to use its factual power is very limited.⁵⁷ This is reflected in various soft law instruments, such as sec. II.10 of the OECD Guidelines ('companies should encourage ... business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines'.) More generally, soft law and established codes of conduct can provide important guidance in this respect; guidance which can help to turn situations of factual control into a company's legal duty to control.⁵⁸

3. Parent vis-a-vis subsidiaries

Corporations are nowadays many-headed organisations, comprising many entities that are linked in a very complex way. Despite this complexity, corporations regard themselves as a unity when it suits their interests to do so, such as for marketing and brand reasons. The classic principle in corporate law is that of the separation of corporate identity.⁵⁹ This means that as a shareholder, the

parent company is not liable for the conduct of the subsidiaries in which it invests. This contrasts with areas like financial reporting and tax law- the taxman, for example, is allowed to look through the corporate group and make the parent pay for the subsidiary's liabilities. **However, in tort the only grounds for a parent's liability are its own negligent conduct vis-a-vis the subsidiary (duty of care) and identifying the subsidiary's conduct with that of the parent (piercing the corporate veil).**⁶⁰ The law of most EU Member States recognizes the possibility of 'piercing the corporate veil' only in serious cases such as abuse of legal entities leading to fraud. One of the reasons for this reluctance to pierce the corporate veil may be that the cases at hand are usually concerned with pure economic loss. It is, however, not logical that a court would take the same reluctant view to pierce the veil in human rights cases that are about death and personal injury.⁶¹

In practice, the main basis for claims against corporations is not 'piercing the veil', but **'duty of care'**. **The principle allegation is then that the parent breached a duty of care that it owed to individuals affected by its overseas operations such as workers employed by subsidiaries and local communities, and that this breach resulted in harm.**⁶² An illustration is the Cape case about employees who were exposed to asbestos in a South African factory.⁶³ When the South African company appeared to be insolvent, the employees sued the parent in England. The Court of Appeal held that the question was whether 'a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory

⁵⁶ Ibidem.

⁵⁷ Ibidem.

⁵⁸ Ibidem, p. 246 and 247.

⁵⁹ Ibidem, p. 247.

⁶⁰ Ibidem.

⁶¹ Ibidem.

⁶² Ibidem, p. 248.

⁶³ https://en.wikipedia.org/wiki/Lubbe_v_Cape_plc.

or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company.⁶⁴

In many European systems, for a duty of the parent to be accepted vis-a-vis its subsidiary **it is required that the parent has a 100% stake or at least a 2/3rds or 75% majority, and that it directs, controls or coordinates the activities of the subsidiary.** Some jurisdictions, (e.g. France and Germany) impose parent liability as a matter of course where the parent has exercised actual control over the affairs of the subsidiary whereas others restrict it to circumstances where the parent company has the legal or economic power to exercise such control.⁶⁵ In modern corporate group structures, the parent will often have de facto control over its subsidiaries. One of the reasons for

this is that the results of subsidiaries in which a parent has a majority stake need to be included in the group's consolidated accounts. The fact that the parent holds a majority of shares in a subsidiary is a strong indication that it has control over the subsidiary's policies and operations. The same goes for situations where the boards of parent and subsidiary are (almost) identical.⁶⁶

The current soft law instruments do not assume the principle of separate legal entities but rather that a parent company does have control over its subsidiaries. Codes of conduct too are usually company-wide, applying to all group entities and internally enforced accordingly. Such codes are a strong indication of control by the parent over its subsidiaries. Generally, it would be hard for a parent to argue that the Corporate Social Responsibility policy applied to the whole group



Photo: Neil Palmer

⁶⁴ Lubbe v Cape pls [1998] CLC 1559, 1568.

⁶⁵ Cees van Dam, Tort Law and Human Rights, p. 248.

⁶⁶ Ibidem, p. 248 and 249.

but that, at the same time, the parent did not have control over its subsidiaries.⁶⁷

With regards to the parent's duty, two situations can be distinguished. The first is where the parent has given the subsidiary instructions that were a direct cause of the human rights violation, such as in the Firestone-case, in which the parent company instructed the subsidiary in such a way that made forced labour and child labour inevitable to achieve the daily quota of rubber.

The second situation is where the parent failed to prevent human rights violations by its subsidiary. This is the area of liability for omissions. Provided that the parent has control over the subsidiary and knew or ought to have known of the risk it posed to the human rights of others, the question is whether the risk was such that it required the parent to interfere. This will depend on the magnitude of the risk that the subsidiary's conduct posed. When human rights violations are at stake, there is more reason to assume that the principle of commercial freedom has to give way to a duty to interfere.⁶⁸

Another example is the English High Court case *Chandler v Cape*⁶⁹. Between 1959 and 1962, David Chandler worked at Cape Building Products, an English company manufacturing incombustibles asbestos board. In 2007, he was diagnosed with asbestosis but by then Cape Building Products no longer existed. Chandler pursued his claim against the parent company Cape plc. The judge held that Cape plc owed Chandler a duty of care. It had actual knowledge of his working conditions and the asbestos related injury was therefore foreseeable. There was also proximity as for at least six years parent and subsidiary had had common directors and the parent's employees also had responsibilities over the subsidiary company. Moreover, a group policy in relation to health and safety had existed from the mid-

1970s and the parent had not presented evidence that there was no such policy at the time. These facts were sufficient for the trial judge to conclude that Cape plc owed Chandler a duty of care. He also found that Cape plc had breached this duty and awarded Chandler's claim.⁷⁰

Another example is the claim filed in the Netherlands by Nigerian farmer Akpan against Shell pls for the harm the farmer and fisherman suffered because of oil spills near Oruma.⁷¹ Although the Netherlands is not a common law jurisdiction, the Dutch court applied Nigerian common law under international private law rules. The court considered that post-independence English precedents, while not binding on Nigerian courts, do 'have persuasive authority and are therefore frequently followed in Nigerian case law'. Applying the three 'Caparo' criteria, namely foreseeability, proximity, and 'fair, just and reasonable', the court ruled that Shell's subsidiary owed a duty of care to its neighbouring property owner and had been negligent in not properly securing a wellhead. The court did not assume a duty of care of parent company Shell towards the neighbouring property owner of Shell Nigeria, for failing to meet the above mentioned Chandler criteria. Since the Dutch court is a non-common law court, one would not expect it to extend the common law to recognize a new duty of care.⁷²

In December 2015, the Court of Appeals in The Hague ruled that the parent company Shell can be taken to court in the Netherlands for the effects of the oil spills in Nigeria. **It ruled that it cannot be established in advance that the parent company is not liable for possible negligence of the Nigerian subsidiary. Shell was also ordered to provide access to documents that could shed more light on the cause of the oil leaks and about the awareness thereof at the top holding of the**

⁶⁷ Ibidem, p. 249.

⁶⁸ Ibidem, p. 249 and 250.

⁶⁹ https://en.wikipedia.org/wiki/Chandler_v_Cape_plc.

⁷⁰ Cees van Dam, Tort Law and Human Rights, p. 250.

⁷¹ <https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria>.

⁷² Cees van Dam, Tort Law and Human Rights, p. 250.

company.⁷³ The question whether Shell is actually liable for the oil spills has so far not been answered on appeal.

4. Suppliers

Corporate policies to outsource work to developing countries because of their cheap labour have created the risk for many companies to become involved in human rights violations through direct or even indirect suppliers. Global brands, in particular, outsource production and require contractors and sub-contractors to deliver fast, effectively and cheaply. By doing so, they create a fertile ground for violations of human rights.⁷⁴ In this regard, the 1998 ILO Declaration on Fundamental Principles and Rights at Work has become an important point of reference for TNCs. It contains internationally recognised labour principles, among which the abolition of all forms of forced labour and a ban on the most serious forms of child labour. Companies need to comply with these principles and ensure that their suppliers do the same. **Active involvement in human rights violations will occur when a company imposes (contractual) duties on suppliers such as strict time limits or high volumes of products, that increase the risk of human rights being violated.** If there is no such active involvement by the corporation, its duty very much depends on the circumstances of the case. **The corporation's duty will particularly be relevant with regard to established or direct suppliers. The further down the supply chain, the less influence a corporation will generally have.**⁷⁵

Factual knowledge about labour practices by suppliers is not always easy to obtain. Particularly in the fashion industry, work may be sub-contracted to family businesses of which the corporation hardly has any knowledge. **This reality requires the corporation to conduct due diligence and carry out risk assessments including inspection**

on the ground on a regular basis to fulfill its duty of care. Economically powerful corporations are able to impose rules on the supplier and its subcontractors, for example if the company is practically the only client of the supplier.

Corporations like to consider contracts with exclusive suppliers as arm's length transactions, but this is not in line with economic reality. Corporations with global brands, in particular, can and should use their economic power to set terms and conditions that minimize the risk of human rights violations in the supply chain.⁷⁶

⁷³ <https://business-humanrights.org/en/dutch-appeals-court-says-shell-may-be-held-liable-for-oil-spills-in-nigeria>.

⁷⁴ Cees van Dam, Tort Law and Human Rights, p. 251.

⁷⁵ Ibidem, p. 252.

⁷⁶ Ibidem, p. 252 and 253.

CONCLUSION

It is sometimes said that the law may act as an indicator of societal change; the field of tort law, thanks to its open standard such as the 'duty of care', is particularly open to societal changes, because it allows citizens and NGOs to raise new legal claims in the light of contemporary societal issues and changing societal norms.⁷⁷ Over the past years, there has been an increase of tort cases brought against parent companies of multinational corporations in home States (where these parent companies have their seat) for harm caused to people and planet as a result of their activities, or activities of their subsidiaries or suppliers, in host States.

These cases are typically brought by host State plaintiffs with the support of both host- and home State civil society actors such as NGOs and grassroots movements. Civil society- and grassroots activism, such as demonstrations, petitions and lobbying can be important components of 'seeking justice' campaigns. Tort cases against TNCs and the activism surrounding them tie in with the changing societal notions on international corporate social accountability and with the increasing assertiveness of affected communities in seeking social and environmental justice.

In the end, these cases revolve around the question whether and to what extent it is (legally) acceptable that Western society-based internationally operating business enterprises pursue profits at the expense of people and planet in host countries, even where this is done in compliance with regulatory standards as imposed and enforced locally. It is through these cases that Western society home State courts are asked to determine, on a case-by-case basis, whether the adverse consequences of the transnational activities of these internationally operating business enterprises on people- and planet-related private third party- or public interests should be left to be

borne by the host State victims suffering them, or whether and to what extent the corporate actors involved may be held liable in tort for the damage suffered and as such are under a legal obligation to compensate that damage. In doing so, they will essentially balance, ex post facto, the freedom of the internationally operating business enterprises to conduct their activities as they see fit, in light of the societal benefits that this may generate, against the right of the host State plaintiffs to be protected from the adverse consequences of those activities, in light of the nature and severity of those consequences.⁷⁸

Essential in determining whether a TNC has neglected its duty of care towards individuals, such as Environmental Human Rights Defenders, is comparing the behavior of the TNC with the behavior that can be expected from a reasonably acting corporation. This standard of care consists of four elements: 1) knowledge of the TNC of the risk of being involved in human rights violations, 2) balancing risk and care, 3) the responsibility of parent companies for human rights violations perpetrated by their subsidiaries and 4) the responsibility of TNCs for human rights violations perpetrated by their suppliers.

⁷⁷ Liesbeth Enneking, *Foreign Direct Liability and Beyond: Explaining the role of Tort Law in Promoting International Corporate Social Responsibility and Accountability*, Eleven International Publishing 2012, p. 659.

⁷⁸ *Ibidem*, p. 659-660.

‘In the end, these human rights tort cases revolve around the question whether and to what extent it is (legally) acceptable that Western society-based internationally operating business enterprises pursue profits at the expense of people and planet in host countries, even where this is done in compliance with regulatory standards as imposed and enforced locally.’

In view of the pressing issues underlying contemporary debates on international corporate social responsibility and accountability and the shortcomings of existing international treaties to regulate global business behavior, there is every reason for home State lawmakers to improve the role that domestic systems of human rights and tort law may play in this context.⁷⁹ In doing so, the emphasis should be on improving and expanding the tort system’s ability to provide remedies to host

State victims, such as environmental human rights defenders, for harm caused by the transnational activities of internationally operating business enterprises; to create transparency on people- and planet-related impacts of corporate activities around the world and to provide behavioral incentives for corporate actors to conduct their business operations with due care for people and planet wherever they operate⁸⁰, following the example of the new French corporate duty of vigilance law.

⁷⁹ On 23 June 2017, the Committee on Economic, Social and Cultural Rights of the United Nations Covenant on Economic, Social and Cultural Rights issued a General Comment 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, in which it formulates in powerful language what these State obligations entail with regards to economic, social and cultural rights. According to this authoritative Comment, States Parties have the duty to take necessary steps to address the existing obstacles to access to justice, as described in paragraph 3.2 and 3.3 of this document, in order to prevent a denial of justice and ensure the human right to effective remedy and reparation. This requires States Parties to remove substantive, procedural and practical barriers to remedies, including by adopting a national legal framework requiring business entities to exercise human rights due diligence throughout their supply chain in order to identify, prevent and mitigate the risks of violations of economic, social and cultural rights. It also requires States to establish parent company or group liability regimes, provide legal aid and other funding schemes to claimants, enable human rights-related class actions and public interest litigation, facilitate access to relevant information and the collection of evidence abroad, including witness testimony, and allow such evidence to be presented in judicial proceedings. Finally, the extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on forum non conveniens considerations. E/C.12/GC/24, paragraphs 16 and 46.

⁸⁰ Liesbeth Enneking, *Foreign Direct Liability and Beyond*, p. 666.

HUMAN RIGHTS OBLIGATIONS
OF TRANSNATIONAL CORPORATIONS
IN TORT LAW

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