

Rouas, Virginie (2017) In search of corporate accountability : transnational litigation against multinational enterprises in France and the Netherlands. PhD Thesis. SOAS, University of London.

<http://eprints.soas.ac.uk/id/eprint/24386>

Copyright © and Moral Rights for this PhD Thesis are retained by the author and/or other copyright owners.

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.

This PhD Thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder/s.

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

When referring to this PhD Thesis, full bibliographic details including the author, title, awarding institution and date of the PhD Thesis must be given e.g. AUTHOR (year of submission) "Full PhD Thesis title", name of the School or Department, PhD Thesis, pagination.

**IN SEARCH OF CORPORATE ACCOUNTABILITY:
TRANSNATIONAL LITIGATION AGAINST
MULTINATIONAL ENTERPRISES IN FRANCE AND
THE NETHERLANDS**

VIRGINIE ROUAS

Thesis submitted for the degree of PhD

2016

Under the supervision of

Peter Muchlinski

Nicholas H.D. Foster

School of Law

Faculty of Law and Social Sciences

School of Oriental and African Studies

University of London

Declaration for SOAS PhD thesis

I have read and understood regulation 17.9 of the Regulations for students of the SOAS, University of London concerning plagiarism. I undertake that all the material presented for examination is my own work and has not been written for me, in whole or in part, by any other person. I also undertake that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged in the work which I present for examination.

Signed: 

Date: 05 FEBRUARY 2017

Abstract

If multinational enterprises (MNEs) can contribute to the economic and social development of the countries where they operate, they may, at the same time, be directly or indirectly involved in human rights violations or environmental damage. Over the last two decades, MNEs have increasingly faced liability claims in their home countries for abuse occurring during their activities in host countries. For the purpose of this thesis, the legal phenomenon referred to above is called ‘transnational litigation against MNEs’. While it originally emerged as a tort law phenomenon in common law countries, however, it has recently developed considerably in European civil law countries under various forms.

This thesis aims to understand the emergence and the socio-legal characteristics of transnational litigation against MNEs in European civil law countries, particularly in France and the Netherlands. It combines legal comparative and qualitative research methods, and is grounded in various socio-legal theories, such as access to justice and social movements.

This thesis is divided in three main parts: 1) the response of public international law and host States to corporate abuse and demands for justice; 2) the legal, procedural, and institutional opportunities and obstacles to gain access to justice in France and the Netherlands; and 3) the interplay between social movements, cause lawyering and legal mobilization, as well as the effectiveness of transnational claims against MNEs to achieve justice, corporate accountability, and trigger legal and policy reforms.

This thesis concludes that transnational litigation against MNEs is not solely a tort law phenomenon limited to common law countries. Litigators in European civil law countries have creatively used the opportunities offered by their legal systems to bring claims against MNEs. If success in obtaining remedies and holding MNEs to account has been limited, legal mobilization has, nonetheless, been a successful strategy to trigger reform on corporate accountability.

Acknowledgements

I am greatly indebted to the wonderful people who made this PhD possible.

First and foremost, I would like to express my deep gratitude to Professor Peter Muchlinski and Professor Nicholas Foster, my research supervisors, for their time, their enthusiastic encouragement, and their useful advice and critiques of my work. I am privileged to have received their insights and intellectual guidance, as well as their support and mentoring. I would also like to thank Professor Philippe Cullet and Professor Lynn Welchman for their advice and support. Moreover, I wish to thank the SOAS Doctoral School for their help and support during the last months of my studies.

I would also like to extend my thanks to the lawyers, academics, and campaigners I met during my field research who took the time to provide invaluable information and to facilitate my research journey.

I am grateful to my mother Charline Décaudin, as well as my partner Joshua Roberts, whose unconditional love and support have enabled me to embark upon the path towards a PhD. In particular, I owe a great deal of gratitude to Joshua, for helping me reflect on my research and produce what I hope is a valuable study.

I would like to thank all my family and friends, in particular those from SOAS, who have supported and encouraged me during the difficulties of the PhD journey.

Finally, I would like to thank my son Raphael, who accompanied me during the last months of the PhD and patiently waited for me to finish the thesis before arriving in this world.

Table of contents

Declaration for SOAS PhD thesis.....	2
Abstract.....	3
Acknowledgements.....	4
Table of contents.....	5
List of abbreviations	13
CHAPTER 1. Introduction.....	15
1 Background.....	15
2 Aims, scope, hypothesis and research questions	20
2.1 Aims.....	20
2.2 Scope.....	21
2.2.1 Transnational litigation against MNEs.....	21
2.2.2 Corporate accountability	23
2.2.3 Legal strategies in civil law countries	25
2.2.4 The European dimension.....	26
2.3 Hypothesis and research questions	28
3 Theoretical framework	28
3.1 Globalization and transnational legal processes	29
3.2 Legal tradition, litigation culture and legal transplant.....	33
3.3 Access to justice	35
3.4 Social movements and cause lawyers.....	37
4 Methodology.....	41
5 Obstacles.....	42
6 Structure of the thesis	43

CHAPTER 2. The interplay between public international law and transnational litigation against multinational enterprises.....	45
1 Introduction	45
2 Home State extraterritorial obligations towards human rights and the environment	47
2.1 The extraterritorial jurisdiction of States under international environmental law	49
2.2 The extraterritorial dimension of the State duty to protect under international human rights law	50
2.3 The State duty to protect under the UNGPs	55
3 The responsibility of MNEs under international law	56
3.1 The international legal personality of non-State actors	57
3.2 International environmental law	60
3.3 International human rights law	63
3.4 The corporate responsibility to respect under the UNGPs	68
4 Effective access to justice under international law	72
4.1 Access to justice under international human rights law	72
4.2 Access to justice in Europe	73
4.2.1 European Union	74
4.2.2 Council of Europe	76
4.2.3 United Nations Economic Commission for Europe	76
4.3 Effective access to judicial remedy under the UNGPs	77
5 Conclusions	79
CHAPTER 3. The origins of transnational litigation against multinational enterprises: access to justice and corporate accountability in host countries	81
1 Introduction	81
2 Legal and procedural frameworks	83
2.1 Liability	84
2.2 Procedure	87
2.3 Remedies	89
3 The institutional framework	91

3.1	The host State	91
3.2	The judiciary	96
3.3	Civil society	99
4	Litigation in host States v home States	101
5	Conclusions	104
CHAPTER 4. The development of transnational litigation against multinational enterprises in Europe		106
1	Introduction	106
2	The emergence of tort litigation against MNEs in England	107
2.1	Jurisdiction and the <i>forum non conveniens</i> doctrine	108
2.2	Corporate liability	110
2.3	Procedure	114
2.3.1	Access to evidence	114
2.3.2	Group action	115
2.3.3	Litigation costs	116
2.4	Out-of-court settlements	118
3	Description of transnational claims against MNEs in France and the Netherlands	118
3.1	Case studies in France	119
3.1.1	Illegal deforestation in Cameroon (Rougier)	119
3.1.2	Forced labour in Myanmar (Total)	120
3.1.3	International law violations in Palestine (Alstom & Veolia)	121
3.1.4	Labour rights abuse in Gabon (COMILOG)	122
3.1.5	Occupational disease in Niger (AREVA)	123
3.1.6	Other cases	124
3.1.6.1	Toxic waste dumping in Ivory Coast (Trafigura)	124
3.1.6.2	Illegal deforestation & war crimes in Liberia (DLH)	125
3.1.6.3	Misleading commercial practices in France (Samsung & Auchan)	125
3.1.6.4	Protection of privacy & torture in Libya (Amesys)	127
3.1.6.5	Forced labour and modern slavery in Qatar (Vinci)	127

3.1.6.6	Land grabbing in Cambodia (Bolloré)	128
3.2	Case studies in the Netherlands	128
3.2.1	Toxic waste dumping in Ivory Coast (Trafigura).....	129
3.2.2	Oil pollution in Nigeria (Shell)	131
3.2.3	War crimes and crimes against humanity in Palestine (Riwal).....	132
4	Conclusions	133
CHAPTER 5. Jurisdiction and applicable law in transnational claims against multinational enterprises in France and the Netherlands		
135		
1	Introduction	135
2	The influence of European private international law on transnational civil claims against MNEs	136
2.1	Court jurisdiction over civil claims against MNEs.....	136
2.1.1	The Brussels I Regulation	137
2.1.1.1	EU defendant	137
2.1.1.2	Non-EU defendant.....	137
2.1.2	The recast Brussels I Regulation.....	143
2.2	Law applicable to civil claims against MNEs	145
2.2.1	Domestic rules.....	146
2.2.2	The Rome II Regulation	149
3	The prosecution of extraterritorial crimes in France and the Netherlands	151
3.1	General rules	152
3.2	Prosecuting legal persons	153
3.3	Relevance of the territoriality principle	154
3.4	Application of the extraterritoriality principles	156
3.4.1	Active personality principle	157
3.4.1.1	France	157
3.4.1.2	The Netherlands.....	159
3.4.2	Passive personality principle.....	163
3.4.3	Universality principle	164
3.4.3.1	France	165

3.4.3.2	The Netherlands.....	166
4	Conclusions	167
CHAPTER 6. Holding multinational enterprises liable in France and the Netherlands.....		170
1	Introduction	170
2	The liability of MNEs.....	171
2.1	Separate legal personality and limited liability	172
2.1.1	Separate legal personality.....	172
2.1.2	Limited liability.....	173
2.2	Corporate groups	174
2.3	Piercing the corporate veil.....	178
3	The civil liability of French and Dutch MNEs	180
3.1	Competition law.....	180
3.2	Tort law.....	181
3.2.1	France	182
3.2.2	The Netherlands	184
3.3	Company law	186
3.3.1	France	187
3.3.2	The Netherlands	190
3.4	Environmental law.....	192
3.4.1	France	192
3.4.2	The Netherlands	196
3.5	Employment law	198
3.5.1	France	198
3.5.2	The Netherlands	202
4	The criminal liability of French and Dutch MNEs.....	202
4.1	Corporate criminal liability and corporate groups.....	202
4.2	The elements of criminal offences committed by companies	204
4.2.1	<i>Actus reus</i>	205
4.2.2	<i>Mens rea</i>	207

5	The emergence of new corporate liability standards	209
5.1	Corporate social responsibility: source of liability?	209
5.1.1	France	209
5.1.2	The Netherlands	211
5.2	Towards human rights due diligence in France?	212
6	Conclusions	213
CHAPTER 7. Procedural opportunities and barriers to accessing effective remedy against multinational enterprises in France and the Netherlands		
216		
1	Introduction	216
2	The participation of plaintiffs in the proceedings.....	217
2.1	Initiating civil proceedings	217
2.1.1	The right of action	217
2.1.2	Standing of NGOs	219
2.2	Initiating criminal proceedings	224
2.2.1	France	225
2.2.2	The Netherlands	226
2.2.3	European Union.....	228
2.3	Collective redress.....	228
2.3.1	France	229
2.3.2	The Netherlands	230
2.3.3	European Union.....	232
3	Production of evidence	232
3.1	Civil proceedings	233
3.1.1	Burden of proof	233
3.1.2	Admissibility	234
3.1.3	Disclosure.....	234
3.1.4	Discovery	238
3.2	Criminal proceedings.....	238
4	Costs and funding of litigation against MNEs.....	239

4.1	Loser pays principle.....	240
4.2	Legal aid	241
4.2.1	European Union.....	241
4.2.2	France	242
4.2.3	The Netherlands	243
4.3	Market-based mechanisms.....	244
5	Remedies	245
5.1	Damages	246
5.2	Other types of remedy	248
6	Conclusions	248
CHAPTER 8. Social movements and legal mobilization for corporate accountability in Europe.....		
		252
1	Introduction	252
2	The corporate accountability movement in Europe.....	253
2.1	The rise of the corporate accountability movement	253
2.2	The characteristics of the corporate accountability movement	255
2.3	Overview of the corporate accountability movement in Europe	258
2.3.1	Characteristics	258
2.3.2	Cause lawyers.....	259
2.3.3	Collaboration.....	261
3	Legal mobilization for corporate accountability in Europe.....	262
3.1	Strategic litigation against MNEs	262
3.1.1	Goals.....	263
3.1.2	Host country victims and CSOs	265
3.1.3	Media.....	267
3.2	Measuring the success of transnational litigation against MNEs	268
3.2.1	Legal and non-legal benefits	269
3.2.2	Out-of-court settlements.....	271
4	Strategic litigation against corporate accountability activism.....	278

5	Conclusions	279
	CHAPTER 9. Conclusions.....	282
1	Summary.....	282
2	Principled conclusions	286
3	Potential future developments	287
4	Avenues for future research.....	289
	Bibliography	292
1	Table of cases	292
2	Table of legislation	297
3	Table of other international documents	299
4	Secondary sources	301
	Appendix I	351

List of abbreviations

African Commission	African Commission on Human and Peoples' Rights
AFPS	Association France Palestine Solidarité
ATS	Alien Tort Statute
BHRRRC	Business and Human Rights Resource Centre
BV	Besloten vennootschappen
CDDH-CORP	Drafting Group on Human Rights and Business
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CORE Coalition	Corporate Responsibility Coalition
CSO	Civil society organization
CSR	Corporate social responsibility
DRC	Democratic Republic of Congo
EC	European Commission
ECCHR	European Center for Constitutional and Human Rights
ECCJ	European Coalition for Corporate Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
eg	For example
EP	European Parliament
EU	European Union
FDL	Foreign direct liability
GLO	Group Litigation Order
ICA	International Crimes Act
ICC	International Criminal Court
ICJ	International Court of Justice
ie	That is
MEA	Multilateral environmental agreement
MNE	Multinational enterprise
NGO	Non-governmental organization
NV	Naamloze vennootschappen
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PIL	Public Interest Litigation
PLO	Palestinian Liberation Organisation
Puma	Puma Energy International BV
Shell Plc	Royal Dutch Shell Plc
SLAPPs	Strategic Lawsuits Against Public Participation
SPDC	Shell Petroleum Development Company of Nigeria Ltd
SRSg	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
TASS	Tribunal des affaires de la sécurité sociale
Trafigura BV	Trafigura Beheer BV

UCC	Union Carbide Corporation
UK	United Kingdom
UN	United Nations
UNCCPR	UN Human Rights Committee
UNCERD	UN Commission on the Elimination of Racial Discrimination
UNCESRC	UN Committee on Economic, Social and Cultural Rights
UNCHR	UN Commission on Human Rights
UNECE	UN Economic Commission for Europe
UNGPs	UN Guiding Principles on Business and Human Rights
UNHRC	UN Human Rights Council
US	United States

CHAPTER 1

Introduction

The belief that corporate benevolence and social responsibility can and should be achieved through market forces, to the point where government regulation becomes unnecessary, is premised on a dangerous diminishment of the importance of democracy.¹

Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power*

This thesis explores the emergence and the socio-legal characteristics of litigation against multinational enterprises (MNEs) before their home country courts for human rights abuse and environmental damage occurring in host countries. In particular, it focuses on the legal, procedural, and institutional opportunities and obstacles faced by foreign victims to gain access to remedies in two European countries of civil law tradition, namely France and the Netherlands. Furthermore, this thesis examines the broader context in which this litigation is embedded. It discusses the role of various actors of the corporate accountability movement in the emergence of the claims at stake. It also questions the benefits of using legal mobilization not only to help victims gain access to remedies but also to hold MNEs to account and trigger legal and policy reform for improved regulation of transnational business activities.

1 Background

Following World War II, MNEs have emerged as the main actors in the globalization of the economy.² As a result of increased foreign investment, they dominate economic activity worldwide and operate in all sectors.³

¹ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2004) 151.

² Luzius Wildhaber, 'Asser Institute Lectures on International Law: Some Aspects of the Transnational Corporation in International Law' (1980) 27 *Netherlands International Law Review* 79, 80.

³ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn, CUP 2002) 183; Michael Kerr and Marie-Claire Cordonier Segger, 'Corporate Social Responsibility: International Strategies and Regimes' in Marie-Claire Cordonier Segger and Christopher Weeramantry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff Publishers 2005) 135.

It is important to provide for a definition of MNEs. There is a multitude of types of business entities operating across borders and, consequently, various expressions exist to mention them (multinational corporations, transnational corporations, etc.).⁴ Different definitions may focus on the type of foreign investment (direct/portfolio), the nature of operations (transnational/multinational), or the extent of the managerial control.⁵ In its 2011 Guidelines for Multinational Enterprises (OECD Guidelines), the Organisation for Economic Co-operation and Development (OECD) provides for a flexible definition of MNEs:

These enterprises 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. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.⁶

The OECD's definition of MNEs is the one used in this thesis. This definition insists on 'the ability to coordinate activities between enterprises in more than one country.'⁷ It is broad enough to encompass various legal forms of undertakings while emphasizing the notion of direct investment.⁸ MNEs may cover various relationships, including between a parent company and its subsidiaries, between a contractor and a subcontractor, or in the context of joint ventures.

⁴ Ebbesson argues, 'There is no general agreement on how to label the various forms of transboundary economic organization, and neither does the given distinction reveal the diversity of corporate structures. Rather, the difficulty in terming and defining them reflects the multitude of structures and relationships.' Jonas Ebbesson, 'Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework' in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspective from Science, Sociology and the Law* (CUP 2011) 200-201.

⁵ For a discussion of definitions, see Peter Muchlinski, *Multinational Enterprises & the Law* (2nd edn, OUP 2007) 5-9.

⁶ 'OECD Guidelines for Multinational Enterprises: 2011 Edition' (OECD 2011) 17.

⁷ Muchlinski (n 5) 7.

⁸ *ibid.*

International organizations, civil society organizations (CSOs),⁹ and academics have criticized the harmful impacts of MNE activities on humans and the environment, especially in developing countries.¹⁰ The case of the oil industry in Nigeria provides a clear example of poor environmental practices by MNEs resulting in severe environmental destruction and human rights abuses.¹¹ For example, intensive use of gas flaring has resulted in severe air pollution and acid rain. Continuous oil spills have also contaminated land and water, destroying important natural resources and the livelihood of local communities. In turn, the impact of oil pollution on local communities in the Niger Delta has been severe and has resulted in health problems, polluted drinking water, and unproductive soils and ponds.¹² In addition to violations of the right to a clean environment, constant abuses of other human rights, such as the rights to property and to life, have been reported.¹³ In general, the worst cases of corporate-related human rights abuses occur in countries where governance challenges are greatest. According to the United Nations (UN), the risk of business-related harm is especially high in low-income countries, in conflict-affected or post-conflict countries, and in countries where the rule of law is weak and levels of corruption high.¹⁴

⁹ In this thesis, the expression CSOs includes various actors, such as non-governmental organizations (NGOs), trade unions, and faith-based organizations. However, it excludes business actors.

¹⁰ UNHRC, 'Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse' (23 May 2008) UN Doc A/HRC/8/5/Add.2. See also Brandon Prosansky, 'Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo' (2007) 5 *Northwestern Journal of International Human Rights* 236; Priscilla Schwartz, 'Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009); 'The True Cost of Chevron: An Alternative Annual Report' (The True Cost of Chevron 2009, 2010, 2011). The Business and Human Rights Resource Centre also publishes daily information on reported cases of corporate abuse. See 'Home' (*Business and Human Rights Resources Centre*) <<http://business-humanrights.org/en>> accessed 30 November 2015.

¹¹ Joshua Eaton, 'The Nigerian Tragedy of Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal* 261; Jędrzej Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (LIT 2000); 'Environmental Assessment of Ogoniland' (UNEP 2011).

¹² Alison Shinsato, 'Increasing the Accountability of Transnational Corporations for Environmental Harms: the Petroleum Industry in Nigeria' (2005) 4 *Northwestern Journal of International Human Rights* 186, 192.

¹³ 'Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity' (Friends of the Earth Nigeria & Climate Justice Programme 2005).

¹⁴ UNHRC, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5, para 16.

In various cases, victims of business-related abuses have sought to obtain redress in the country where the abuse took place. However, they have faced various legal, procedural, and political obstacles, such as inadequate regimes of liability or procedural rules. In poor countries, MNEs may provide the State with its main source of income, thus creating a situation where States are reluctant to regulate corporate activities. Furthermore, judicial institutions may be less reliable, as a result of severe delays in legal proceedings or corruption. The MNE's subsidiary may also become financially insolvent, preventing victims from obtaining financial compensation.¹⁵ Moreover, the political situation of the host country may be unstable, already creating a risk of State abuse of human rights and a lack of real legal protection.¹⁶

In order to have access to remedy, and to hold MNEs liable for the human rights abuse and environmental damage occurring in the context of their global business activities, victims have brought liability claims against MNEs directly in their home countries. Over the last twenty years, an increasing number of claims have been brought for human rights abuse or environmental damage occurring in foreign countries (host countries) against MNEs in the country where they are headquartered or have their main business activity (home country).¹⁷ In this thesis, this legal phenomenon will be referred to as 'transnational litigation against MNEs.'

The character of transnational claims against MNEs varies considerably, ranging from tort suits for environmental pollution caused by oil spills to criminal proceedings alleging forced labour, or contractual liability claims for violations of international law. In addition, they raise complex legal questions and require overcoming important procedural obstacles. To date, few of these claims have resulted in a court ruling in favour of the plaintiffs. Nonetheless, the number of transnational claims against MNEs is increasing and expanding to more countries.

¹⁵ Kerr and Cordonier Segger (n 3) 141.

¹⁶ Hari Osofsky, 'Learning From Environmental Justice: A New Model for International Environmental Rights' (2005) 24 *Stanford Environmental Law Journal* 71, 75.

¹⁷ Kerr and Cordonier Segger (n 3) 140.

Until recently, transnational litigation against MNEs was mainly concentrated in developed countries of common law tradition, most notably in the United States (US) and England.¹⁸ Historically, it started in these countries in the 1980s-1990s. In the US, foreign victims brought the first tort claims against MNEs under the Alien Tort Statute (ATS)¹⁹ for violations of international customary law or international treaties to which the US was a contracting State. At the same time, the first tort claims based in common law were brought against MNEs in England. In these proceedings, plaintiffs raised the tort liability of the parent company for damage arising out of its subsidiary's activities in foreign countries, often under the law of negligence.

Since the turn of the 21st century, transnational litigation against MNEs has gained in importance in European countries of civil law tradition, including France, the Netherlands, Belgium, Germany, and Switzerland. For example, Total, a French oil and gas MNE, faced various criminal lawsuits in France and Belgium for gross human rights abuses which had taken place in Myanmar in the 1990s.²⁰ In 2013, an NGO filed a tort claim in Sweden against Boliden Mineral AB, a Swedish company, for dumping 20,000 tonnes of mining toxic waste in Chile in the 1980s.²¹ In Germany, a senior manager of Danzer, a timber trading company, faced a criminal lawsuit for failing to prevent its Congolese subsidiary from participating in State-sponsored violence against civilians in the Democratic Republic of Congo (DRC).²² In Switzerland, Nestlé, a food MNE, faced a criminal lawsuit for the murder of a trade unionist in Colombia.²³

¹⁸ See Saman Zia-Zarifi, 'Suing Multinational Corporations in the US for Violating International Law' (1999) 4 *UCLA Journal of International Law and Foreign Affairs* 81; Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 *International and Comparative Law Quarterly* 1; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004).

¹⁹ 28 USC § 1350 (1789) Alien's Action for Tort.

²⁰ Benoît Frydman and Ludovic Hennebel, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' in Manoj Kumar Sinha (ed), *Business and Human Rights* (SAGE 2013).

²¹ Rasmus Kløcker Larsen, 'Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v. Boliden Mineral AB*?' (2014) 83 *Nordic Journal of International Law* 404.

²² 'Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries. The KiK, Lahmeyer, Danzer and Nestlé Cases' (ECCHR 2015).

²³ 'Case Report: Luciano Romero and the Nestlé Case' (ECCHR 2014).

Overall, there is an increasing trend for MNEs to face liability claims in the national courts of European countries over human rights abuses and environmental damage taking place in developing countries.²⁴ Despite the difference in the nature of these claims, they share a common aim, which is to hold parent companies of MNEs liable for the negative impacts of their global activities. These claims represent ‘the flip side of foreign direct investment,’²⁵ as they target the parent company ‘as the apparent “orchestrator” of company-wide investment standards and policies.’²⁶

2 Aims, scope, hypothesis and research questions

This section presents the aims, scope, hypothesis, and research questions which led this research.

2.1 Aims

In general, this thesis aims to understand the emergence and the socio-legal characteristics of transnational litigation against MNEs in Europe, with a specific focus on civil law countries. More precisely, it has three main objectives. The first objective is to identify the factors which have led to the emergence of this specific type of litigation in home countries. In particular, this thesis assesses the responses of the international community and of host States to situations of corporate human rights abuse and environmental damage, and to demands for justice. The second objective is to assess how the substantive and procedural laws applying to transnational litigation against MNEs in France and the Netherlands create opportunities and challenges for foreign victims of business-related abuse to gain access to remedies before domestic courts. The third objective is to understand the socio-legal dimension of transnational claims against MNEs in Europe. This thesis questions the interplay between the development of these claims and the existence of cause lawyers and social movements. It identifies how legal mobilization against MNEs in European home countries is used by various actors with competing interests, and the potential conflicts that may arise. Ultimately,

²⁴ Halina Ward, ‘Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options’ (2001) 24 *Hastings International and Comparative Law Review* 451, 454.

²⁵ *ibid.*

²⁶ Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 198.

this thesis focuses on ‘the manner in which law and courts are used as social control mechanisms’²⁷ of corporate activities.

2.2 Scope

The scope of this thesis focuses on the study of transnational claims against MNEs in European civil law countries, in particular France and the Netherlands. It also explores the role of social movements and cause lawyers in the emergence of this type of litigation and their use of legal mobilization as a political strategy to achieve corporate accountability reform.

2.2.1 Transnational litigation against MNEs

In the existing scholarship on transnational litigation against MNEs, authors use various expressions to talk about claims alleging the liability of corporate actors in the context of foreign investment, including ‘foreign direct liability litigation’ and ‘transnational human rights litigation.’

Ward was the first author to use the expression ‘foreign direct liability’ (FDL). She described it as follows:

The parent companies of an increasing number of multinational corporate groups in the extractive and chemical industries have found themselves in their home courts defending against ‘foreign direct liability’ – legal actions in which foreign citizens (mostly from developing countries) have claimed damages for the negative environmental or health impacts of the group’s foreign direct investment.²⁸

Ward distinguishes between liability claims at domestic level raising ‘the direct responsibilities of corporations under international law’ (eg the ATS in the US) and other

²⁷ Herbert Jacob, ‘Introduction’ in Herbert Jacob and others (eds), *Courts, Law & Politics in Comparative Perspective* (Yale University Press 1996) 14.

²⁸ Halina Ward, ‘Foreign Direct Liability: A New Weapon in the Performance Armoury’ (The Royal Institute of International Affairs 2000) 1.

domestic claims raising the liability of parent companies in home country courts.²⁹ However, she suggests that both types of litigation question the contribution and the adequacy of existing international or national legal frameworks to solve issues of transnational corporate accountability.³⁰ Other authors have used the same expression,³¹ most notably referring to tort claims brought directly against the parent company of an MNE before its home country courts for its involvement in activities occurring in foreign countries. As a result, other types of claims, such as criminal or civil complaints, have rarely been regarded as FDL litigation. Other authors have used the expression ‘transnational human rights litigation,’ especially in the context of tort claims for violations of international human rights law under the ATS in the US.

In this thesis, the use of both expressions was excluded. First, the expression ‘FDL litigation’ appears to focus primarily on the issue of corporate liability, therefore minimizing other significant aspects, such as access to justice, social movements, and transnational law. While corporate liability is of importance here, the perspective adopted in this study is broader, and the abovementioned concepts are equally important to the socio-legal understanding of transnational litigation against MNEs. In addition, FDL refers to the liability of the parent company of an MNE for its own acts or omissions.³² Nonetheless, in many cases, plaintiffs have raised not only the liability of the parent company but also that of its subsidiaries, partners, or other companies under its control. In the latter situation, the concept of FDL is, therefore, inadequate. Moreover, literature on FDL litigation has focused excessively on tort proceedings, thus neglecting claims brought under criminal law and other specialized areas of civil law. However, plaintiffs who have brought claims outside of tort law have usually sought to achieve similar aims, namely to obtain remediation for the damage suffered and to hold the parent company accountable for abuses which occurred abroad. Second, the expression ‘transnational human rights litigation’ was also excluded, as it focuses mainly on claims alleging direct violations of international human rights law. If plaintiffs have alleged

²⁹ Ward, ‘Securing Transnational Corporate Accountability through National Courts’ (n 24) 451.

³⁰ *ibid.*

³¹ 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).

³² Ward, ‘Securing Transnational Corporate Accountability through National Courts’ (n 24) 460.

the violation of international rules, they have relied mainly on the application of domestic law to punish transnational corporate abuse. Besides, plaintiffs have sought compensation not only for human rights abuse but also for environmental damage. Therefore, the sole focus on human rights is inadequate in the context of this thesis.

The expression ‘transnational litigation against MNEs’ emphasizes the cross-border dimension of the litigation. Indeed, claims are brought in the home country where the MNE is headquartered, or has its principal place of business, whereas the damage resulting from the human rights abuse or the environmental damage occurs in the host country where the MNE’s activities occur. Furthermore, the transnational nature of legal claims against MNEs echoes that of the economic activities of the same actors across borders. It also highlights the contemporary challenges created by economic globalization, particularly foreign investment, to classical theories of the domesticity of law, State sovereignty, and international law. Ultimately, the expression ‘transnational litigation against MNEs’ takes into account the diversity of the legal strategies used by litigators to gain access to remedies, shed light on corporate abuse, and demand legal and policy reform.

2.2.2 Corporate accountability

This thesis explores the use of legal mobilization as a strategy to achieve corporate accountability. It is not concerned with the search for corporate responsibility through private regulation and other types of soft-law instruments.³³ As a result of linguistic constraints imposed by the English language, and to represent various legal realities, this thesis distinguishes between the concepts of corporate responsibility, liability, and accountability.³⁴

³³ There is already an extensive scholarship on the merits and challenges of private law regulation and corporate responsibility instruments. See Ilias Bantekas, ‘Corporate Social Responsibility in International Law’ (2004) 22 *Boston University International Law Journal* 309; Larry Backer, ‘Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator’ (2007) 39 *Connecticut Law Review* 1739; Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law* (Routledge 2011); Jędrzej Frynas, ‘Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention’ (2012) 17 *Ecology and Society* 4.

³⁴ It should be noted that other languages may use the same word to represent various legal realities (eg French uses the word ‘responsabilité’ for accountability, liability, and responsibility). Furthermore, various legal fields may use similar words in different ways (eg the word ‘responsibility’ under public international law compared with its use in other legal fields).

Responsibility refers to ‘a moral obligation to behave correctly towards or in respect of something or someone. Thus, corporate responsibility imposes a moral, and not a legal obligation, upon companies.’³⁵ Liability evokes ‘the state of being legally responsible for something.’³⁶ As a result, corporate liability implies a legal obligation upon companies. Accountability refers to the fact or condition of being ‘required or expected to justify actions or decisions.’³⁷ Therefore, corporate accountability is a wider concept than corporate liability. It encompasses ‘the idea that those accountable should be answerable for the consequences of their actions’ and refers to legal and non-legal risks.³⁸

Furthermore, this thesis pays attention to the role of social movement actors, including CSOs and cause lawyers, in the emergence of transnational litigation against MNEs and in shaping it as a political strategy to achieve corporate accountability. In this thesis, this litigation is primarily seen as a strategic type of legal mobilization, which borrows characteristics of both traditional litigation (help victims gain access to remedies) and public interest litigation (achieve legal and policy reform). This is particularly visible in the way each claim is strategically chosen by litigators, not only for its chances to obtain remedies, but also for its opportunities to highlight demands for corporate accountability and trigger legal and policy reform. However, to date, scholars have neglected the broader social dimension of transnational litigation against MNEs.³⁹ In particular, few authors have explored the role of social movement actors in the emergence of transnational litigation against MNEs and its shaping as a political project, in particular in Europe.⁴⁰

³⁵ ‘Responsibility’ (*Oxford Dictionaries*, OUP 2015)

<<http://www.oxforddictionaries.com/definition/english/responsibility>> accessed 30 November 2015.

Nonetheless, ‘responsibility’ may also evoke ‘the state or fact of having a duty to deal with something or or having control over someone.’ This word may be used to refer to State obligations under public international law.

³⁶ ‘Liability’ (*Oxford Dictionaries*, OUP 2015) <<http://www.oxforddictionaries.com/definition/english/liability>> accessed 30 November 2015.

³⁷ ‘Accountable’ (*Oxford Dictionaries*, OUP 2015)

<<http://www.oxforddictionaries.com/definition/english/accountable>> accessed 30 November 2015.

³⁸ Nadia Bernaz, ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’ (2013) 117 *Journal of Business Ethics* 493, 494.

³⁹ Ward, ‘Securing Transnational Corporate Accountability through National Courts’ (n 24) 454.

⁴⁰ For research focusing on the US, see Cheryl Holzmeyer, ‘Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe v. Unocal*’ (2009) 43 *Law &*

2.2.3 Legal strategies in civil law countries

This thesis focuses on the analysis of transnational litigation against MNEs in two European civil law countries, namely France and the Netherlands. However, it emphasizes the study of France, due to an increase in the number of claims against MNEs before the French courts, as well as relevant legislative developments, in recent years.

France and the Netherlands were chosen as case studies for two main reasons. First, the increase in the number of claims brought against MNEs in these countries provides sufficient material to draw conclusions on the accessibility of their legal systems by victims of corporate abuse. Second, France and the Netherlands are European countries of civil law tradition. They share a common legal history, which has influenced the shaping of their current legal system to some extent.⁴¹ Therefore, it is instructive from a comparative law perspective to assess the similarities and differences in the way these countries treat transnational claims against MNEs. It also allows for a better understanding of whether this type of litigation has developed its own characteristics in civil law countries.

Until recently, transnational litigation against MNEs has been predominantly practised in common law countries.⁴² Therefore, most of the existing scholarship has largely focused on litigation under the ATS in the US⁴³ and tort-based claims in England⁴⁴ and other common law countries (eg US, Canada, or Australia).⁴⁵ Nonetheless, transnational litigation against MNEs has developed considerably in European civil law countries since the turn of the 21st

Society Review 271, 300; John Dale, *Free Burma: Transnational Legal Action and Corporate Accountability* (University of Minnesota Press 2011) 207.

⁴¹ Jeroen Chorus and E. Chris Coppens, 'History' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius (eds), *Introduction to Dutch Law* (4th edn, Kluwer Law 2006) 8.

⁴² Ward, 'Securing Transnational Corporate Accountability through National Courts' (n 24) 455. In 2001, Ward predicted that, although most of the claims against MNEs had been brought in common law countries where, she argued, legal cultural links between Anglo-Saxon lawyers and procedural rules probably facilitated FDL claims, in the longer term, these cases would more likely emerge in European countries of civil law tradition, particularly the Netherlands and France.

⁴³ Beth Stephens, 'The Curious History of the Alien Tort Statute' (2014) 89 *Notre Dame Law Review* 1467.

⁴⁴ Peter Muchlinski, 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 *The Company Lawyer* 168; Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States' (2011) 3 *City University of Hong Kong Law Review* 1.

⁴⁵ Barnali Choudhury, 'Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses' (2005) 26 *Northwestern Journal of International Law & Business* 43.

century. One consequence is that, during the time of this research, scholars and CSOs have shown a growing interest in claims brought in countries outside the common law tradition.⁴⁶ However, a comparative study focusing exclusively on transnational claims against MNEs in civil law countries is, to this day, lacking. Furthermore, the existing scholarship has mainly focused on the study of tort claims. As a result, the study of criminal and other types of civil proceedings has been neglected.

Scholars have generally assumed that transnational litigation against MNEs is a legal phenomenon limited to, or only possible in, common law countries.⁴⁷ However, such an assumption is factually incorrect, as it neglects the fact that transnational litigation against MNEs can take on various shapes. Whereas litigators in common law countries tend to favour the use of tort claims, litigators in civil law countries use a wider array of legal strategies, due to the legal tradition and the culture of their jurisdiction, existing statutory constraints and opportunities, and conventional litigation practice. There is a need to better understand the diversity of the legal strategies used by litigators in civil law countries to, ultimately, have a more complete picture of the strategic nature of transnational litigation against MNEs.

2.2.4 The European dimension

France and the Netherlands are two European countries whose legal and procedural frameworks are, to a certain extent, influenced by the existence of common institutions and rules in Europe. Since the end of World War II, various regional organizations, such as the EU (European Union), the Council of Europe (CoE), or the UN Economic Commission for Europe (UNECE), have contributed to the development of a common legal and policy framework, which is now shared by a majority of countries in Europe.

⁴⁶ Enneking wrote a comparative study of tort claims against MNEs across the US, England, and the Netherlands. See Enneking (n 31). See also Gwynne Skinner and others, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, ECCJ & CORE 2013).

⁴⁷ On the prospects of non-ATS claims, see Enneking (n 31) 271-275.

In the context of this thesis, it is important to understand how the existence of a common European framework has influenced the development and the orientation of transnational litigation against MNEs. For instance, the EU has enacted several regulations which govern the jurisdiction of courts in, and the law applicable to, civil and commercial cross-border disputes.⁴⁸ What has been the effect of those regulations on procedural and substantive issues arising from transnational claims against MNEs in European countries? Furthermore, the CoE established the European Court of Human Rights (ECtHR) to supervise the application of the European Convention on Human Rights (ECHR)⁴⁹ in States Parties. This regional mechanism is seen by many as one of the most efficient human rights systems in the world. As such, do the ECHR and the case-law of the ECtHR provide effective protection against human rights violations in the context of MNE activities abroad? In addition, the UNECE adopted the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),⁵⁰ which guarantees, amongst various objectives, the right of access to justice in environmental matters. Does this mechanism provide any opportunities for foreign plaintiffs to gain access to remedies in European home countries for environmental pollution caused by MNEs?

These regional organizations have also created an institutional framework which shapes, to a certain extent, the action, at both national and regional levels, of CSOs based in European countries. Transnational litigation against MNEs is indissociable from the corporate accountability movement, which uses legal mobilization to demand increased regulation of corporate activity by traditional public actors. Therefore, how does the European institutional framework influence the development of transnational claims against MNEs in European countries?

⁴⁸ On the denationalization of private law and the growing importance of EU law, see Franz Werro, 'Comparative Studies in Private Law: A European Point of View' in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (CUP 2012) 123.

⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

⁵⁰ Aarhus Convention (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

2.3 Hypothesis and research questions

On the basis of an initial literature review, the following hypothesis was developed for the purpose of this thesis: transnational litigation against MNEs is typically a tort-based legal phenomenon and it is characteristic of common law countries where legal tradition and culture, as well as legal and procedural frameworks, are more permissive of this type of litigation. At the same time, transnational litigation against MNEs is less likely to develop or be successful in civil law countries where legal tradition and culture, as well as legal and procedural frameworks, impede or limit this type of litigation.

In order to test this hypothesis, meaning to challenge the idea that transnational litigation against MNEs is a phenomenon exclusively found in common law countries, this thesis aims to answer the following research questions:

- Which factors trigger the emergence of transnational litigation against MNEs in home countries? In particular, what is the role of legal, procedural, and institutional frameworks at international and regional levels, as well as in host countries, in the development of such litigation?
- What are the substantive and procedural legal frameworks governing transnational claims against MNEs in France and the Netherlands? Do such frameworks create or limit the opportunities for foreign victims of corporate abuse to gain access to remedies in those countries?
- What is the role played by social movements and cause lawyers in the emergence and the shaping of transnational litigation against MNEs in Europe? Which aims do they pursue and to which extent does legal mobilization contribute to the achievement of these aims?

3 Theoretical framework

The theoretical framework of this thesis rests on various socio-legal and comparative law theories and concepts, namely globalization and transnational legal processes; legal tradition, litigation culture, and legal transplant; access to justice; and social movements and cause lawyering.

3.1 Globalization and transnational legal processes

Transnational litigation against MNEs is directly linked to the debate on corporate accountability in the context of globalization.⁵¹ Generally, authors disagree on the nature and the novelty of globalization, as well as its normative values and processes.⁵² De Sousa Santos insists on the fact that globalization comprises a very broad set of phenomena and dimensions and, as a result, there is not ‘one sole entity called globalization, instead there are globalizations.’⁵³ The existing legal scholarship offers various definitions of the concept of ‘globalization.’ Twining defines it as economic, political, social, and cultural processes that ‘tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it.’⁵⁴ Other authors insist on the fact that national frontiers are becoming irrelevant in the context of globalization.⁵⁵ For Garcia, globalization is ‘the sum total of political, social, economic, legal and symbolic processes rendering the division of the globe into national boundaries increasingly less important for the purpose of individual meaning and social decision.’⁵⁶ Ultimately, globalization is an economic, political, social, and legal phenomenon where the relevance of national borders and sovereignty to individual and societal decision-making processes is challenged.

MNEs have gained in power and influence during the contemporary phase of economic globalization.⁵⁷ If MNEs can bring positive changes worldwide, they may also pose a threat to the enjoyment of human rights and a clean environment.⁵⁸ MNEs may use their

⁵¹ Ward, ‘Securing Transnational Corporate Accountability through National Courts’ (n 24) 452.

⁵² Frédéric Mégret, ‘Globalization’, *MPEPIL* (2009) <<http://opil.ouplaw.com/>> accessed 30 November 2015.

⁵³ De Sousa Santos (n 3) 187.

⁵⁴ William Twining, *Globalization and Legal Theory* (CUP 2000) 4.

⁵⁵ On the relation between norms and space in the context of globalization, see Paul Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485, 511-518.

⁵⁶ Frank Garcia, ‘Global Market and Human Rights: Trading Away the Human Rights Principle’ (1999) 25 *Brooklyn Journal of International Law* 51, 56.

⁵⁷ Upendra Baxi, *The Future of Human Rights* (2nd edn, OUP 2006) 236. For a discussion of corporate power, see Jean-Philippe Robé, ‘Multinational Enterprises: The Constitution of a Pluralistic Legal Order’ in Gerd Teubner (ed), *Global Law Without a State* (Ashgate 1997); Nicholas Connolly and Manette Kaisershot, ‘Corporate Power and Human Rights’ (2015) 19 *International Journal of Human Rights* 663.

⁵⁸ Jeffrey Dunoff, ‘Does Globalization Advance Human Rights?’ (1999) 25 *Brooklyn Journal of International Law* 125; Ward, ‘Securing Transnational Corporate Accountability through National Courts’ (n 24) 452-453.

‘transboundary *subjectivity* and *structure*’ to escape from liability when they cause harm to people or the environment in other countries.⁵⁹

The law has been slow to respond and inadequate in controlling MNEs’ behaviour.⁶⁰ If international law has allowed MNEs to increasingly gain rights in the fields of foreign investment and international trade, thus facilitating their global expansion, it has been unable to ensure that MNEs respect human rights or the environment, especially in States where regulation provides little protection to individuals or the environment. Moreover, international law is fragmented into a myriad of treaties and institutions with different objectives, sets of values, and decision-making processes. The excessive specialization in each field of international law, and the lack of coordination and dialogue amongst those various fields contribute to create conflicts, especially between international economic law and international human rights law. Garcia suggests that these conflicts raise a problem of justice, as ‘the inquiry into the effects of market globalization on human rights law becomes an inquiry into how the economic facts and regulatory infrastructure of globalization enhance, or interfere with, the contributions which international human rights law seeks to make towards the attainment of justice.’⁶¹ National law also appears ill-adapted, as its predominant focus on domestic issues and its devotion to the *economic persona* have impeded its effectiveness in regulating and controlling MNEs.⁶²

At the same time, globalization has given rise to new demands on corporations to exercise their power responsibly and to account for it. It can exert a transformative effect on corporate accountability, turning it from a choice into an imperative.⁶³

Several aspects of the interplay between globalization and transnational litigation against MNEs must be considered here. First, the processes of globalization are fundamentally

⁵⁹ Ebbesson (n 4) 201 (emphasis in text).

⁶⁰ Michael Addo, ‘Human Rights and Transnational Corporations: An Introduction’ in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 9.

⁶¹ Garcia (n 56) 57.

⁶² Addo (n 60) 11-9.

⁶³ Ward, ‘Securing Transnational Corporate Accountability through National Courts’ (n 24) 453.

changing the significance of national and societal boundaries, generally making them less important.⁶⁴ In the same way, transnational claims against MNEs challenge territorial conceptions of State jurisdiction firmly embedded in international and domestic legal systems. In particular, they point out ‘the mismatch between the territorial scope of State regulatory jurisdiction and the globally integrated organization of the MNE.’⁶⁵ Second, globalization has renewed the debate on legal personality.⁶⁶ While businesses have insisted on keeping a traditional interpretation, advocates for greater corporate accountability have supported new definitions of legal personality under international law.⁶⁷ Similarly, plaintiffs in transnational claims against MNEs have challenged the application of separate legal personality to entities of MNEs. Third, a variety of significant actors who are relevant to the analysis of patterns of legal and law-related relations in the modern world are emerging in the context of globalization.⁶⁸ While MNEs are increasing their economic and political importance on the world stage, transnational activist movements advocating for new forms of corporate accountability are becoming influential in shaping international and domestic policies and laws through various strategies, including legal mobilization. Ultimately, transnational claims against MNEs represent one aspect of the globalization of the international legal system.⁶⁹ Paul holds that they ‘represent both a frustration with the limits of traditional international institutions and cooperative regimes and a positive step toward building a new international legal order.’⁷⁰

Another fundamental aspect of this type of litigation is its transnational legal nature. Jessup defines the term ‘transnational law’ to include ‘all law which regulates actions or events that

⁶⁴ Twining (n 54) 7.

⁶⁵ Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: a Case for Reform?’ (2010) 34 Cambridge Journal of Economics 915, 920.

⁶⁶ Twining (n 54) 10.

⁶⁷ For an overview of the debate, see Dimitra Kokkini-Iatridou and Paul JIM de Waart, ‘Foreign Investment in Developing Countries: Legal Personality of Multinationals in International Law’ (1983) 14 Netherlands Yearbook of International Law 87; Karsten Nowrot, ‘New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities’ (ESIL Research Forum on International Law: Contemporary Problems, Geneva, 2005).

⁶⁸ Twining (n 54) 9.

⁶⁹ Joey Paul, ‘Holding Multinational Corporations Responsible under International Law’ (2001) 24 Hastings International & Comparative Law Review 285, 290.

⁷⁰ *ibid* 289.

transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.⁷¹ Importantly, transnational law may not be formally enacted by States, as it may be concerned with legal activity involving various actors, including States but also individuals, corporations, CSOs, and other groups.⁷² Transnational litigation against MNEs reflects the interpenetration of both public and private international law, as these claims raise not only questions of private international law (eg the choice of jurisdiction or applicable law) but also issues of public international law (eg the application of international human rights and environmental law to non-State actors in cross-border situations). It also involves a variety of actors, such as lawyers and CSOs, who seek to influence regulatory behaviour by challenging the application of legal norms and practice beyond borders.

Transnational claims against MNEs also provide an example of the concept of ‘interlegality’ described by De Sousa Santos as the phenomenological dimension of legal plurality in which ‘everyday life crosses or is interpenetrated by different and contrasting legal orders and legal cultures.’⁷³ Interlegality is:

the conception of different legal spaces surimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life. We live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transition and trespassing.⁷⁴

In Europe, transnational claims against MNEs reveal the interactions between various legal orders, namely EU/Member States, host/home countries, international/national. Furthermore, litigators have made use of creative legal strategies, mixing aspects of different legal orders,

⁷¹ Philip Jessup, *Transnational Law* (Yale University Press 1956) 136. For a discussion of transnational law, see also Harold Koh, ‘Transnational Legal Process’ (1996) 75 *Nebraska Law Review* 181; Paul Schiff Berman, ‘A Pluralist Approach to International Law’ (2007) 32 *Yale Journal of International Law* 301.

⁷² Carrie Menkel-Meadow, ‘Why and How to Study “Transnational” Law’ (2011) 1 *UC Irvine Law Review* 97, 103.

⁷³ De Sousa Santos (n 3) 97.

⁷⁴ *ibid.*

to challenge the perceived increase in corporate power and to force a debate on corporate accountability for human rights and environmental abuse.

3.2 Legal tradition, litigation culture and legal transplant

Legal tradition and litigation culture have influenced the emergence of transnational litigation against MNEs and the way it has developed in different home countries.

According to Rheinstein, domestic and local systems of laws ‘can be grouped in families whose members are more or less all linked to one single mother law, and which thus tend to resemble each other to a more or less considerable extent.’⁷⁵ As pointed out earlier, transnational litigation against MNEs was, until recently, predominantly practised in common law countries. Therefore, it has often been said that the legal tradition of common law countries fosters the emergence of transnational claims against MNEs by providing better opportunities for victims to gain access to remedies in courts.⁷⁶ However, due to the recent increase in claims against MNEs in European civil law countries, one may question the role played by legal tradition in the emergence of transnational litigation against MNEs.⁷⁷

Similarly, litigation culture is a useful tool to understand the differences in the legal strategies employed by litigators and, ultimately, the shaping of transnational litigation against MNEs in home countries. Scholars have argued that the differences in litigation culture between common law and civil law countries explain the various levels of development of tort litigation against MNEs amongst home countries.⁷⁸ For instance,

⁷⁵ Max Rheinstein, ‘Comparative Law: Its Functions, Methods and Usages’ (1968) 22 *Arkansas Law Review and Bar Association Journal* 415, 416. On legal tradition, see René David and John Brierley, *Major Legal Systems in the World Today* (3rd edn, Carswell Legal 1985); Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998).

⁷⁶ The general assumption that common law countries provide better opportunities for victims to gain access to remedies has been challenged in the field of comparative law. See Michaël Haravon, ‘Quel Procès Civil en 2010: Regard Comparé sur l’Accès à la Justice en Angleterre, aux Etats-Unis et en France’ (2010) 62 *Revue Internationale de Droit Comparé* 895.

⁷⁷ Peter Muchlinski, ‘The Provision of Private Law Remedies against Multinational Enterprises: a Comparative Law Perspective’ (2009) 4 *Journal of Comparative Law* 148.

⁷⁸ Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction’ (2009) 40 *George Washington International Law Review* 939, 974;

American and English litigators are more inclined to bring tort claims. In the US, tort litigation is used as a way to promote social reform, influence future policies, redress past civil wrongs, and prevent future ones from occurring.⁷⁹ Furthermore, a framework of financial incentives and public interest lawyers has developed to sustain tort litigation.⁸⁰ In comparison, the litigation culture in many European civil law countries does not foster the use of tort litigation against MNEs.⁸¹ Europeans underestimate the role tort liability can play in social reform. For instance, the European Commission (EC) decided that tort liability law in Europe should no longer be oriented toward influencing socially undesirable behaviour and should focus on compensation instead.⁸² Such a decision is consistent with the civil law tradition of continental European systems, which traditionally view the protection of the public interest as a task for criminal law, and perceive tort law as an unfit tool for prevention or punishment of offenses.⁸³ As a result, litigators in civil law countries may favour alternative types of proceedings, such as criminal or specialised civil proceedings, to tort claims for suing MNEs.

Legal transplant is another useful concept to understand the various shapes that litigation has taken in civil law countries.⁸⁴ Watson defines legal transplant as ‘the moving of a rule or a system of law from one country to another, or from one people to another.’⁸⁵ According to Legrand, ‘the transfer is one that occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from another.’⁸⁶ However, Legrand warns us against the idea of a ‘pure legal transfer’ of a rule from one jurisdiction to another, as ‘a rule is necessarily an incorporative cultural form’ and is ‘the unknowing

Liesbeth Enneking, ‘Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases’ (2009) 40 *George Washington International Law Review* 903, 931.

⁷⁹ Enneking, ‘Crossing the Atlantic?’ (n 78) 931.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ For an overview of the concept, see Alan Watson, *Legal Transplants* (Scottish Academic Press 1974); Pierre Legrand, ‘The Impossibility of “Legal Transplants”’ (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Alan Watson, ‘Legal Transplants and European Private Law’ (2000) 4(4) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/44/art44-2.html>> accessed 30 November 2015; David Nelken, ‘The Meaning of Success in Transnational Legal Transfers’ (2001) 19 *Windsor Yearbook of Access to Justice* 349.

⁸⁵ Watson, *Legal transplants* (n 84) 21.

⁸⁶ Legrand (n 84) 111.

articulator of a cultural sensibility.⁸⁷ Therefore, a ‘pure’ legal transfer of a rule from one country to another seems impossible. The rule implanted in another country will intrinsically be different from the original rule. Consequently, the comparison should not focus exclusively on legal similarities and differences, but should also take into consideration similarities and differences in the social, historical, and cultural context of the native and new jurisdictions.

The concept of legal transplant provides a new perspective on transnational litigation against MNEs. One major question is whether this type of litigation is native to common law countries and, if so, whether it has been transplanted to European civil law countries. In this context, the existence of transnational networks of activists and the various exchanges between these actors seem to have played a key role in the transplant, or import, of transnational litigation against MNEs into civil law countries. Importantly, litigators and CSOs in France and the Netherlands have chosen legal strategies adapted to the social, political, and legal context of the new jurisdictions. This is particularly visible in France, where litigators have favoured the use of criminal proceedings instead of tort proceedings to hold MNEs liable.

3.3 Access to justice

Access to justice is a crucial concept in the context of this thesis.⁸⁸ According to Cappelletti and Garth, the expression ‘access to justice’ serves to focus on two basic purposes of the ‘legal system.’⁸⁹ First, access to justice means that the legal system must be equally accessible to all. Plaintiffs must be empowered to bring a claim before a court. Therefore, the procedural rules and practicalities shaping the legal system, such as standards on standing, litigation costs, availability of legal aid, or access to legal representation, may allow or restrict the ability of plaintiffs, especially the poor and disadvantaged ones, to bring a claim.

⁸⁷ *ibid* 116.

⁸⁸ On access to justice, see Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Review* 181; Deborah Rhode, *Access to Justice* (OUP 2004); Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007).

⁸⁹ Cappelletti and Bryant have defined legal system as ‘the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the State.’ See Cappelletti and Garth (n 88) 182.

Access to justice cannot be achieved when plaintiffs face many obstacles that prevent them from filing a lawsuit. Second, access to justice means that the legal system must lead to results that are ‘individually and socially just.’⁹⁰ In transnational litigation against MNEs, existing standards of corporate liability may produce unfair results and create major obstacles for victims of business-related abuse to hold the parent company liable for harm caused by its subsidiaries.⁹¹

The concept of access to justice should also be understood in a wider sense. Ghai and Cottrell argue that there is a narrow and a broad meaning of the concept of access to justice.⁹² The narrow approach focuses on the courts and other institutions of administering justice, and with the process whereby a person presents a case for adjudication. The broader approach, however, addresses the process of law making, the contents of the law, the legitimacy of the courts, alternative modes of legal representation, and dispute settlement.⁹³ Ghai and Cottrell suggest that access to justice means ‘the ability to approach and influence decisions of those organs which exercise the authority of the State to make laws and to adjudicate on rights and obligations.’⁹⁴ Transnational litigation against MNEs raises issues linked to the broad meaning of access to justice. Plaintiffs and litigators, including lawyers and CSOs, have challenged not only business accountability towards human rights and the environment in the context of foreign investment, but also the processes of international, regional, and national law-making, the contents of corporate liability regimes, and the role of national and regional courts to protect the interests of the most vulnerable. Ultimately, transnational litigation against MNEs is a search of justice for both the direct victims of corporate abuse and society at large. It aims to restore the balance between corporate interests and those of society and its most exposed elements by influencing policy-makers and courts.

⁹⁰ *ibid.*

⁹¹ For a discussion of the implications of separate legal personality and limited liability for litigation against MNEs, see Muchlinski, ‘Limited Liability and Multinational Enterprises’ (n 65).

⁹² Yash Ghai and Jill Cottrell, ‘The Rule of Law and Access to Justice’ in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010) 3.

⁹³ *ibid.*

⁹⁴ *ibid.*

3.4 Social movements and cause lawyers

Over the last decades, CSOs and lawyers have played an important role in ensuring that global companies are held accountable for human rights and environmental abuse.⁹⁵ Therefore, the concepts of social movements and cause lawyering are useful to understand how the development of transnational litigation against MNEs is closely associated to the existence and the demands of the corporate accountability movement.⁹⁶

Scholars from various fields of social sciences have written extensively on the concept of ‘social movements.’⁹⁷ Therefore, there is no unique definition of what a social movement is. Diani provides a basic definition of social movements as ‘networks of informal interactions between a plurality of individuals, groups and/or organizations, engaged in political or cultural conflicts, on the basis of shared collective identities.’⁹⁸ In general, social movements are different from interest groups, political parties, protest events, and coalitions.⁹⁹ According to Della Porta, four elements are common in social science definitions of social movements: a network structure, the use of unconventional means, shared beliefs and solidarity, and the pursuit of some conflictual aims.¹⁰⁰ Della Porta and Diani argue that the turn of the 21st century saw the emergence of a wave of mobilizations for a ‘globalization from below.’¹⁰¹

⁹⁵ On the role of CSOs in holding companies to account, see Robin Broad and John Cavanagh, ‘The Corporate Accountability Movement: Lessons & Opportunities’ (1999) 23 *Fletcher Forum of World Affairs* 151; Rory Sullivan, ‘The Influence of NGOs on the Normative Framework for Business and Human Rights’ in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing 2005); Jonathan Doh and Terrence Guay, ‘Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective’ (2006) 43 *Journal of Management Studies* 47; Jem Bendell, *The Corporate Responsibility Movement* (Greenleaf Publishing 2009).

⁹⁶ For a history of the corporate accountability movement, see Jem Bendell, ‘Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement’ (2004) UNRISD Technology, Business and Society Programme Paper No 13
<[http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/504AF359BB33967FC1256EA9003CE20A?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/504AF359BB33967FC1256EA9003CE20A?OpenDocument)> accessed 30 November 2015.

⁹⁷ Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (2d edn, Blackwell 2006) 1. On social movements, see David Snow, Sarah Soule, and Hanspeter Kriesi (eds), *The Blackwell Companion to Social Movements* (Blackwell 2004); Daniel Cefaï, *Pourquoi se Mobilise-t-on? Les Théories de l’Action Collective* (La Découverte 2007); Suzanne Staggenborg, *Social Movements* (OUP 2011).

⁹⁸ Mario Diani, ‘The Concept of Social Movement’ (1992) 40 *The Sociological Review* 1, 1.

⁹⁹ *ibid.*

¹⁰⁰ Donatella Della Porta, ‘Social Movement’ (*Oxford Bibliographies*, 2011)
<<http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0050.xml>> accessed 30 November 2015).

¹⁰¹ Della Porta and Diani (n 93) 2.

They also call this new wave the ‘global justice movement.’ Della Porta and Diani suggest that the initiatives of the global justice movement are very heterogeneous and not necessarily connected to each other. Actors address a range of issues, from child labour and corporate human rights abuses to deforestation. Their initiatives take a myriad of forms and different points of view.¹⁰²

Keck and Sikkink have also provided a landmark analysis of transnational advocacy networks.¹⁰³ They argue that activist networks, both transnationally and nationally, share similar central values or principled ideas, make creative use of information, and employ sophisticated political strategies in targeting their campaigns.¹⁰⁴ In particular, Keck and Sikkink suggest that:

[They] mobilize information strategically to help create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and governments. Activists in networks try not only to influence policy outcomes, but also to transform the terms and nature of the debate. They are not always successful in their efforts, but they are increasingly relevant players in policy debates.¹⁰⁵

It was pointed out earlier that De Sousa Santos describes different globalizations.¹⁰⁶ In this context, he distinguishes between hegemonic and counter-hegemonic globalizations. One mode of production of counter-hegemonic globalization is ‘insurgent cosmopolitanism.’¹⁰⁷ De Sousa Santos describes it as follows:

It consists of the transnationally organized resistance [...] through local/global linkages between social organizations and movements representing those classes and

¹⁰² *ibid.*

¹⁰³ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).

¹⁰⁴ Keck and Sikkink define ‘principled ideas’ as ‘[i]deas that specify criteria for determining whether actions are right and wrong and whether outcomes are just or unjust.’ *ibid.* 1.

¹⁰⁵ *ibid.* 2.

¹⁰⁶ De Sousa Santos (n 3) 187.

¹⁰⁷ Boaventura de Sousa Santos, ‘Globalizations’ (2006) 23 *Theory, Culture & Society* 393, 397.

social groups victimized by hegemonic globalization and united in concrete struggles against exclusion, subordinate inclusion, destruction of livelihoods and ecological destruction, political oppression, or cultural suppression, etc. They take advantage of the possibilities of transnational interaction created by the world system in transition.¹⁰⁸

An important feature of insurgent cosmopolitanism, as defined by De Sousa Santos, is ‘the aspiration by oppressed groups to organize their resistance on the same scale and through the same type of coalitions used by the oppressors to victimize them, that is, the global scale and local/global conditions.’¹⁰⁹

Insurgent cosmopolitanism lies at the heart of the mobilization and the construction of the corporate accountability movement. At the turn of the 21st century, CSOs, lawyers, and victims have grouped together to challenge corporate impunity and to demand accountability for business-related human rights abuse and environmental damage resulting from the various processes of economic globalization. They have organized their resistance through transnational activist networks, thus operating on the same scale than MNEs.¹¹⁰ They have also mobilized financial and modern communication resources to build campaigns and other activities, such as transnational litigation against MNEs, which strategically help them achieve their aims. In particular, the corporate accountability movement focuses on the role of States and national courts to impose human rights and environmental obligations on companies. Ultimately, the corporate accountability movement is a major actor of counter-hegemonic globalization.

The interactions of the corporate accountability movement with cause lawyers have contributed to the development of transnational litigation against MNEs as a strategic form of

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid* 398.

¹¹⁰ Similarly, Yaziji and Doh observe that, in the context of changes in the economic and political systems of Western industrialized societies, we have seen the parallel development of the societal importance of corporations on the one hand and NGOs on the other. Michael Yaziji and Jonathan Doh, *NGOs and Corporations: Conflict and Collaboration* (CUP 2009) 27.

legal mobilization.¹¹¹ The concept of cause lawyering poses a number of definitional challenges, as a result of the range of possible settings and styles of cause lawyering.¹¹² Generally, cause lawyers are activist lawyers who seek to use the courts as a vehicle to achieve social change or social justice beyond the individual claim at stake.¹¹³ Menkel-Meadow defines cause lawyering as ‘any activity that seeks to use law-related means or to change laws or regulations to achieve great social justice – both for particular individuals (drawing on individualistic “helping” orientations) and for disadvantaged groups.’¹¹⁴

Cause lawyering contrasts with conventional lawyering in the sense that cause lawyers participate in parallel advocacy and legal reform activities for the benefit of the cause they fight for. Furthermore, scholars suggest that cause lawyers have the propensity to transgress conventional or generally accepted professional ethical standards of legal practice, such as neutrality, client selection, or partisanship.¹¹⁵ Another important aspect of cause lawyering is that it is often said to be characteristic of common law countries, especially the US, where strategic litigation and public interest litigation are widely accepted.¹¹⁶

In the context of this study, various types of cause lawyers have been involved in transnational claims against MNEs. While plaintiffs have been represented by lawyers practicing in activist law firms in England, the Netherlands, and Belgium, claims against MNEs have been led by NGOs created by lawyers in France and Germany. One commonality between these lawyers is that they are specialized in human rights, environmental, and, in particular, corporate accountability litigation. These cause lawyers demonstrate a particular legal entrepreneurship, as they make ‘creative use of existing laws

¹¹¹ On the relationship between cause lawyering and social movements, see Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006).

¹¹² Andrew Boon, ‘Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression’ (2004) 7 *Legal Ethics* 250, 252.

¹¹³ Thelton Henderson, ‘Social Change, Judicial Activism and the Public Interest Lawyer’ (2003) 33 *Washington University Journal of Law and Policy* 33, 37.

¹¹⁴ Carrie Menkel-Meadow, ‘The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers’ in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998) 37.

¹¹⁵ Boon (n 112) 254-257. However, such an allegation is difficult to establish due to the absence of empirical evidence.

¹¹⁶ *ibid* 251.

and procedures' to seek redress and challenge corporate impunity in the home country of MNEs.¹¹⁷ Furthermore, they have been involved in advocacy and legal reform activities in parallel to litigation.

4 Methodology

Two main methods of research and analysis were used in this thesis. They formed a 'comparative socio-legal method,' which aimed at 'placing doctrinal materials in their social context' to reach the underlying socio-legal reality of transnational litigation against MNEs in European countries.¹¹⁸

First, a legal comparative method was used to identify similarities and differences in the characteristics of transnational claims against MNEs in France and the Netherlands. For this purpose, various types of data were collected, including complaints and judgements, national statutes and other forms of national and European regulation, legislative bills and reports, and academic articles. Second, a socio-legal method based on data mining and qualitative research was used to understand the role of various actors in the European corporate accountability movement in the emergence of transnational claims against MNEs and how their strategies have shaped this litigation in European countries. The main data were collected through interviews with relevant lawyers and NGO campaigners, and through analysis of CSOs reports and media articles. Overall, the fieldwork took place in London, Brussels, Amsterdam, and Paris. Due to potential sensitivity of existing cases, names of individuals, organizations, and places have been voluntarily omitted in this thesis to preserve anonymity. As a result, information collected during the interviews is presented in a generic way.¹¹⁹

It should also be noted that a review of the academic literature and reports of international organizations, as well as an analysis of relevant international, regional, and national

¹¹⁷ Muchlinski, 'The Provision of Private Law Remedies against Multinational Enterprises' (n 77) 12.

¹¹⁸ Jean Carbonnier, *Sociologie Juridique* (Presses Universitaires de France 1978) 47. Jean Carbonnier talks of 'droit sociologique comparé.'

¹¹⁹ See Appendix I of this thesis.

legislation and case-law, were conducted to assess the response of public international law and host countries to issues of corporate accountability and access to justice.

5 Obstacles

While conducting this research, the author had to deal with several obstacles in relation to language, access to data, and position of the researcher.

Numerous scholars have underlined the different issues linked to linguistics in comparative law methodology, including inadequate translation and misunderstanding of concepts.¹²⁰ This study focuses on transnational claims against MNEs in France and the Netherlands. The author speaks both French and English. There were no particular difficulties in understanding documents regarding France. However, documents on the Netherlands were mainly in Dutch. At times, this situation complicated access to, and analysis of, some documents. Nonetheless, a great deal of legislation, case-law, and articles about the Netherlands was available in English. Another issue appeared regarding the different meanings that legal concepts could have in various countries. The author is a French lawyer mainly trained in French law. Some concepts found in other legal systems do not exist under French law. Furthermore, similar words had, at times, different meanings (eg the French word ‘responsabilité’ can be translated in ‘liability,’ ‘accountability,’ and ‘responsibility.’ However, these three words do not bear the same meaning). The author had to be extremely careful about such mistakes.

Access to data, especially case-law, also proved to be challenging at times. For example, some judgements were not available on the Internet or any data-bases. When a case is pending, or when a judgement’s outcomes are negative for the plaintiffs, litigators tend to be reticent to publicize rulings. Furthermore, confidentiality may also prevent judgements from being shared. Out-of-court settlements are problematic in this regard, as companies always impose confidentiality requirements on plaintiffs to keep them from communicating the terms of the settlement. It was also difficult to interview relevant individuals from law firms

¹²⁰ Rheinstein (n 75) 416; Vernon Palmer, ‘From Lerothi to Lando: Some Examples of Comparative Law Methodology’ (2005) 53 *The American Journal of Comparative Law* 261, 265.

and CSOs who could provide the necessary information to understand the role of social movements and legal entrepreneurship in the development of transnational litigation against MNEs. Ultimately, the author was progressively able to access judgements or individuals through connections she made with CSOs and lawyers involved in transnational claims against MNEs.

Finally, the position of the author was, at times, problematic. During her thesis, the author worked either on a voluntary basis or as an employee for CSOs involved either in transnational claims against MNEs or in the European corporate accountability movement. The author was aware of potential conflicts with objectivity requirements for this thesis.¹²¹

6 Structure of the thesis

This thesis is divided into nine chapters. Chapter 1, which is the present chapter, introduces the background to the thesis; the aims, scope, and research questions; the theoretical framework; and the methodology. Chapter 2 presents the interplay between public international law and transnational litigation against MNEs. In particular, it explores how public international law has responded to three main issues raised in transnational litigation against MNEs, namely: home State obligations to protect human rights and the environment and to provide access to judicial remedies to victims of business-related abuse; MNE obligations under international human rights and environmental law; and existing international standards to guarantee access to justice. Chapter 3 gives an overview of the main opportunities and challenges faced by victims of corporate abuse when seeking to gain access to justice in host countries while questioning the desirability of litigation in home States. Chapter 4 explains the emergence of transnational litigation against MNEs in England and presents the French and Dutch case studies of this research. Chapter 5 describes the influence of the EU regime of private international law and the rules governing criminal jurisdiction on transnational litigation against MNEs in France and the Netherlands. Chapter

¹²¹ In his study on the history of the corporate accountability movement, Bendell mentions his participation in the social movement he describes during the research. While he acknowledges the subjectivity of this approach, Bendell also argues that researchers may gain knowledge through an alternative paradigm of social inquiry called ‘civil action research.’ His research ‘was explicitly normative, seeking to drive social progress.’ Bendell, ‘Barricades and Boardrooms’ (n 96) 1-2.

6 is concerned with the study of civil and criminal regimes of corporate liability in France and the Netherlands. Chapter 7 presents an analysis of procedural opportunities and obstacles to gain effective access to remedies in France and the Netherlands. Chapter 8 examines the links between social movements, cause lawyering, and transnational litigation against MNEs. It identifies the European corporate accountability movement and cause lawyers, and assesses how various civil society actors have used legal mobilization as a strategy to achieve conflicting aims. Finally, Chapter 9 summarizes the conclusions of this research and the current international, European, and national initiatives to regulate MNEs and improve access to justice. It also provides suggestions for future research.

CHAPTER 2

The interplay between public international law and transnational litigation against multinational enterprises

1 Introduction

By nature, MNEs operate across borders of sovereign States. Therefore, an internationally coordinated approach appears to be an appropriate way to provide an effective normative framework to regulate MNE activity and offer redress in situations of corporate human rights abuse and environmental damage.¹ Such regulation has been much debated in various international forums over the last decades. To date, voluntary and soft-law instruments, such as the UN Global Compact and the OECD Guidelines, have been the favoured form of international regulation.² At the same time, there have been several ambitious initiatives to impose some sort of legally binding obligations on MNEs, such as the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms).³ However, in 2005, the international community rejected the UN Norms, partly as a result of the absence of international consensus on the question of binding regulation of corporate accountability.⁴

In 2005, John Ruggie was appointed as the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

¹ Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 *Hastings International and Comparative Law Review* 451, 470.

² 'UN Global Compact' (UN) <<https://www.unglobalcompact.org/about>> accessed 30 November 2015; 'OECD Guidelines for Multinational Enterprises: 2011 Edition' (OECD 2011).

³ UNCHR, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

⁴ For a discussion of the UN Norms, see David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *The American Journal of International Law* 901; Carolin Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 4 *German Law Journal* 1065; Larry Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law* 287; John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *The American Journal of International Law* 819.

(SRSRG).⁵ Ruggie's mission was to move beyond the impasse created by the rejection of the UN Norms and to clarify the respective roles and responsibilities of States and businesses under public international law. Following Ruggie's work, the UN Human Rights Council (UNHRC) adopted the UN 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (UN Framework) in 2008,⁶ and the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011.⁷

The UN Framework is a 'principles-based conceptual and policy framework' which aims at 'adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.'⁸ It comprises three complementary and interdependent principles, also called pillars:

- the State duty to protect against human rights abuses by third parties, including business;
- the corporate responsibility to respect human rights; and
- the need for more effective access to remedies.

The UNGPs completed the UN Framework by providing recommendations for the implementation of the three pillars. They aim at enhancing standards and practices with regard to business and human rights and contributing to a socially sustainable globalization.⁹ Nonetheless, neither the UN Framework nor the UNGPs create new international legal obligations upon States or businesses, and they are not legally binding.¹⁰ Furthermore, they do not address environmental issues in the context of business activities.¹¹

⁵ UNCHR, Res 69 (2005) UN Doc E/CN.4/RES/2005/69.

⁶ UNHRC, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5.

⁷ UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

⁸ UN Framework (n 6) para 1.

⁹ UNGPs (n 7) General Principles.

¹⁰ *ibid.*

¹¹ For a discussion of the interplay between the UN Framework and the UNGPs, and the environment, see Katinka Jesse and Erik Koppe, 'Business Enterprises and the Environment: Corporate Environmental Responsibility' (2013) 4 *The Dovenschmidt Quarterly* 176.

Chapter 2 aims to describe how public international law, including European instruments, as well as the UN Framework and the UNGPs, has responded to three main issues raised in transnational litigation against MNEs. It assesses:

- whether the home State has extraterritorial obligations to protect human rights and prevent environmental damage from MNEs under its jurisdiction or control in host countries;
- whether MNEs have international obligations towards human rights and the environment; and
- whether victims of business-related abuse enjoy a number of international rights and guarantees to gain access to judicial remedies against MNEs.

The main goal of Chapter 2 is to identify the opportunities and the weaknesses of the international legal system to respond to challenges posed by MNE activities and demands for justice in cases of corporate abuse.

2 Home State extraterritorial obligations towards human rights and the environment

The transnational impacts of MNE activities challenge the scope and implementation of home State extraterritorial obligations under public international law. Scholars and lawyers have debated whether the home State obligation to protect the enjoyment of human rights from private actors interference applies in the context of its MNEs' activities in host countries.¹² Similarly, the question has arisen under international environmental law whether a home State has an obligation to prevent its MNEs from polluting in third countries. The debate over home State extraterritorial obligations under public international law is reflected at the domestic level in transnational claims against MNEs. This type of litigation raises similar questions, as plaintiffs challenge the home State duty to regulate, punish, and

¹² See Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598; UNHRC, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries' (13 February 2007) UN Doc A/HRC/4/35/Add.1 (Overview of Treaty Body Commentaries).

provide remedies against a parent company for its involvement, either directly or through its subsidiaries, in human rights abuse and environmental damage occurring in host countries.

This section explores how public international law has responded to the challenges regarding State extraterritorial obligations raised by transnational litigation against MNEs. It discusses the extraterritorial dimension of home State obligations under international human rights and environmental law. This section also covers the treatment of the State duty to protect under the UNGPs.

Before going any further, it is necessary to clarify the concept of extraterritoriality, in particular the notion of State extraterritorial jurisdiction.¹³ Under public international law, each State has exclusive jurisdiction to regulate the activities of natural and legal persons, including companies, within the limits of its territory.¹⁴ As a consequence, the territoriality principle serves as the basic principle of jurisdiction. However, national laws may be given extraterritorial application on an exceptional basis, provided that they are justified by one of the recognized principles of extraterritorial jurisdiction under public international law, including the active personality, the passive personality, or the universality principles.¹⁵

Zerk defines ‘extraterritorial jurisdiction’ as ‘the ability of a State, via various legal, regulatory and judicial institutions, to exercise its authority over actors and activities outside its own territory.’¹⁶ Extraterritorial jurisdiction may refer to three types of jurisdiction:

- Prescriptive jurisdiction: States have the ability to prescribe their laws, or make their laws applicable, to persons, activities, or conducts abroad.

¹³ The concept of extraterritoriality, and extraterritorial jurisdiction, is contentious in international law. On the subject, see Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 6.

¹⁴ On the territoriality principle, see *ibid* 49-100.

¹⁵ Ryngaert (n 13) 101. Chapter 5 of this thesis identifies how France and the Netherlands exercise extraterritorial jurisdiction in the context of transnational criminal litigation against MNEs.

¹⁶ Jennifer Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (2010) Harvard University Corporate Social Responsibility Initiative Working Paper No 59, 13.

- Enforcement jurisdiction: States have the ability to ensure that their laws are complied with abroad by enforcing or compelling compliance or punishing noncompliance with their laws.
- Adjudicative jurisdiction: States have the ability to subject persons to their domestic courts to resolve private disputes with a foreign element.¹⁷

Transnational litigation against MNEs results from the interplay between prescriptive and adjudicative jurisdictions.¹⁸

Finally, the UNGPs recognize that States may choose to exercise extraterritorial jurisdiction through either domestic measures with extraterritorial implication or direct extraterritorial legislation and enforcement over private actors and activities abroad.¹⁹

2.1 The extraterritorial jurisdiction of States under international environmental law

International environmental law generally imposes a prohibition on States to cause transboundary pollution.²⁰ States have a duty to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²¹ This prohibition has been recognized as a rule of customary international law binding on all States.²² Nevertheless, it remains unclear whether home States should prevent their MNEs from causing environmental damage overseas on the basis of such prohibition.

¹⁷ Zerk (n 16) 13; Ryngaert (n 13) 9.

¹⁸ Ryngaert (n 13) 10.

¹⁹ UNGPs (n 7) Principle 2, Commentary.

²⁰ *Trail Smelter Arbitration (US v Canada)* (1938 and 1941) 3 RIAA 1905.

²¹ Declaration of the UN Conference on the Human Environment (adopted on 16 June 1972) UN Doc A/CONF.48/14/Rev.1, Principle 21; Rio Declaration on Environment and Development (adopted on 13 June 1992) UN Doc A/CONF.151/26 (vol I), Principle 2; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [29]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgement) [1997] ICJ Rep 7, [53].

²² Jesse and Koppe (n 11) 178.

In general, the question of whether a home State should play a role in preventing and remedying environmental harm caused by MNEs abroad is controversial.²³ Some authors have argued for the direct regulation of MNEs through the application of home State domestic environmental laws to their foreign operations to ensure that they respect stringent environmental standards wherever they operate.²⁴ However, in practice, States do not typically attempt to extend their domestic environmental laws to other States.²⁵ At the same time, States may adopt domestic measures with extraterritorial implication to reduce transboundary environmental risks, to control the export of environmental hazards to other States, or to discourage poor environmental practices beyond their own jurisdiction. Such measures may have a direct effect on business actors operating both within their territory and in other States.²⁶ Generally, States prefer to address environmental issues through international treaty regimes.²⁷ Some treaties may allow or require the use of domestic measures with extraterritorial implication.²⁸ However, international environmental law does not offer a general approach to States' direct assertion of extraterritorial jurisdiction.

2.2 The extraterritorial dimension of the State duty to protect under international human rights law

Under international human rights law, it is generally accepted that States have three types of human rights obligations: to respect, to protect, and to fulfil.²⁹ This section focuses on the State obligation to protect, which requires that States protect right holders against interference by private actors.³⁰ The main UN human rights treaties generally acknowledge

²³ Sara Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011) 3 Trade, Law and Development 164, 166.

²⁴ See Francesco Francioni, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin Be Held Responsible?' in Francesco Francioni and Tullio Scovazzi (eds), *International Responsibility for Environmental Harm* (Kluwer 1991); Tetsuya Morimoto, 'Growing Industrialization and our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad' (2005) 1 Utrecht Law Review 134.

²⁵ Zerk (n 16) 176.

²⁶ *ibid.*

²⁷ *ibid* 187.

²⁸ For example, see Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57.

²⁹ Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2nd edn, CUP 2014) 214.

³⁰ *ibid* 427.

that States have various obligations to protect, such as preventing the abuse of human rights by third parties and, when such an abuse takes place, punishing the perpetrators. Failure to abide by these obligations may amount to a violation of the State's treaty obligations.³¹ Direct references to situations of human rights abuse by business actors in the main UN human rights treaties are not widespread. Nonetheless, UN treaty bodies, which are responsible for monitoring the implementation of the core international human rights treaties, have occasionally required States to effectively regulate and adjudicate corporate activities with regard to human rights.³² For instance, the UN Committee on Economic, Social and Cultural Rights (UNCESRC) has held that, as part of their obligations to protect people's resource base for food, States Parties should take appropriate steps to ensure that activities of the private business sector are in conformity with the right to food.³³ A number of scholars argue that international human rights law is progressively accepting that States must protect the enjoyment of human rights from interference by businesses.³⁴ Such a duty applies to both host and home States in the context of MNE activities.

If States have a duty to protect human rights against interference by business actors, one can question whether such a duty extends outside their territory. In particular, do home States have an obligation to prevent their MNEs from committing human rights abuse in host countries? Furthermore, when such abuse takes place, do home States have an obligation to adjudicate and punish their MNEs? The main UN human rights treaties have adopted different approaches to the extraterritorial dimension of States' obligations. However, in most cases, they provide unclear responses to questions raised in the context of MNE transnational activities. For instance, according to Article 2(1) International Covenant on Civil and Political Rights (ICCPR), each State Party 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized' in the ICCPR.³⁵ Nevertheless, the ambiguous formulation of 'within its territory and subject to its

³¹ 'Overview of Treaty Body Commentaries' (n 12) para 7.

³² *ibid* para 2.

³³ UNCESRC, 'General Comment 12' (12 May 1999) UN Doc E/C.12/1999/5, para 27.

³⁴ See Olivier de Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (OHCHR Seminar, Brussels, November 2006).

³⁵ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

jurisdiction' has cast doubt on whether contracting States have extraterritorial obligations under the ICCPR.³⁶ Moreover, the UN Human Rights Committee (UNCCPR)³⁷ has held that Article 2(1) means that a State Party must respect and ensure the rights laid down in the ICCPR to anyone within its power or effective control, even if not situated within the territory of the State Party.³⁸ However, the UNCCPR has remained silent on whether a State Party must protect ICCPR rights against interference from private persons within its power or effective control, such as MNEs.

Another example is Article 2(1) International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that each State Party 'undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures.'³⁹ As a result of the absence of a territorial/extraterritorial distinction regarding States' obligations under the ICESCR in the wording of Article 2(1), various scholars have concluded that the drafters intended a certain extraterritorial scope as part of the treaty.⁴⁰ In the context of the abuse of rights under the ICESCR by MNEs in host countries, Coomans argues that home States are under an obligation to regulate, investigate, and bring before their courts MNEs under their jurisdiction 'where a threshold of gravity of human rights violations is at stake.'⁴¹ Coomans also advances that home States may be held responsible for violations of ICESCR rights that result from their failure to exercise due diligence in controlling the behaviour of their

³⁶ Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 45.

³⁷ In order to avoid any confusion with the UN Human Rights Council, the acronym used for the UN Human Rights Committee is UNCCPR throughout this thesis.

³⁸ UNCCPR, 'General Comment 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10.

³⁹ ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁴⁰ Rolf Künemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 201; Fons Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 185.

⁴¹ Coomans (n 40) 193.

MNEs.⁴² Furthermore, the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles)⁴³ provide that a State must adopt and enforce measures to protect ICESCR rights extraterritorially through legal and other means in specific circumstances, including where the harm or threat of harm originates or occurs on that State's territory,⁴⁴ or where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.⁴⁵

Nevertheless, in the last years, some UN treaty bodies have increasingly encouraged home States to take regulatory action to prevent abuse by their companies overseas.⁴⁶ In 2007, the UN Commission on the Elimination of Racial Discrimination encouraged a State Party to take appropriate legislative or administrative measures to prevent adverse impacts on the rights of indigenous peoples in other countries from the activities of corporations registered in the State Party.⁴⁷ Furthermore, in 2012, the UNCCPR encouraged Germany 'to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations' and 'to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.'⁴⁸

In Europe, the ECtHR has progressively recognized that contracting States have positive obligations under the ECHR. Therefore, they must take measures to enable the full

⁴² *ibid.*

⁴³ The Maastricht Principles are the outcome of an expert meeting organized in 2011. They are non-legally binding principles, which reflect the views of leading academics on the extraterritorial human rights obligations of States. 'Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (*Maastricht Centre for Human Rights*) <<http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>> accessed 30 November 2015.

⁴⁴ *ibid* Principle 25 (a).

⁴⁵ *ibid* Principle 25(c).

⁴⁶ UN Framework (n 6) para 19.

⁴⁷ UNCERD, 'Concluding Observations' (25 May 2007) UN Doc CERD/C/CAN/CO/18, para 17.

⁴⁸ UNCCPR, 'Concluding Observations on the Sixth Periodic Report of Germany' (12 November 2012) UN Doc CCPR/C/DEU/CO/6, para 16.

enjoyment of the ECHR rights in private relations.⁴⁹ In certain circumstances, a State may be responsible for failing to protect a right, or tolerating the violation of that right, by a private person. The ECtHR has already found that States had failed to protect ECHR rights against businesses.⁵⁰ In *López Ostra v Spain*,⁵¹ the ECtHR found that the nuisance and health problems caused by a private waste-treatment plant had disproportionately interfered with the applicant's right to privacy and family life. If the Spanish authorities were not directly responsible for the pollution in question, they allowed the plant to be built on public land and subsidised the plant's construction. The ECtHR found that Spain 'did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life.'⁵²

Another question relates to the extraterritorial dimension of the contracting States' positive obligations under the ECHR. Article 1 ECHR provides that the contracting States 'shall secure to everyone within their jurisdiction the rights and freedoms' of the convention. However, the ECHR remains silent about the situation where the perpetrator of the abuse is a private person under the contracting State's jurisdiction. The ECtHR has identified various situations where a State may be held responsible for failing to protect ECHR rights in an extraterritorial context. In most cases, State responsibility was found for extraterritorial violations involving acts or omissions by State organs, not acts by private persons.⁵³ Thus, it remains unclear whether a State could be held responsible for failing to prevent or tolerating

⁴⁹ For a discussion of States' positive obligations under the ECHR, see Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Richard Kay, 'The European Convention on Human Rights and the Control of Private Law' (2005) 5 *European Human Rights Law Review* 466.

⁵⁰ For cases involving corporate human rights abuse, see *Young, James and Webster v UK* (1981) 4 EHRR 38; *Sibson v UK* (1993) 17 EHRR 193; *Fadeyeva v Russia* (2007) 45 EHRR 10.

⁵¹ *López Ostra v Spain* (1995) 20 EHRR 277.

⁵² *ibid* para 58.

⁵³ See 'Factsheet: Extra-Territorial Jurisdiction of States Parties to the European Convention on Human Rights' (ECHR July 2015).

the extraterritorial violation of an ECHR right abroad by a company which is under its jurisdiction.⁵⁴

2.3 The State duty to protect under the UNGPs

The UNGPs provide that ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’⁵⁵ Moreover, ‘States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.’⁵⁶ Specifically, the UNGPs provide that States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.⁵⁷ At the same time, they are not prohibited from doing so where a recognized basis for jurisdiction exists.⁵⁸ However, there is ‘increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.’⁵⁹

Scholars have underlined that the SRSG ‘settled for a middle-of-the-road position’ regarding the extraterritorial nature of State obligations under international human rights law.⁶⁰ Such a position has been criticized by various CSOs which viewed it as too conservative. In particular, they have argued that Principle 2 does not reflect the recognition by various international bodies of the legal obligation for States to take action to prevent

⁵⁴ CoE (Steering Committee for Human Rights), ‘Feasibility Study on Corporate Social Responsibility in the Field of Human Rights’ (30 November 2012) CDDH(2012)R76 Addendum VII, para 33.

⁵⁵ UNGPs (n 7) Principle 1.

⁵⁶ *ibid* Principle 2.

⁵⁷ *ibid* Principle 2, Commentary.

⁵⁸ *ibid*.

⁵⁹ UN Framework (n 6) para 19; *ibid*.

⁶⁰ Nadia Bernaz, ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’ (2013) 117 *Journal of Business Ethics* 493, 493. See also Daniel Augenstein and David Kinley, ‘When Human Rights “Responsibilities” Become “Duties”’: The Extraterritorial Obligations of States that Bind Corporations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013).

abuses by their companies overseas.⁶¹ The SRSB missed the opportunity to recognize an extraterritorial State obligation to protect, which would have bridged the protection gap which currently exists in some host countries and would have prevented ‘relocations of convenience,’ meaning the situation where companies decide to register in countries which do not subject them to regulations that protect human rights.⁶² Another weakness of the UNGPs is that they provide little indication of the nature and scope of potential extraterritorial measures (eg domestic measures with extraterritorial implications or direct extraterritorial legislation and enforcement). Ultimately, the UNGPs provide an insufficient response to the interplay between home State obligations under international human rights law and extraterritoriality.

3 The responsibility of MNEs under international law

The responsibility of MNEs under public international law has been the subject of an intense debate for the last decades. In particular, scholars and lawyers have argued about whether MNEs have rights and obligations under international law.⁶³ The traditional view that only States may have international rights and obligations limits the effectiveness of public international law to protect human rights and the environment against interference from businesses in their transnational commercial activities.⁶⁴ At domestic level, transnational litigation against MNEs echoes the international debate on the responsibility of MNEs to respect human rights and the environment. In particular, it raises questions around the liability of parent companies for their direct or indirect involvement in human rights abuse and environmental damage resulting from corporate group’s activities abroad.

⁶¹ Bernaz (n 60) 494.

⁶² *ibid.*

⁶³ See Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006); Larry Backer, ‘Multinational Corporations as Objects and Sources of Transnational Regulation’ (2008) 14 *ILSA Journal of International and Comparative Law* 499; Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar 2011).

⁶⁴ Steven Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443, 461.

This section discusses the responsibility of MNEs under public international law. It first provides an overview of the international legal personality of non-State actors. It then explores whether MNEs have obligations under international human rights and environmental law. Finally, it covers the treatment of the corporate responsibility to respect human rights under the UNGPs.

3.1 The international legal personality of non-State actors

According to Jägers, under international law, ‘entities only owe responsibilities to the international community when they are considered to be subjects of law, in other words, the bearers of international legal personality.’⁶⁵ As such, the question of whether individual persons equate to ‘subjects of international law’ is an important one.

According to a basic definition, a subject of international law is an entity capable of possessing international rights and duties.⁶⁶ A more elaborate definition would describe a subject of international law as ‘an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claims.’⁶⁷ One peculiarity of international legal personality is that ‘[it] not only denotes the quality of having rights and duties as well as certain capacities under the law, but [...] it also includes the *competence to create the law*.’⁶⁸ However, the existing literature disagrees on the various aspects of international legal personality, such as the modalities to acquire it or the precise consequences attached to it.⁶⁹

⁶⁵ Nicola Jägers, ‘The Legal Status of the Multinational Corporation under International Law’ in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 261.

⁶⁶ Christian Walter notes that ‘[t]he terms international legal personality and international legal capacity describe the same characteristic, namely the fact that an entity is capable of possessing international rights and/or duties.’ See Christian Walter, ‘Subjects of International Law’, *MPEPIL* (2007), para 21 <<http://opil.ouplaw.com/>> accessed 30 November 2015.

⁶⁷ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 115.

⁶⁸ Roland Portmann, *Legal Personality in International Law* (CUP 2010) 8 (emphasis in the text).

⁶⁹ Jägers (n 65) 262; *ibid* 7-12.

Traditionally, States are considered to be the main subjects of international law.⁷⁰ However, international courts have progressively accepted that other actors could be subjects of international law and, therefore, have international rights and obligations. In 1949, the International Court of Justice (ICJ) accepted that the UN had the capacity to bring an international claim, thus recognizing that actors other than States could possess international legal personality.⁷¹ Nonetheless, the ICJ was cautious to specify that ‘the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.’⁷² Following World War II, the Nuremberg International Military Tribunal also accepted that ‘international law imposes duties and liabilities upon individuals as upon States.’⁷³ The subsequent development of international criminal law and international human rights law has led to the acceptance that ‘the individual today has acquired a legally relevant position in international law. It has internationally been granted rights and is made subject to obligations.’⁷⁴ Furthermore, international humanitarian law places duties on rebel groups to respect certain human rights of persons under their control.⁷⁵

Since the period after 1945, scholars and lawyers have debated the question whether MNEs may be subjects of international law.⁷⁶ Under the State-centric paradigm of public international law, MNEs are not considered to be subjects of international law. As such, they have no rights or obligations, or some limited ones. It is admitted that each member of an MNE has legal personality only under the jurisdiction of the country in which it has its

⁷⁰ Walter (n 66) para 2.

⁷¹ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 [184]-[185].

⁷² *ibid* [178].

⁷³ Judgement of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172, 220.

⁷⁴ Walter (n 66) para 18.

⁷⁵ Ratner (n 64) 466.

⁷⁶ Walter (n 66) para 19. On the subject, see Arghyrios Fatouros, ‘Problèmes et Méthodes d’une Réglementation des Entreprises Multinationales’ (1974) 101 *Journal du Droit International* 495; Theo Vogelaar, ‘Asser Institute Lectures on International Law: Multinational Corporations and International Law’ (1980) 27 *Netherlands International Law Review* 69; Dimitra Kokkini-Iatridou and Paul JIM de Waart, ‘Foreign Investment in Developing Countries: Legal Personality of Multinationals in International Law’ (1983) 14 *Netherlands Yearbook of International Law* 87.

statutory seat.⁷⁷ However, the intensification of MNE activities, as a result of the liberalization of international trade and the multiplication of foreign direct investments, has shaped new legal interactions at the international level. For example, under foreign investment law, MNEs have been granted significant rights in international investment agreements in order to protect foreign investments against interference by the host State.⁷⁸ Furthermore, international arbitration tribunals and scholars have occasionally accepted that MNEs could be subjects of international law when they entered into investment agreements with States.⁷⁹ This is the case when such agreements contain specific arbitration clauses to avoid litigation before the domestic courts of the contracting State in order to create a situation of equality between the contracting parties.⁸⁰ Such a view may lead to a ‘partial’ or ‘qualified’ international legal personality of MNEs.⁸¹ At the same time, scholars have argued that such contractual clauses do not change the nature of the contractual relationship or the legal capacity of the contracting parties.⁸²

Ultimately, the intensification of MNE activities and the transnational nature of such business activities challenge the idea that MNEs cannot have rights and obligations under public international law. Furthermore, the State-centric paradigm of public international law appears inadequate, or limited, to regulate MNEs’ activities or deal with the intricate interactions between MNEs, States, and human rights and the environment.⁸³

Scholars, lawyers, and CSOs have criticized the classical approach of public international law regarding MNEs. They have suggested that MNEs benefit from their international non-

⁷⁷ Vogelaar (n 76) 76.

⁷⁸ Luzius Wildhaber, ‘Asser Institute Lectures on International Law: Some Aspects of the Transnational Corporation in International Law’ (1980) 27 *Netherlands International Law Review* 79, 84; David Kinley and Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931, 946; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 577.

⁷⁹ Irmgard Marboe and August Reinisch, ‘Contracts between States and Foreign Private Law Persons’, *MPEPIL* (2011), para 14 <<http://opil.ouplaw.com/>> accessed 30 November 2015; Peter Muchlinski, ‘Corporations in International Law’, *MPEPIL* (2014), para 7 <<http://opil.ouplaw.com/>> accessed 30 November 2015.

⁸⁰ Marboe and Reinisch (n 79) para 13.

⁸¹ Walter (n 66) para 20; Muchlinski, ‘Corporations in International Law’ (n 79) para 7.

⁸² Marboe and Reinisch (n 79) para 15.

⁸³ Kinley and Tadaki (n 78) 945; Gatto (n 63) 9.

status which ‘immunizes them from direct accountability to international legal norms and permits them to use sympathetic national governments to parry outside efforts to mould their behaviour.’⁸⁴ They have also formulated new theories on the rights and obligations of MNEs under international human rights and environmental law.⁸⁵ Such theories aim to provide solutions to hold corporate groups accountable for their negative impacts on human rights and the environment.

3.2 International environmental law

While MNEs contribute considerably to worldwide stress on the environment, their transnational nature poses a considerable challenge to global environmental governance.⁸⁶ International environmental law is said to focus on the ‘transboundary *effects* on health and the environment, and transboundary *fluxes* of harmful substances.’⁸⁷ However, it appears unable to apprehend and govern harm arising from MNE transnational activities.⁸⁸ Furthermore, it fails to acknowledge MNEs’ abuse of their ‘transboundary subjectivity and structure’ to escape environmental liability.⁸⁹ As a result, international environmental law offers little assistance to solve environmental challenges created by MNEs’ activities.

Generally, multilateral environmental agreements (MEAs) lack a comprehensive approach to the regulation of corporate actors.⁹⁰ They mainly create State obligations and, as a result, do not directly bind companies. Provisions imposing obligations on corporate actors are

⁸⁴ Jonathan Charney, ‘Transnational Corporations and Developing Public International Law’ [1983] *Duke Law Journal* 748, 767.

⁸⁵ *ibid* 753; Kinley and Tadaki (n 78) 1021; Olivier de Schutter, ‘The Challenge of Imposing Human Rights Norms on Corporate Actors’ in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006) 33. Kinley and Tadaki suggest that ‘there is an urgent need to reassess the traditional concepts and structures of international human rights law, so that the focus is on the *effective protection* of human rights, rather than on the entities from which human rights have to be protected’ (emphasis in the text).

⁸⁶ André Nollkaemper, ‘Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives’ in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (CUP 2006) 180.

⁸⁷ Jonas Ebbesson, ‘Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework’ in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (CUP 2006) 201 (emphasis in text).

⁸⁸ Seck (n 23) 173-174.

⁸⁹ Ebbesson (n 87) 201.

⁹⁰ *ibid* 202. See also Elisa Morgera, *Corporate Accountability in International Environmental Law* (OUP 2009).

usually indirect, as their implementation rests primarily on States and national courts at the domestic level.⁹¹ Furthermore, other constraints, such as the restricted territorial or substantive scope of MEAs, the lack of ratification by some States, or the failure of many MEAs to enter into force, limit the ability of these agreements to impose obligations on corporate actors.⁹²

Nevertheless, MEAs have the potential to influence corporate environmental behaviour on various grounds.⁹³ First, a number of MEAs create a regime of civil liability in which corporate actors, where they qualify as operators in the context of specified activities, may be held liable for environmental pollution.⁹⁴ This is the case for a number of harmful activities, such as dumping of waste at sea, transboundary shipment in hazardous wastes, oil pollution at sea, hunting and trading in endangered species, and use of various hazardous and ozone-depleting substances.⁹⁵ Second, some MEAs require the adoption of criminal penalties to regulate certain business conduct,⁹⁶ such as the Convention on the Protection of the Environment through Criminal Law of the CoE.⁹⁷ Other MEAs explicitly create other types of State obligations regarding corporate actors. For example, Article 10(e) Convention on Biological Diversity⁹⁸ requires each State to ‘encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.’ Third, some MEAs contain provisions that may directly and indirectly affect free trade rules, or conflict with the measures contained in the agreements concluded

⁹¹ Muchlinski, ‘Corporations in International Law’ (n 79) para 42. Some authors argue that, as a result, MNEs have ‘indirect responsibility under national law and direct responsibility under international law.’ See Nollkaemper (n 86) 188; Stavros-Evdokimos Pantazopoulos, ‘Towards a Coherent Framework of Transnational Corporations’ Responsibility in International Environmental Law’ (2014) 24 Yearbook of International Environmental Law 131, 147-148.

⁹² Pantazopoulos (n 91) 164.

⁹³ Linda Siegele and Halina Ward, ‘Corporate Social Responsibility: A Step Towards Stronger Involvement of Business in MEA Implementation?’ (2007) 16 RECIEL 135, 136.

⁹⁴ Nollkaemper (n 86) 188; Pantazopoulos (n 91) 144-148.

⁹⁵ Ebbesson (n 87) 207.

⁹⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 330.

⁹⁷ Convention on the Protection of the Environment through Criminal Law (adopted 4 November 1998) CETS No 172.

⁹⁸ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

under the World Trade Organization.⁹⁹ Fourth, international environmental law has seen the development of general concepts and principles (eg the precautionary and the polluter pays principles, environmental impact assessment, transparency, etc.), and policies, which are directly relevant to the regulation of corporate actors.¹⁰⁰ Ultimately, however, MEAs offer only a fragmented and indirect response to the regulation of corporations and their impact on the environment.

In parallel, self-regulation of corporate actors through soft-law instruments has gained in importance in international environmental law over the last decades. Some scholars argue that such regulatory approach has contributed to the emergence of a number of standards on corporate conduct which are now rooted in international environmental law. The soft-law nature of these instruments and the participation of companies in these processes have generally facilitated the development of such standards.¹⁰¹ Although these standards are non binding, they constitute criteria against which business activities may be measured with respect to environmental protection.¹⁰² In addition, the participation of corporate actors in international environmental standard-setting processes may increase the chances that companies will follow environmentally sound behaviour.¹⁰³ Some authors argue that these environmental standards are now converging to a considerable extent and may be directly applicable to MNEs.¹⁰⁴ Furthermore, when developed in the context of international initiatives, the respect of these standards by corporate actors may be monitored by international mechanisms, which ‘contribute to the establishment of a coherent corporate responsibility framework.’¹⁰⁵ For some authors, international environmental law has found innovative and pragmatic normative ways to address the challenges arising from corporate actors environmental behaviour.¹⁰⁶ At the same time, some scholars and CSOs have

⁹⁹ Siegele and Ward (n 93) 141.

¹⁰⁰ Ebbesson (n 87) 208.

¹⁰¹ Pantazopoulos (n 91) 148.

¹⁰² *ibid* 160.

¹⁰³ *ibid* 155.

¹⁰⁴ Morgera (n 90) 172; Jorge Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012) 60; Pantazopoulos (n 91) 148.

¹⁰⁵ Pantazopoulos (n 91) 161.

¹⁰⁶ *ibid* 165.

challenged the idea that self-regulation through soft-law instruments is an effective way to prevent the occurrence of environmental damage by companies.¹⁰⁷

3.3 International human rights law

There is no international regime of binding norms governing the interactions between MNEs and human rights.¹⁰⁸ Some authors have talked of the ‘invisibility’ of MNEs’ accountability under international human rights law.¹⁰⁹ This situation may be explained by the influence of the abovementioned State-centric paradigm of public international law on the development of international human rights law. Since MNEs are not usually recognized as traditional subjects of international law, they cannot be direct bearers of legal obligations under international human rights law.¹¹⁰ Furthermore, human rights were originally devised to protect individuals against the arbitrary exercise of power by the authorities of the territorial State.¹¹¹

Scholars, lawyers, and CSOs have progressively challenged this status quo and have developed various theories on the obligations of MNEs under international human rights law. These theories share the idea that MNEs have acquired an ‘enormous power’ which interferes with the enjoyment of human rights.¹¹² However, States have been unable or unwilling to regulate such power while MNEs have used the ‘innocent bystander rhetoric’ to avoid accountability with regard to human rights abuse.¹¹³ Therefore, to avoid a situation of impunity, MNEs increase in power should be accompanied by an increase in

¹⁰⁷ Jędrzej Frynas, ‘Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention’ (2012) 17 *Ecology and Society* 4.

¹⁰⁸ Kinley and Tadaki (n 78) 935.

¹⁰⁹ *ibid* 937.

¹¹⁰ See Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 9; Zerk, *Multinationals and CSR* (n 63) 104; Peter Muchlinski, ‘Multinational Enterprises as Actors in International Law: Creating “Soft law” Obligations and “Hard Law” Rights’ in Math Noortmann and Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010) 11.

¹¹¹ Kinley and Tadaki (n 78) 937.

¹¹² Andrew Clapham, *Human Rights in the Private Sphere* (OUP 1996) 137; Ratner (n 64) 462-465.

¹¹³ See Jena Martin Amerson, ‘What’s in a Name? Transnational Corporations as Bystanders under International Law’ 85 (2011) *St John’s Law Review* 1.

accountability under international human rights law.¹¹⁴ Scholars have suggested that it is not necessary for MNEs to possess full international legal personality, such as the one possessed by States, to be imposed human rights obligations.¹¹⁵ The reason is that transplanting notions of State responsibility to businesses would prove too difficult.¹¹⁶ Instead, they propose that MNEs have ‘limited rights and responsibilities, such as the right to sue and be sued, the ability to assert a right, and the acceptance of legal responsibility in judicial forums, but not have the status as a party to intergovernmental forums or international instruments.’¹¹⁷ This solution, they say, would constitute ‘a sound base upon which to build a regime of direct human rights responsibilities at international law, but it would also preserve the primacy of States on the international plane.’¹¹⁸

Even where there is agreement that MNEs can have duties under international human rights law, opinions diverge on the scope of obligations MNEs should possess. In particular, authors have various views on the normative nature (ie binding/non-binding), the type (ie respect, protect, fulfil), and the range (ie all human rights or a limited number) of human rights obligations of MNEs.

First, there is a disagreement on the normative nature of MNEs’ human rights obligations. While some authors plead for the adoption of human rights norms legally binding on MNEs, others argue that voluntary norms are more politically and technically feasible.¹¹⁹ To date, most international human rights norms directly applicable to MNEs have been formulated in soft-law instruments. As a result, soft-law instruments have a normative impact on MNEs by calling them to respect certain conduct vis-à-vis human rights.¹²⁰ However, because these norms are generally unenforceable, they are, in practice, effectively limited.¹²¹ At the same

¹¹⁴ Weissbrodt and Kruger (n 4) 901-922; Kinley and Tadaki (n 78) 933.

¹¹⁵ Kinley and Tadaki (n 78) 945.

¹¹⁶ Ratner (n 64) 496-523.

¹¹⁷ Kinley and Tadaki (n 78) 946.

¹¹⁸ *ibid.*

¹¹⁹ The latter position was adopted during the negotiations of the OECD Guidelines and by the SRSG. See also Vogelhaar (n 76) 76.

¹²⁰ Kinley and Tadaki (n 78) 958.

¹²¹ At the same time, some authors have suggested that soft-law norms may produce some legal effects. See Halina Ward, ‘Legal Issues in Corporate Citizenship’ (IIED 2003) 5.

time, some authors postulate that the international legal framework on human rights already provides the basis for ‘drawing out strong legally binding obligations for corporations.’¹²² For instance, the Universal Declaration of Human Rights (UDHR)¹²³ has often been quoted as ‘a potential legal source of corporate human rights responsibilities.’¹²⁴

Second, the debate focuses on the extent of MNEs’ responsibility under international human rights law, as well as the type of human rights obligations that MNEs should bear (ie obligations to respect, protect, and fulfil). This question demonstrates at least the perception of competition between imposing obligations on either State or non-State actors under international human rights law. In general, experts agree that MNE responsibility should not exclude State responsibility. Furthermore, it is frequently held that MNEs should not simply have the same human rights obligations as States because such an approach would amount ‘to ignore the differences between the nature and functions of States and corporations.’¹²⁵ Corporate obligations under international human rights law should therefore be modelled in the light of the characteristics of corporate activity.¹²⁶ However, there is a disagreement as to the types of human rights obligation that MNEs should bear. While some authors argue that MNEs should only have an obligation to respect human rights,¹²⁷ others suggest that corporate groups should have, in certain circumstances, an obligation to protect, even to fulfil, human rights.¹²⁸ For example, a company should ensure that its business partners do not abuse human rights in their own activities. Previous normative efforts to impose human rights obligations upon MNEs considered the possibility that MNEs may bear other types of obligations. For instance, the UN Norms provided that, within their respective spheres of activity and influence, MNEs had the obligation ‘to promote, secure the fulfilment of,

¹²² David Bilchitz, ‘A Chasm between ‘Is’ and ‘Ought’? A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles’ in Surya Deva and David Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 136.

¹²³ UDHR (adopted 10 December 1948) UNGA Res 217 A(III).

¹²⁴ Kinley and Tadaki (n 78) 948.

¹²⁵ *ibid* 961. See also Daniel Aguirre, ‘Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation’ (2011) 42 California Western International Law Journal 123.

¹²⁶ Ratner (n 64) 496-523.

¹²⁷ The SRSG adopted this view in the UNGPs.

¹²⁸ Kinley and Tadaki (n 78) 962-966; David Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’ (2010) 12 SUR – International Journal on Human Rights 199, 207.

respect, ensure respect of and protect human rights recognized in international as well as national law.¹²⁹ However, the SRSJ rejected this view, partly because of the difficulties associated with the concepts of spheres of activity and influence.¹³⁰

Third, there are various views on the question whether the entire body of human rights law should apply directly to MNEs, and corporations more generally. One approach accepts that MNEs should have specific international obligations only with regard to gross human rights abuses, such as the crime of genocide or crimes against humanity.¹³¹ In theory, international criminal law seems to admit that MNEs must refrain from participating in the commission of genocide.¹³² Other authors differentiate between human rights that corporations can directly infringe upon, and human rights that only States can directly violate. Ratner argues that the duties of the corporation with regard to the latter can only be complicity-based, and that links between the corporation and the State are a necessary factor for the derivation of corporate duties.¹³³

UN treaty bodies have expressed various views regarding the question whether private actors have obligations under international human rights law. The UNCCPR clearly stated that, under Article 2(1) ICCPR, obligations are binding only on States Parties and do not have direct horizontal effect as a matter of international law.¹³⁴ Therefore, the ICCPR produces no direct effect for private third parties, and private actors, such as MNEs, do not have obligations under the ICCPR.¹³⁵ Furthermore, the question of MNEs' obligations

¹²⁹ UN Norms (n 3) para 1.

¹³⁰ Ruggie (n 4) 825-826.

¹³¹ This is the approach suggested by the OHCHR. See Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (Report prepared for the OHCHR, 2014).

¹³² Michael Kelly, 'Prosecuting Corporations for Genocide under International Law' (2012) 6 Harvard Law & Policy Review 339. Kelly suggests that international law does not prevent the prosecution of corporations for complicity in genocide *per se*. However, to date, corporate involvement in genocide has been dealt with through individual criminal liability for corporate officers or civil liability for the corporate entity.

¹³³ Ratner (n 64) 489-496.

¹³⁴ 'General Comment 31' (n 38) para 8.

¹³⁵ Christian Tomuschat, 'International Covenant on Civil and Political Rights (1966)', *MPEPIL* (2010), para 21 <<http://opil.ouplaw.com/>> accessed 30 November 2015.

regarding ICESCR rights has not been addressed systematically.¹³⁶ On several occasions, the UNCESCR has formulated the role of business actors in the realization of some ICESCR rights. For example, in its General Comment 12 on the right to adequate food, the UNCESCR stated that violations of the right to food could occur through the direct action of States or other entities insufficiently regulated by States.¹³⁷ In particular, while only States are parties to the ICESCR and are thus ultimately accountable for compliance with it, all members of society, including the private business sector, have responsibilities in the realization of the right to adequate food.¹³⁸ In particular, the private business sector, either national or transnational, ‘should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.’¹³⁹ Therefore, the UNCESCR formulated a non-binding responsibility of MNEs to respect the right to food.

In Europe,¹⁴⁰ the existing case-law of the ECtHR in relation to private companies is limited to cases where such actors invoke their own rights under the ECHR. An individual alleging a violation of his rights by a private company cannot raise his claim before the ECtHR, based on various reasons.¹⁴¹ First, applications may only be brought against contracting States.¹⁴² As a result, any application brought against a company is inadmissible, as being incompatible *ratione personae* with the ECHR’s provisions.¹⁴³ Second, the ECHR rights do not have any horizontal effect, since this instrument does not recognise the principle of direct third party effect.¹⁴⁴ Third, the ECtHR may consider applications only after all

¹³⁶ Maria McFarland Sánchez-Moreno and Tracy Higgins, ‘No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia’ (2004) 27 *Fordham International Law Journal* 1663, 1675.

¹³⁷ ‘General Comment 12’ (n 33) para 19.

¹³⁸ *ibid* para 20.

¹³⁹ *ibid*.

¹⁴⁰ For a discussion of corporations’ obligations under European human rights law, see Olivier de Schutter, ‘The Accountability of Multinationals for Human Rights Violations in European Law’ in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005).

¹⁴¹ CoE (Steering Committee for Human Rights), ‘Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights: Existing Standards and Outstanding Issues’ (4 June 2012) CDDH(2012)012, paras 25-29.

¹⁴² ECHR, Articles 33 and 34.

¹⁴³ ‘Draft Preliminary Study’ (n 141) paras 25-26.

¹⁴⁴ *ibid* para 26.

domestic remedies have been exhausted. Consequently, the applications brought to the ECtHR are against judgements of domestic courts, not corporations.¹⁴⁵ Fourth, it appears that judges of the ECtHR lack the awareness to creatively hold companies accountable for human rights abuse under the ECHR.¹⁴⁶ Consequently, private companies cannot be held responsible for human rights violations under the ECHR.

3.4 The corporate responsibility to respect under the UNGPs

The SRSG rejected the view that companies, where they have influence, should have the same range of responsibilities as States.¹⁴⁷ Companies are economic actors and, as such, their responsibilities ‘cannot and should not simply mirror the duties of States.’¹⁴⁸ Furthermore, the SRSG rejected that companies should have responsibilities for a limited list of human rights. Since businesses can have an impact on the entire spectrum of internationally recognized rights,¹⁴⁹ limiting the rights for which they may be responsible would have negative consequences in particular instances.¹⁵⁰ Businesses should, at least, respect internationally recognized human rights.¹⁵¹ As a result, the UN Framework and the UNGPs rest on ‘differentiated but complementary responsibilities’ in relation to all human rights.¹⁵²

Both instruments recognize the corporate responsibility to respect human rights independently of States’ duties.¹⁵³ Business enterprises should avoid infringing the human rights of others and should address adverse human rights impacts with which they are

¹⁴⁵ *ibid.*

¹⁴⁶ See Stéphanie Khoury, ‘Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to Accountability’ (2010) 4 *Sortuz Oñati Journal of Emergent Socio-Legal Studies* 68.

¹⁴⁷ UN Framework (n 6) para 6.

¹⁴⁸ *ibid* para 53.

¹⁴⁹ UNHRC, ‘Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse’ (23 May 2008) UN Doc A/HRC/8/5/Add.2, para 16.

¹⁵⁰ UN Framework (n 6) para 6.

¹⁵¹ UNGPs (n 7) Principle 12, Commentary. They are understood, at a minimum, as those expressed in the International Bill of Human Rights and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. However, businesses may need to consider additional standards, including the UN instruments protecting the human rights of specific groups or individuals.

¹⁵² UN Framework (n 6) para 9.

¹⁵³ *ibid* para 55; UNGPs (n 7) Principle 11.

involved.¹⁵⁴ The term ‘responsibility’ was preferred to ‘duty’ to indicate that respecting human rights is not currently an obligation that international human rights law generally imposes directly on companies. Instead, the corporate responsibility to respect human rights is ‘a global standard of expected conduct for all business enterprises wherever they operate,’ and ‘exists over and above compliance with national laws and regulations protecting human rights.’¹⁵⁵ Companies should respect human rights ‘because it is the basic expectation society has of business.’¹⁵⁶ Ultimately, the UN Framework and the UNGPs define corporate responsibility on the basis of social expectations (the social licence of companies to operate) and not legal standards.¹⁵⁷

Importantly, in order to meet their responsibility to respect human rights, business enterprises should have in place a process called ‘human rights due diligence’ to identify, prevent, mitigate, and account for how they address their impacts on human rights.¹⁵⁸ Human rights due diligence ‘should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.’¹⁵⁹ Therefore, human rights due diligence refers to the steps a company must take to become aware of, prevent, and address adverse human rights impacts.¹⁶⁰ The SRSG noted that, to discharge its responsibility to respect, a company should carry out due diligence.¹⁶¹ However, the nature of human rights due diligence, whether it is a principle or a process, is unclear.¹⁶²

¹⁵⁴ UNGPs (n 7) Principle 11

¹⁵⁵ *ibid.*

¹⁵⁶ UN Framework (n 6) para 9.

¹⁵⁷ Nicola Jägers, ‘Will Transnational Private Regulation Close the Governance Gap?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 298. For a discussion of the social licence to operate under the UNGPs, see Sally Wheeler, ‘Global Production, CSR and Human Rights: the Court of Public Opinion and the Social Licence to Operate’ (2015) 19 *International Journal of Human Rights* 757.

¹⁵⁸ UNGPs (n 7) Principle 15.

¹⁵⁹ *ibid* Principle 17

¹⁶⁰ *ibid.*

¹⁶¹ UN Framework (n 6) para 56.

¹⁶² For a discussion of the human rights due diligence, see Olga Martin-Ortega, ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’ (2014) 32 *Netherlands Quarterly of Human Rights Law* 44.

If the UN Framework and the UNGPs have been acknowledged as representing an important step, they have not closed the long-running debate about corporations and the demands for international legal obligations and corporate accountability.¹⁶³ In particular, scholars and CSOs have criticized the voluntary nature of the corporate responsibility to respect human rights.¹⁶⁴ Both instruments excessively emphasize the role of the State as the sole duty-bearer of human rights obligations while avoiding to establish clear international standards and/or obligations applicable to companies. As a result, the ‘rather minimalist take’ on corporate responsibility leads to missed opportunities and weaknesses, especially since companies have already been legally obliged not to perpetrate, aid, or abet international crimes.¹⁶⁵ Scholars have also pointed out that ‘it is difficult to see how, without the complement of international legal obligations, this privatised voluntary process will be significantly more effective than other voluntary self-regulation regimes in regulating and enforcing the compliance of corporations with human rights norms.’¹⁶⁶ Furthermore, they have criticized the scope of the corporate responsibility to respect, arguing that ‘corporate obligations should not only involve “negative” obligations to avoid harm but also include a “duty to fulfil”: obligations to contribute actively to the realisation of fundamental rights.’¹⁶⁷ Scholars have also pointed out that the SRSR failed to acknowledge that corporations may have an obligation to realize human rights based on their social function.¹⁶⁸ At the same time, the SRSR’s views of the ambit of the corporate responsibility to respect, especially the human rights due diligence process, is sometimes ambiguous. At times, the SRSR seems to imply that corporations may have a positive duty to protect human rights against abuse by third parties, which is similar to the State obligation to protect under international human

¹⁶³ Carlos López, ‘The “Ruggie Process”: From Legal Obligations to Corporate Social Responsibility’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 77.

¹⁶⁴ See ‘Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives’ (Misereor and Global Policy Forum Europe 2008) 13; Penelope Simons, ‘International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights’ (2012) 3 *Journal of Human Rights and the Environment* 5; John Knox, ‘The Ruggie Rules: Applying Human Rights Law to Corporations’ in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012).

¹⁶⁵ Nicola Jägers, ‘UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability’ (2011) 29 *Netherlands Quarterly of Human Rights* 159, 160.

¹⁶⁶ Simons (n 164) 38.

¹⁶⁷ Bilchitz, ‘The Ruggie Framework’ (n 128) 200.

¹⁶⁸ *ibid* 208-211.

rights law.¹⁶⁹ Commentators have also criticized the practical approach to corporate human rights due diligence.¹⁷⁰ For instance, the absence of any template or indicative methodology for the production of accurate human rights due diligence makes it difficult for outsiders to evaluate a company's respect of human rights, or for companies to learn and share best practice with each other.¹⁷¹

At the same time, other authors have argued that the corporate responsibility to respect is an important improvement in comparison with what previously existed. Despite its soft-law nature, it may nonetheless produce 'real legal consequences.'¹⁷² To date, the corporate responsibility to respect has been welcomed by various actors with competing interests and, on the long term, it may be universally accepted as an international standard.¹⁷³ Moreover, human rights due diligence may create a direct duty of care upon businesses either where they have voluntarily accepted to carry it out,¹⁷⁴ or where States have enacted statutes governing the human rights due diligence of companies. Furthermore, when properly conducted, human rights due diligence can help companies demonstrate that they took every reasonable step to avoid involvement in a human rights violation and provide protection against mismanagement claims by shareholders.¹⁷⁵ The implementation of human rights due diligence also encourages companies to depart from an exclusive shareholder-based corporate governance model towards a more stakeholder-based model, which takes into account the interests of victims of business-related human rights abuse in the decision-making processes of companies.¹⁷⁶

¹⁶⁹ *ibid* 206.

¹⁷⁰ For a discussion of the efficacy of the human rights due diligence process, see James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31 *Impact Assessment and Project Appraisal* 107.

¹⁷¹ Wheeler (n 157) 768.

¹⁷² Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145, 146.

¹⁷³ Simons (n 164) 38.

¹⁷⁴ Muchlinski, 'Implementing the New UN Corporate Human Rights Framework' (n 172) 146.

¹⁷⁵ *ibid* 149.

¹⁷⁶ *ibid* 165-167.

4 Effective access to justice under international law

Effective access to justice is an essential component of the system of protection and enforcement of various international regimes. For instance, when a human right is violated, access to justice is of fundamental importance for the injured individual. In particular, the respect and the protection of human rights can be guaranteed only by the availability of effective judicial remedies under both international and national law.¹⁷⁷ Similarly, in order for international and national regimes of environmental law to be effectively protective, victims of environmental damage and NGOs must be able to bring a claim before a court and have access to various remedies, such as damages and restoration.

This section explores the treatment of access to justice under international law. In particular, it focuses on how international law guarantees the effective implementation of specific aspects of access to justice relevant to transnational litigation against MNEs, such as access to courts, availability of remedies, and protection of victims' procedural rights. This section places emphasis on the international and European frameworks governing human rights and the environment. It ends with an overview of the third pillar of the UNGPs on effective access to remedy.

4.1 Access to justice under international human rights law

International and regional treaties do not protect a general right to access to justice *per se*. Nonetheless, they may protect certain guarantees and rights related to access to justice, such as access to courts, availability of remedies, and various procedural guarantees during the legal proceedings.¹⁷⁸ In general, international and regional human rights instruments recognize the right to a fair trial in proceedings relating to criminal charges and to civil rights and obligations.¹⁷⁹ For instance, Article 14 ICCPR enumerates a number of guarantees to ensure the fairness of criminal trials and the effective protection of persons charged with a criminal offence, such as the right to be presumed innocent until proved guilty according

¹⁷⁷ Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 1.

¹⁷⁸ There are various interpretations of the concept of access to justice. For an overview of these interpretations, see Chapter 1.

¹⁷⁹ For example, UDHR, Articles 10 and 11; ICCPR, Articles 14 and 15.

to law. Article 7 African Charter on Human and Peoples' Rights (Banjul Charter)¹⁸⁰ goes further by rendering the right to a fair trial applicable to all proceedings.¹⁸¹

If the number of protected guarantees and rights and their treatment may vary from one instrument to another, some guarantees and rights may be commonly found amongst international instruments. For example, the independence and impartiality of the judiciary is an absolute guarantee and a crucial component of the right to a fair trial.¹⁸² The right to equality before courts and tribunals is also a key element of human rights protection and serves as a procedural means to safeguard the rule of law.¹⁸³ It usually imposes a positive obligation on States to provide equal access to courts and procedural rights in their legal systems.¹⁸⁴ An important feature of the right to equality before courts and tribunals, which is relevant in the context of transnational litigation against MNEs, is the principle of equality of arms. This principle means that the same procedural rights are to be provided to all the parties, unless distinctions are based on law and can be justified on objective and reasonable grounds.¹⁸⁵ A number of international and regional human rights instruments also protect the right to an effective remedy by a competent national court or authority for acts violating the human rights they enshrine.¹⁸⁶ They usually impose on States a positive obligation to provide access to courts, and foresee the availability of remedies. Ultimately, States have the main responsibility to ensure the respect, protection, and fulfilment of rights related to access to justice.

4.2 Access to justice in Europe

In Europe, various regional bodies have adopted legal standards and case-law to ensure effective access to justice in situations of human rights abuse and environmental pollution. The EU, the CoE, and the UNECE are the most relevant organizations in this regard.

¹⁸⁰ Banjul Charter (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

¹⁸¹ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 346.

¹⁸² *ibid* 347.

¹⁸³ UNCCPR, 'General Comment 32' (23 August 2007) UN Doc CCPR/C/GC/32, para 2.

¹⁸⁴ Bantekas and Oette (n 181) 348.

¹⁸⁵ 'General Comment 32' (n 183) para 13.

¹⁸⁶ UDHR, Article 8; ICCPR, Article 2(3); ECHR, Article 13.

4.2.1 European Union

Despite the lack of clarity of the access to justice concept in EU law,¹⁸⁷ some observers have pointed out the European ‘constitutionalisation’¹⁸⁸ of access to justice over the past years. In particular, recent changes in EU primary law have strengthened the role and the powers of the EU institutions to legislate in civil and criminal justice.¹⁸⁹ Article 61(4) Treaty of Lisbon imposes a general requirement on the EU to facilitate access to justice.¹⁹⁰ In particular, the EU must adopt measures to ensure effective access to civil justice¹⁹¹ and it may establish minimum rules to guarantee the rights of victims of crime.¹⁹² The EU has already used its new powers to improve specific rights related to access to justice. For instance, it recently enacted Directive 2012/29/EU (Directive on the rights of victims of crimes),¹⁹³ which establishes minimum standards on the rights, support, and protection of victims of crime. This instrument aims ‘to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.’¹⁹⁴ As will be demonstrated later in this thesis, the Directive on the rights of victims of crimes is directly relevant to transnational criminal litigation against MNEs.

Furthermore, the Treaty of Lisbon gave the Charter of Fundamental Rights of the EU (EU Charter)¹⁹⁵ the same legal binding force as EU treaties.¹⁹⁶ Therefore, the EU Charter ‘is not a text setting out abstract values, it is an instrument to enable people to enjoy the rights

¹⁸⁷ Elvira Méndez Pinedo, ‘Access to Justice as Hope in the Dark: In Search for A New Concept in European Law’ (2011) 1 *International Journal of Humanities and Social Sciences* 9, 9.

¹⁸⁸ For a discussion of ‘constitutionalisation,’ see Martin Loughlin, “What Is Constitutionalisation?” in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010).

¹⁸⁹ Pinedo (n 187) 18.

¹⁹⁰ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1.

¹⁹¹ *ibid* Article 65(2)(e).

¹⁹² *ibid* Article 69A(2)(c).

¹⁹³ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

¹⁹⁴ *ibid* Article 1(1).

¹⁹⁵ EU Charter [2012] OJ C326/392.

¹⁹⁶ For a discussion of the new status of the EU Charter, see Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375.

enshrined within it when they are in a situation governed by Union law.¹⁹⁷ However, much uncertainty remains regarding the direct horizontal effect of the EU Charter or its exact scope of applicability in EU Member States.¹⁹⁸ Article 47 EU Charter provides for the right to an effective remedy and to a fair trial, echoing Articles 6 and 13 ECHR.¹⁹⁹ Article 47 foresees that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. In addition, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Article 47 also provides for the right to legal advice and representation, and for legal aid when it is necessary to ensure effective access to justice.

Given the new status of the EU Charter, the rights protected under Article 47 have become primary law that the EU and the Member States must respect when implementing EU law. Therefore, Article 47 could play a decisive role in improving the effectiveness of rights granted under European private law.²⁰⁰ In this regard, the Court of Justice of the EU (CJEU) may play an increasing role in protecting the rights and guarantees enshrined in Article 47 and, therefore, in promoting effective access to justice in the EU.²⁰¹ The CJEU has already guaranteed effective judicial protection and access to legal aid on the grounds of Article 47.²⁰² However, restricted access to the CJEU by victims of rights abuse limits its role in protecting effective access to justice in the EU.

¹⁹⁷ Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final, 3.

¹⁹⁸ *ibid.* The EU Charter applies not only to EU institutions and bodies but also to Member States when they are implementing EU law. However, it does not apply to Member States in situations where there is no link to EU law.

¹⁹⁹ Nonetheless, the scope of application of Article 47 is broader. See Chantal Mak, 'Rights and Remedies – Article 47 EU CFR and Effective Judicial Protection in European Private Law Matters' (2012) Amsterdam Law School Research No 2012-88, 4 <<http://ssrn.com/abstract=2126551>> accessed 30 November 2015.

²⁰⁰ *ibid.* For a discussion of the effects of the EU Charter on the domestic plane, see Richard Layton and Cian Murphy, 'The Emergence of the EU Charter of Fundamental Rights in United Kingdom Law' [2014] *European Human Rights Law Review* 469.

²⁰¹ Derrick Wyatt and others, *European Union Law* (5th edn, Hart Publishing 2006) 310. Article 47 is one of the EU Charter's provisions which have generated the most considerable amount of litigation in the CJEU. See Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on ECJ's Approach to Fundamental Rights' (2012) 49 *Common Market Law Review* 1565, 1572.

²⁰² Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849. See also Sánchez (n 201) 1579.

4.2.2 Council of Europe

Article 6 ECHR protects the right to a fair trial in civil and criminal proceedings. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6 also provides for a number of guarantees in the context of criminal proceedings. Furthermore, Article 13 ECHR protects the right to an effective remedy. Everyone whose rights guaranteed in the ECHR are violated must have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. In general, States Parties have a positive obligation to secure to everyone within their jurisdiction both rights.²⁰³

The ECtHR has developed a progressive case-law in relation to Articles 6 and 13 ECHR, which has had a positive impact on access to justice in contracting States.²⁰⁴ However, to date, the ECtHR has been of little help to plaintiffs in the context of transnational litigation against MNEs. In several cases, after exhaustion of domestic remedies, plaintiffs brought an application to the ECtHR on the grounds that States had violated their right to a fair trial under Article 6. However, the ECtHR rejected all applications without providing any justification.²⁰⁵ This lack of transparency contradicts the objectives and the nature of the ECHR. Furthermore, litigators have suggested that the ECtHR is missing the chance to clarify how Article 6 can play a role in securing access to justice in Europe to foreign victims of corporate abuse.²⁰⁶

4.2.3 United Nations Economic Commission for Europe

Access to justice has gained momentum in the field of international environmental law. The most obvious example is the Aarhus Convention,²⁰⁷ which is a ‘reflection of the procedural

²⁰³ ECHR, Article 1.

²⁰⁴ For instance, *Steel and Morris v UK* (2005) 41 EHRR 22.

²⁰⁵ In a case against Nestlé, a food MNE, in Switzerland, the plaintiffs brought an application to the ECtHR which was rejected in 2015. Similarly, in a case against Total, an energy MNE, in Belgium, the plaintiffs brought an application to the ECtHR which was also rejected.

²⁰⁶ ‘Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries. The KiK, Lahmeyer, Danzer and Nestlé Cases’ (ECCHR 2015) 4.

²⁰⁷ Aarhus Convention (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

dimension to the intersection between environmental and human rights.²⁰⁸ Article 9 Aarhus Convention contains various provisions governing access to justice in environmental matters.²⁰⁹ In particular, Article 9(3) explicitly recognizes access to justice in horizontal relationships by providing that each State Party ‘shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.’ Such procedures must provide adequate and effective remedies, including injunctive relief, and must be fair, equitable, timely, and not prohibitively expensive.²¹⁰ Furthermore, States must ensure that information is provided to the public on access to administrative and judicial review procedures and they must consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.²¹¹

The Aarhus Convention is widely ratified in Europe (including by France and the Netherlands) and has helped shape national environmental law and practice in European countries.²¹² However, litigators have not used it in the context of transnational environmental litigation against MNEs. It remains to be seen how the Aarhus Convention can be a helpful instrument to improve access to justice in European countries by victims of corporate abuse in the future.

4.3 Effective access to judicial remedy under the UNGPs

The UN Framework acknowledges that victims of corporate abuse have sought remedy outside the State where the harm occurred, particularly through home State courts, but have

²⁰⁸ Catherine Redgwell, ‘Access to Environmental Justice’ in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 156.

²⁰⁹ Under the Aarhus Convention, ‘access to justice’ means that ‘members of the public have legal mechanisms that they can use to gain review of potential violations of the access-to-information and public participation provisions of the Convention as well as of domestic environmental law.’ ‘The Aarhus Convention: An Implementation Guide’ (2nd edn, UNECE 2014) 123.

²¹⁰ Aarhus Convention, Article 9(4).

²¹¹ *ibid* Article 9(5).

²¹² Birnie, Boyle and Redgwell (n 96) 294.

faced extensive obstacles (eg prohibitive costs, absence of legal aid, lack of legal standing for non-citizens, etc.). Matters are further complicated when they seek redress from a parent corporation for actions by a foreign subsidiary. As a result, these obstacles may deter claims and prevent victims from gaining access to remedy.²¹³ Therefore, the UN Framework formulates the need for effective access to remedies, through judicial and non-judicial grievance mechanisms.²¹⁴ Importantly, effective grievance mechanisms play an important role in the State duty to protect, as ‘State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses.’²¹⁵

The UNGPs also provide that, ‘[as] part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.’²¹⁶ Furthermore, ‘States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.’²¹⁷

Scholars and CSOs have been critical of the access to remedy pillar, holding that it is the weakest of the three pillars and that the SRSR has particularly neglected the formulation of access to judicial remedies.²¹⁸ The UN Framework and the UNGPs do not provide clear solutions to address obstacles to gain access to remedy.²¹⁹ Furthermore, they do not offer guidance to victims on the ways in which to gain access to courts in home States in the

²¹³ UN Framework (n 6) para 89.

²¹⁴ *ibid* paras 82-103.

²¹⁵ *ibid* para 82.

²¹⁶ UNGPs (n 7) Principle 25.

²¹⁷ *ibid* Principle 26.

²¹⁸ See ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (International Commission of Jurists June 2014) 9; Tebello Thabane, ‘Weak Extraterritorial Remedies: The Achilles Heel of Ruggie’s “Protect, Respect and Remedy” Framework and Guiding Principles’ (2014) 14 *African Human Rights Law Journal* 43.

²¹⁹ ‘Needs and Options’ (n 218) 10.

context of transnational litigation against MNEs.²²⁰ As a way to respond to the various criticisms regarding the content of the third pillar, the Office of the UN High Commissioner for Human Rights (OHCHR) received a mandate from the UNHRC to launch an initiative aiming to deliver guidance to States on the implementation of the UNGPs in the area of access to remedy.²²¹

5 Conclusions

Chapter 2 assessed how public international law has responded to three main issues arising in the context of transnational litigation against MNEs, namely the home State obligations to regulate the extraterritorial impacts of its MNEs and to provide foreign victims with access to judicial remedies; MNE international obligations towards human rights and the environment; and the international rights and procedural guarantees that victims of business-related abuse should enjoy when seeking to gain access to judicial remedies.

First, home States have the general obligation to protect the enjoyment of human rights against interference from MNEs. However, it remains unclear whether such an obligation extends extraterritorially, meaning whether home States have an obligation to protect against human rights violations by their MNEs in host countries. Furthermore, while it is accepted that States should not cause environmental damage on the territory of other States, it is unclear whether such an obligation applies extraterritorially to MNEs under their jurisdiction or control. Second, under the traditional State-centric approach to international law, non-State actors, such as MNEs, do not have international legal personality. Therefore, they have neither rights nor obligations, and they cannot be held liable for breach of international law standards, such as human rights or environmental standards. However, this view has been progressively challenged. For instance, international investment law recognizes that MNEs, as foreign investors, enjoy a number of rights. Moreover, human rights treaty bodies have occasionally accepted that specific non-State actors may have

²²⁰ Thabane (n 218) 57.

²²¹ ‘Initiative on Enhancing Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses’ (OHCHR)

<<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>> accessed 30 November 2015.

international obligations in specific circumstances. Third, public international law recognizes a number of rights and procedural guarantees related to access to justice, which may prove useful to victims of corporate human rights abuse and environmental damage seeking to obtain remedies. However, in Europe, it remains unclear how various regional human rights and environmental instruments may provide opportunities for foreign victims to gain access to remedies at the domestic level.

Finally, while the UN Framework and the UNGPs have clarified various issues at stake in the debate on business and human rights, scholars and CSOs have criticized the SRSG for ‘sacrificing principle for the purposes of achieving agreements.’²²² They have disagreed with the SRSG position on the respective human rights obligations of States and MNEs and criticized the weaknesses of the third pillar on access to remedies. Ultimately, the absence of adequate solutions provided by public international law to MNE human rights abuse and environmental damage in their transnational activities has strengthened demands for corporate accountability and access to justice at the domestic level.

The next chapter of this thesis focuses on such demands in host States and assesses the main legal, procedural, and institutional opportunities and obstacles for victims of business-related abuse to gain access to judicial remedies.

²²² Bilchitz, ‘The Ruggie Framework’ (n 128) 200.

CHAPTER 3

The origins of transnational litigation against multinational enterprises: access to justice and corporate accountability in host countries

1 Introduction

Transnational litigation against MNEs partly has its origins in governance and justiciability issues in host developing countries (host countries).¹ Lawyers, CSOs, and scholars frequently argue that host countries cannot effectively control and regulate foreign MNEs.² Furthermore, they hold that various legal, procedural, and institutional obstacles often restrict the ability of victims of business-related abuse to gain access to justice in host countries. Amongst the several hurdles regularly cited, one can find pervasive State corruption, inadequate liability regimes to deal with complex corporate structures, lack of judicial impartiality, or persecution of victims or witnesses.³ As a result, victims of MNEs would rarely be successful in lawsuits against companies in host States.⁴ By contrast, home developed States (home States) would be more likely to have a legal and judicial system able to cope with complex liability claims involving MNEs or to offer large amounts of damages.⁵

At the same time, some experts argue that recent litigation in some host countries demonstrates that foreign companies may be successfully sued for social and environmental damage.⁶ They suggest that human rights and environmental litigation against MNEs is not

¹ Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 *Hastings International and Comparative Law Review* 451, 463.

² Beth Stephens, 'Corporate Liability: Enforcing Human Rights through Domestic Litigation' (2001) 24 *Hastings International and Comparative Law Review* 401; Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011) 110.

³ For example, scholars and CSOs have argued that tort law in India was less dynamic and robust in comparison with tort law in the US to offer adequate remedy to victims of the Bhopal gas leak. See Marc Galanter, 'Law's Elusive Promise: Learning from Bhopal' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths 2002).

⁴ Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower 2012) 179.

⁵ Ward (n 1) 463; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 11; Mark Taylor, Robert Thompson and Anita Ramasastry, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (FAFO 2010) 8.

⁶ Jędrzej Frynas, 'Social and Environmental Litigation against Transnational Firms in Africa' (2004) 42 *Journal of Modern African Studies* 363, 363.

solely a Western phenomenon and is also emerging in developing countries.⁷ For instance, since the 1990s, litigation against oil companies in Nigeria has quickly grown as a result of changes in tort law, including relaxed rules of evidence and higher financial compensation.⁸ These changes have made it easier to effectively sue oil companies.⁹ Furthermore, South Africa has also seen the emergence of human rights and environmental litigation against MNEs.¹⁰ Over the last two decades, a number of class action lawsuits have been brought before the South African courts against mining companies for alleged health and security negligence.¹¹ Recently, the Business and Human Rights Resource Centre (BHRRC), the leading information platform on business and human rights, suggested that litigation related to corporate human rights and environmental abuse is increasing in developing countries. A growing number of cases have been filed in various host countries, including Kenya, Myanmar, Peru, and Thailand, often in relation to land grabbing conflicts.¹²

The aim of Chapter 3 is to assess the specific challenges that the legal, procedural, and institutional frameworks of host States have posed, or may pose, to victims of business-related abuse trying to gain access to justice. It also considers the link between the existence of these challenges and the emergence of transnational litigation against MNEs in home States. Chapter 3 starts with an examination of legal and procedural frameworks in host countries, focusing on liability regimes, procedural rules, and remedies. It then provides a description of the institutional framework in host countries, including the role of the State,

⁷ See Jędrzej Frynas, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43 *Journal of African Law* 121; Iman Prihandono, 'Litigating Human Rights-Related Cases against TNCs in Indonesia' (2012) 133 *LAWASIA* 113; Peter Muchlinski and Virginie Rouas, 'Foreign Direct-Liability Litigation: Toward the Transnationalization of Corporate Legal Responsibility' in Lara Blecher, Nancy Kaymar Stafford and Gretchen Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association 2014).

⁸ Frynas, 'Social and Environmental Litigation' (n 6) 371-372. In 1994, in the *Shell v Farah* case, claimants were awarded significant financial compensation for harm suffered to their land following an oil spill.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ In 2012, a South African law firm applied for a class action order on behalf of 15,000 former gold miners who had contracted silicosis. The litigation names 29 respondent gold mining companies. 'About the Silicosis Litigation' (*Richard Spoor Inc Attorneys*) <<http://goldminersilicosis.co.za/about-the-silicosis-litigation/>> accessed 30 November 2015.

¹² 'Annual Briefing: Corporate Legal Accountability' (*Business and Human Rights Resource Center*, January 2015) 7-8 <<http://business-humanrights.org/en/corporate-legal-accountability/publications/corporate-legal-accountability-annual-briefings>> accessed 30 November 2015.

the judiciary, and civil society. It finally weights the arguments for and against transnational litigation against MNEs in home States.

The author was confronted with a number of methodological issues for this chapter. First, it should be noted that it is beyond the purpose of this chapter to conduct a detailed study of access to justice in host countries. Instead, it provides an overview of the main challenges that victims of corporate abuse have faced, or may face, when seeking to gain access to justice in host countries based on a review of the existing literature on the subject. In particular, the series of reports recently published by the International Commission of Jurists on access to justice for victims of corporate human rights abuse in various countries provided the main source of information.¹³ Second, the concept of ‘host countries’ is problematic from a comparative law perspective. The business-related abuses raised in past transnational claims against MNEs took place in host countries at different stages of economic (eg emerging/least developed economies), political (eg democratic/dictatorial; conflict-affected/post-conflict societies), or social development. In addition, host countries belong to various groups of legal traditions (eg common law/civil law/mixed, etc.). Therefore, it seems inaccurate to assume that host States form a homogenous category and that a comparison of their legal, procedural, and institutional frameworks will extract a general truth about access to justice for corporate abuse in host countries. As a result, this chapter only aims to provide a basis for future in-depth research on the subject.

2 Legal and procedural frameworks

Scholars, litigators, and CSOs often point out the weaknesses of host countries’ legal and procedural frameworks in comparison with those of home countries. This section explores the main challenges relating to rules on liability, procedure, and available remedies existing in host States.

¹³ This section is mainly based on reports on the DRC, Nigeria, India, and South Africa.

2.1 Liability

Commentators often argue that host States have weak environmental and social regulation in place in order to attract foreign investment. Furthermore, they hold that host countries frequently lack an efficient legal system capable to deal with complex liability claims involving corporate groups or large groups of individuals.¹⁴

The reports of the International Commission of Jurists demonstrate that host countries have progressively shaped a legal framework to protect human rights and the environment.¹⁵ This conclusion seems to apply not only to politically stable countries but also to fragile and conflict-affected States, such as the DRC. Many host countries are States parties to the main UN human rights treaties, including the ICCPR,¹⁶ and other regional treaties, such as the Banjul Charter. Some of the rights contained in these treaties have received legal protection under the constitution of some host States, such as Nigeria. In addition, some national constitutions contain innovative provisions, which may be useful in the context of litigation against companies. For example, the Indian Constitution contains some Fundamental Rights which are expressly guaranteed against non-State actors and are, therefore, directly and horizontally applicable against companies.¹⁷ Furthermore, some host States have enacted legislation which may protect specific interests, such as the environment, or provide victims of business-related abuse access to remedies. For instance, following the Bhopal gas leak in 1984,¹⁸ India enacted the Environment (Protection) Act in 1986 and the Public Liability

¹⁴ See Robert Fowler, 'International Environmental Standards for Transnational Corporations' (1995) *Environmental Law* 1, 11; Joseph (n 5) 11; Tetsuya Morimoto, 'Growing Industrialization and Our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad' (2005) 1 *Utrecht Law Review* 134, 137; Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar 2011) 25.

¹⁵ Prihandono also argues that, since the end of the 1990s, Indonesia has enacted various laws which have strengthened the legal protection of human rights and the environment. See Iman Prihandono, 'Transnational Corporations and Human Rights Violations in Indonesia' (2013) 14 *Australian Journal of Asian Law* 1.

¹⁶ 'Ratification of 18 International Human Rights Treaties' (*OHCHR*) <<http://indicators.ohchr.org/>> accessed 30 November 2015.

¹⁷ 'Access to Justice: Human Rights Abuses Involving Corporations – India' (International Commission of Jurists 2011) 7.

¹⁸ For an account of the Bhopal gas leak, see Jamie Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29 *Osgoode Hall Law Journal* 1.

Insurance Act in 1991.¹⁹ The latter provides immediate relief to victims of accidents involving hazardous substance.²⁰

However, the laws of some host countries may be framed to discourage litigation, making it particularly difficult for poor or vulnerable communities to use the legal system to protect their rights.²¹ Furthermore, the enforcement of legislation, which is crucial to ensure the protection of human rights and the environment, remains a major challenge in many host countries.²² For instance, India has a rich corpus of environmental laws, but limited implementation of these laws restricts their efficacy.²³ There are a number of reasons for such a situation: the absence of governmental willingness; the lack of resources; corruption and cultural indifference to the rule of law.²⁴ Enforcement problems may be particularly acute in authoritarian regimes or poor countries.²⁵ When business-related abuse takes place in dictatorial regimes where the State itself also commits human rights violations, the application of legal standards to protect people and the environment against corporate abuse may be particularly limited. In Nigeria, successive military regimes prevented the protection of human rights despite the existence of constitutional guarantees since the independence of the country.²⁶

It has also been argued that host States may provide inadequate liability regimes to treat complex claims related to corporate human rights abuse and environmental damage. For instance, traditional Indian tort law and class action suits appear to be insufficiently developed to deal with mass torts.²⁷ Other host States may not recognize the criminal liability of companies, such as the DRC, or may recognize criminal liability of companies for a

¹⁹ 'India' (n 17) 19.

²⁰ *ibid* 21.

²¹ Michael Anderson, 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs' (2003) IDS Working Paper 178, 16; *ibid* 58.

²² For example, in Indonesia, despite the existence of laws protecting human rights and the environment, their functioning and enforcement remain problematic. See Prihandono (n 15).

²³ 'India' (n 17) 19.

²⁴ *ibid* 48.

²⁵ 'Access to Justice: Human Rights Abuses Involving Corporations – The Democratic Republic of the Congo' (International Commission of Jurists 2012) 26.

²⁶ Amao (n 2) 113.

²⁷ 'India' (n 17) 58.

limited number of crimes, such as Nigeria or India.²⁸ Courts may also be reluctant to pierce the corporate veil or they may rigidly apply legislation or case-law related to corporate separate legal personality and limited liability, such as in Nigeria or India.²⁹

However, as this thesis demonstrates later, such criticisms should not be confined towards host States alone. Indeed, courts in home countries also struggle with the attribution of liability when faced with claims related to complex corporate groups and are often reluctant to pierce the corporate veil. Furthermore, many host countries are former colonies which continue to rely upon the legal architecture of some European home States built to support colonial rules.³⁰ Many host countries have inherited specific legal principles or procedural rules from European countries (eg the DRC applies specific concepts of company law dating from Belgian colonisation)³¹ or share similar liability rules with them (eg India³² and Nigeria³³ share tort law based in common law with England). At times, the continued survival of colonial legislation is inconsistent with basic human rights.³⁴ However, in some instances, courts in host States have actually departed from these legal rules to adopt a progressive approach, which meets contemporary liability needs.³⁵ Finally, the existence of successful claims in which courts in host States have established corporate liability should not be ignored. For instance, in what appears to be a landmark case, the director of a mining company was recently found criminally liable for environmental pollution in South Africa.³⁶

²⁸ *ibid* 12; ‘DRC’ (n 25) 9; ‘Access to Justice: Human Rights Abuses Involving Corporations – Nigeria’ (International Commission of Jurists 2012) 21-24.

²⁹ ‘India’ (n 17) 62; ‘Nigeria’ (n 28) 21-24.

³⁰ Anderson (n 21) 11, 14.

³¹ ‘DRC’ (n 25) 6.

³² ‘India’ (n 17) 17.

³³ For instance, Amao points out that, during the British colonisation, the law applicable to companies in Nigeria consisted of the common law, the doctrines of equity, and the statutes of general application in England. As a result, ‘common law concepts such as the concept of the separate and independent legal personality of companies as enunciated in *Salomon v. Salomon* was received into the Nigeria company law and has since remained part of the law.’ See Amao (n 2) 118. See also ‘Nigeria’ (n 28) 24.

³⁴ Anderson (n 21) 14.

³⁵ *MC Mehta v Union of India* (1986) 1987 SCR (1) 819. The Supreme Court departed from the *Rylands v Fletcher* case-law and developed the absolute liability principle. See also ‘India’ (n 17) 18.

³⁶ *The State v Blue Platinum Ventures Pty Ltd* [2014] RN126/13. See also Siphso Kings, ‘Mining Boss Found Liable for Company’s Environment Damage’ *Mail & Guardian* (4 February 2014) <<http://mg.co.za/article/2014-02-04-director-found-liable-for-companys-environment-damage>> accessed 30 November 2015.

Over the last decade, an increasing number of host countries have enacted innovative legislation to impose mandatory corporate social responsibility (CSR) on corporations, including Indonesia, Mauritius, and India.³⁷ In 2007, Indonesia enacted the Limited Company Liability Act No 40/2007, which created mandatory CSR for natural resources companies. Similarly, in 2009, Mauritius amended its legislation on income tax to introduce a binding requirement on CSR. Since 2012, registered companies must pay 2% of their profits towards programmes promoting the social and environmental development of Mauritius.³⁸ The introduction of such legislation is particularly innovative, as it allows the redistribution of corporate profits to programmes which benefit local communities and protect the environment. This is particularly welcome in host countries where poverty and the lack of infrastructure or basic services are recurrent issues.

However, these provisions do little to hold companies which are involved in human rights abuse or polluting activities accountable. Furthermore, scholars have pointed out a number of challenges which threaten the effective enforcement of these laws and, ultimately, their potential benefits. For instance, in Indonesia, the lack of legislative or governmental guidance as to the meaning of mandatory CSR has created legal uncertainties regarding what is expected from companies.³⁹

2.2 Procedure

The existence of protective legislation is of no use ‘unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the court in good time and without excessive cost.’⁴⁰ The socio-economic reality of many host countries, such as poverty or the lack of legal awareness,⁴¹ coupled with ill-adapted procedural rules or

³⁷ In India, Section 135 of Company Act, 2013 provides that companies with a net worth, a turnover, or a net profit beyond various amounts are required to spend at least 2% of their average net profit on CSR activities. For a discussion of the CSR regime in India, see Afra Afsharipour and Shruti Rana, ‘The Emergence of New Corporate Social Responsibility Regimes in China and India’ (2014) 14 UC Davis Business Law Journal 176.

³⁸ For a discussion of the CSR regime in Mauritius, see Renginee Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – The Case of Mauritius* (Routledge 2015).

³⁹ Prihandono, ‘Transnational Corporations and Human Rights Violations in Indonesia’ (n 15) 17.

⁴⁰ Anderson (n 21) 15.

⁴¹ ‘Nigeria’ (n 28) 44; ‘Access to Justice: Human Rights Abuses Involving Corporations – South Africa’ (International Commission of Jurists 2010) 32.

excessive formalism in the application of procedural rules, often limits the opportunities for victims to gain access to justice in host countries. Furthermore, the lack of institutional skill and legal literacy (ie the ability to understand and use the legal system), reluctance to use the law, particularly among poor communities, difficulty in accessing legal information, and inadequate legal representation all contribute to access to justice issues in developing countries.⁴²

The rules governing legal standing in a number of host countries allow victims and, in some cases, their representatives and NGOs to bring claims against companies.⁴³ In Indonesia, environmental NGOs have legal standing to bring civil claims to protect the environment. However, they can only request specific measures from the defendant, such as environmental rehabilitation, and cannot request compensation for potential damages.⁴⁴ In the DRC, legally-registered NGOs can potentially bring a civil claim for damages. Furthermore, victims may bring a civil claim as ‘partie civile’ in the context of criminal proceedings. However, the existence of collective redress mechanisms is still unclear.⁴⁵ Some host countries, such as India and Nigeria, have embraced public interest litigation (PIL).⁴⁶ This type of litigation liberalizes standing rules so that litigation can be brought on behalf of the poorest.⁴⁷ Nevertheless, PIL focuses mainly on challenging governmental policies, thus providing limited remedy opportunities to victims.⁴⁸

High legal costs and limited, or non-existent, legal aid or pro bono services may prevent poor victims from gaining access to courts in host countries.⁴⁹ In India, the existence of *ad valorem* fees (fees in proportion to the value of the claim made) tend to prevent litigants from

⁴² Anderson (n 21) 16-20.

⁴³ ‘South Africa’ (n 41) 58.

⁴⁴ Iman Prihandono and Esti Hayu Dewanty, ‘Litigating Cross-Border Environmental Dispute in Indonesian Civil Court: The Montara Case’ (2015) 1 Indonesia Law Review 14, 23.

⁴⁵ ‘DRC’ (n 25) 43.

⁴⁶ ‘India’ (n 17) 38; ‘Nigeria’ (n 28) 44.

⁴⁷ For a discussion of PIL in Asia, see Po Jen Yap and Holning Lau (eds), *Public Interest Litigation in Asia* (Routledge 2011).

⁴⁸ ‘India’ (n 17) 38-41.

⁴⁹ Anderson (n 21) 16.

bringing claims against companies in mass tort cases where court fees are very high.⁵⁰ In the DRC, parties must pay court fees, including enforcement fees, which are often too high in proportion to their income. Moreover, the *pro bono* legal aid system in the DRC is often inoperative.⁵¹ In South Africa, as a priority, legal aid is allocated to criminal matters, meaning that victims of corporate abuse may not have access to legal aid.⁵²

Another challenge relates to rules governing evidence. In some countries, plaintiffs have no right to access evidence or information held by companies (eg Nigeria) while in others discovery or disclosure procedures provide limited opportunities to gain access to evidence, especially in comparison with the US or England (eg India).⁵³ Finally, endemic delays in judicial process remain problematic in many host countries.⁵⁴

2.3 Remedies

The extent of available remedies also influences the level of access to justice by victims of corporate abuse. It is crucial that they have access to various remedies, ranging from compensation to restitution or reparation, which are appropriately tailored to their needs. In some cases, the use of remedies other than damages, such as injunctions, may be necessary to prevent environmental pollution or the breach of individual rights.

Recent examples have demonstrated that national courts in host countries are receptive to injunction requests.⁵⁵ In India, courts have been willing to issue injunctions, including interim injunctions, against polluting companies to protect the environment.⁵⁶ At the same time, however, courts may favour the award of damages to victims or ignore requests for other

⁵⁰ 'India' (n 17) 56.

⁵¹ 'DRC' (n 25) 34.

⁵² 'South Africa' (n 41) 34-35.

⁵³ 'India' (n 17) 61; 'Nigeria' (n 28) 53.

⁵⁴ Frynas, 'Social and Environmental Litigation' (n 6) 380; 'South Africa' (n 41) 59; 'India' (n 17) 54; 'Nigeria' (n 28) 54.

⁵⁵ In November 2014, a court in Kenya halted the construction of a port until the amount of compensation required to be paid to those displaced by the construction could be determined. Eunice Machuhi, 'Court Halts Lamu Port Construction' *Business Daily* (28 November 2014) <<http://www.businessdailyafrica.com/Court-halts-Lamu-port-construction/-/539546/2537434/-/muheff7/-/index.html>> accessed 30 November 2015.

⁵⁶ 'India' (n 17) 34.

remedies to the detriment of other interests. For example, Nigerian courts have failed to order any injunctions to stop harmful gas flaring or to force MNEs to upgrade their facilities, despite the existence of legal provisions allowing them to do so.⁵⁷ They usually ignore remedies which can prevent environmental damage or restore damaged environment in the context of oil-related litigation.⁵⁸ However, it should be pointed out that courts in some home countries also tend to favour the award of damages, even though other remedies may be available and more appropriate to the claim.

In tort litigation, the award of damages may be lower in host countries in comparison with home countries (eg the US and England). Following the Bhopal gas leak, the Indian government chose to file a lawsuit against Union Carbide Corporation (UCC) in the US, and not in India, because damages awarded in tort actions in India were lower and not perceived to have much deterrent effect.⁵⁹ Some scholars argue that the main motivation for claims against MNEs in the US and England is linked to plaintiff-friendly levels of damages. While Nigerian and South Africa cases have a prospect of obtaining millions of dollars in compensation, court cases in the US may potentially lead to compensation awards in the range of billions of dollars.⁶⁰ Furthermore, the practice of imposing punitive damages is well developed in the US and is available in many common law countries.⁶¹

The failure to enforce, or execute judgements, remains a major concern in many host countries.⁶² In Nigeria, a tort claim was brought against a number of oil companies in which plaintiffs alleged that the practice of gas flaring violated their constitutionally protected rights and environmental law. In 2005, the Federal High Court of Nigeria agreed with them and ordered that gas flaring stopped immediately. However, the oil companies failed to comply

⁵⁷ Frynas, 'Social and Environmental Litigation' (n 6) 380; Amao (n 2).

⁵⁸ Kaniye Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12 *RECIEL* 199, 207.

⁵⁹ 'India' (n 17) 33.

⁶⁰ Frynas, 'Social and Environmental Litigation' (n 6) 373.

⁶¹ At the same time, punitive damages are not necessarily accepted amongst all home countries, especially in European civil law countries. For a discussion of punitive damages, see John Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 *Columbia Journal of Transnational Law* 391.

⁶² 'South Africa' (n 41) 63; 'India' (n 17) 65; 'DRC' (n 25) 43.

with the ruling, which was never executed. Furthermore, the judge in this case was later transferred to a different court and the lead plaintiff in the action was detained. Such difficulties in enforcing judicial decisions make access to justice in Nigeria seems unlikely.⁶³

3 The institutional framework

The institutional context is one of the major obstacles to access to justice for corporate abuse in host States. The relationship between host States and MNEs can be problematic, especially when authorities have little leeway or willingness to enact protective legislation or to promote corporate accountability. In addition, the lack of impartiality and independence of the judiciary in host States may prevent plaintiffs from being heard in a fair way. Finally, the presence of NGOs and lawyers concerned with human rights, environmental protection, and corporate accountability is crucial in helping victims bring claims against companies.

3.1 The host State

Scholars have pointed out that governments of developing countries are generally reluctant to sue MNEs on behalf of their citizens.⁶⁴ As a result, injured citizens are usually left without a local remedy for the harm suffered.⁶⁵ The relationship between MNEs and governments of host States may explain such situation.

Attracting foreign investment is crucial for developing countries facing poverty and development issues. Scholars have explained that MNEs exploit regulatory differences between countries ('regulatory arbitrage'), which results in an intense competition between States to attract foreign investment.⁶⁶ When host States enact laws to facilitate foreign investment, they may be reluctant to consider the impact of these laws on human rights and the environment and to impose regulation on MNEs.⁶⁷ Investment agreements between foreign investors and host States may contain stabilisation clauses, which address changes of

⁶³ Hari Osofsky, 'Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria' (2010) 1 *Journal of Human Rights and the Environment* 189, 191.

⁶⁴ Taylor, Thompson and Ramasastry (n 5) 23.

⁶⁵ Mujih (n 4) 179.

⁶⁶ Frynas, 'Social and Environmental Litigation' (n 6) 365.

⁶⁷ *ibid*; Olivier de Schutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006) 1.

legislation in the host State throughout the period of investment.⁶⁸ Stabilisation clauses may constrain the ability of host States to enact legislation to protect humans and the environment due to impacts on foreign investment.⁶⁹ Furthermore, under the current regime of international arbitration for foreign investment, rulings in host States upholding complaints brought by private parties may be attacked by the foreign investor before an arbitral tribunal on the grounds that they constitute wrongful interference with the investment.⁷⁰ Ultimately, the obligations imposed by investment treaties on host States may, in practice, prevent them from fully complying with their international human rights obligations.⁷¹

Host States may also have a substantial interest, or be actively involved, in the economic activity of the MNE. In some countries, the government may be excessively reliant on revenues from the extractive industry where the impact of MNE operations is the most obvious.⁷² For instance, Nigeria is one of the largest producers of crude petroleum in the world and its government relies excessively on oil revenue.⁷³ Another example is the Chad-Cameroon Oil and Pipeline Project, a 1,070km underground pipeline designed to carry crude oil from Chad to Cameroon, which has raised a number of social and environmental concerns. It was executed through a joint venture involving the governments of Chad and Cameroon as well as foreign MNEs. The relationship between the host State and the company is, therefore, inextricable,⁷⁴ as, for instance, involvement of host States in joint ventures can result in ‘a weak judiciary, which is dependent on the executive, even more biased in actions brought by ordinary citizens against the company.’⁷⁵

⁶⁸ Jernej Cernic, ‘Corporate Human Rights Obligations under Stabilization Clauses’ (2010) 11 *German Law Journal* 210, 213.

⁶⁹ Lorenzo Cotula, ‘Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses’ (2008) 1 *Journal of World Energy Law & Business* 158, 158.

⁷⁰ Francesco Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 *European Journal of International Law* 729, 738.

⁷¹ De Schutter (n 67) 25.

⁷² Amao (n 2) 116.

⁷³ Crude oil accounts for around one third of GDP, 75% of public revenue and 95% of exports in Nigeria. See *ibid* 116-118.

⁷⁴ Mujih (n 4) 180.

⁷⁵ *ibid*.

Generally, corruption may limit access to justice in host countries.⁷⁶ African CSOs identify corruption as ‘the primary challenge preventing improved access to justice and remedies.’⁷⁷ The illegal dumping of toxic waste in Ivory Coast in 2006 and the ensuing litigation in the Ivory Coast and in England against Trafigura, an MNE trading international commodities, illustrate this point.⁷⁸ This case concerned the more general issue of transnational movements and the subsequent dumping of hazardous waste in developing countries.⁷⁹ In late 2005, Trafigura decided to buy a large amount of unrefined petroleum called coker naphtha as a cheap blendstock for fuels. Trafigura refined it through an industrial process called caustic washing carried on board of the *Probo Koala* ship, which sailed on charter for Trafigura. In June 2006, after several unsuccessful attempts to dispose of the waste produced during the caustic washing, Trafigura arranged to deliver the waste to the Amsterdam Port Services (APS) in the Netherlands. However, while unloading the waste, APS discovered that the waste was far more contaminated than it had thought and raised the price for treatment. Trafigura rejected the new quote and asked for the waste to be reloaded onto the *Probo Koala*. In August 2006, the *Probo Koala* illegally unloaded the shipment of toxic waste in the city of Abidjan. During the following days, more than 100,000 individuals experienced various physical symptoms, including headaches, skin irritations, breathing difficulties, and bleeding noses, and had to visit hospitals. The Ivorian authorities attributed at least 15 deaths to exposure to the waste.⁸⁰ The *Probo Koala* incident resulted in one of the worst sanitary crises in the history of the Ivory Coast. In September 2006, two executives of Trafigura were charged with various criminal offences of Ivorian public health and environmental laws, as well as poisoning. A number of Ivorian port and customs officials were also charged with several offences. However, in February 2007, Trafigura and the government of Ivory Coast

⁷⁶ For a discussion of corruption practices in the courts of Western African countries, see Alou Mahaman Tidjani, ‘La Justice au Plus Offrant: Les Infortunes du Système Judiciaire en Afrique de l’Ouest (Autour du Cas du Niger)’ (2001) 83 *Politique Africaine* 59.

⁷⁷ ‘Civil Society Organizations in Resource-Rich Communities: Helping Ensure Beneficial Outcomes for All’ (Global Rights Business and Human Rights Roundtable, London, 10-11 October 2013) 6.

⁷⁸ For a description of the events, see ‘The Toxic Truth About a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Cote d’Ivoire’ (Amnesty International & Greenpeace Netherlands 2012).

⁷⁹ Olanrewaju Fagbohun, ‘The Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of the Dumping of Toxic Waste in Abidjan, Cote d’Ivoire’ (2007) 37 *Hong Kong Law Journal* 831.

⁸⁰ ‘The Toxic Truth’ (n 78) 23.

reached a settlement, in which Trafigura agreed to pay the sum of CFA 95bn (approximately US \$195m) and the government waived its right to prosecute against the company. Neither Trafigura nor its executives were brought to trial in Ivory Coast.⁸¹

In November 2006, the British law firm Leigh Day filed a tort claim in the English High Court on behalf of 30,000 Ivoirians against Trafigura Ltd and Trafigura Beheer BV⁸² for damages relating to personal injury and economic loss caused by the dumping of toxic waste in Abidjan.⁸³ In September 2009, the parties reached a confidential out-of-court settlement in which Trafigura agreed to pay approximately £30m to the claimants, which amounted to roughly £1,000 per claimant.⁸⁴ However, Trafigura did not admit liability for the harm alleged by the claimants. Following the settlement, Trafigura proceeded with the payment of financial compensation, but the claimants faced, and continue to face, major difficulties in receiving compensation. In November 2009, Leigh Day expressed its concern that the compensation paid by Trafigura to the Ivorian claimants had been misappropriated.⁸⁵ It appeared that the distribution process established by the claimants' lawyers was derailed when a group of individuals, who falsely claimed to represent the claimants, secured control of the compensation fund through an Ivorian court order.⁸⁶ In 2012, an Ivorian police investigation concluded that £5m from the compensation fund had disappeared and recommended the opening of a case for fraud and misuse of funds.⁸⁷ Various government officials were accused of embezzling funds intended for the victims, including the Minister Adama Bictogo who resigned over allegations that he had stolen £700,000 from the compensation fund.⁸⁸ Some victims were still awaiting financial compensation in 2015.⁸⁹

⁸¹ *ibid* 9.

⁸² Both companies will be referred to as 'Trafigura.'

⁸³ *Motto v Trafigura Ltd* [2006] Claim BV HQ06X03370.

⁸⁴ 'Agreed Final Joint Statement (Issued on Behalf of All Parties to the Trafigura Personal Injury Group Litigation)' (Trafigura and Leigh Day 2009).

⁸⁵ 'Concern that Ivory Coast Compensation Will Be Misappropriated' (*Leigh Day*, 6 November 2009) <<http://www.leighday.co.uk/News/2009/November-2009/Concern-that-Ivory-Coast-compensation-will-be-misa>> accessed 30 November 2015.

⁸⁶ *ibid*; 'The Toxic Truth' (n 78) 163.

⁸⁷ Rupert Neate, 'Ivory Coast Minister Quits Over "Missing" Trafigura Money' *The Guardian* (London, 24 May 2012) <<http://www.theguardian.com/world/2012/may/24/ivory-coast-minister-quits-trafigura-money>> accessed 30 November 2015.

⁸⁸ *ibid*.

Host States may also be reluctant to launch criminal proceedings against MNEs or investigate business impacts on people and the environment when settlement agreements are concluded with MNEs. For instance, the government of Ivory Coast agreed that Trafigura would not be sued in Ivorian courts following the settlement agreement. However, Ivorian victims were never compensated for the harm they suffered. Similarly, after the Bhopal gas leak, UCC paid \$470m to the government of India following an order of the Indian Supreme Court at the beginning of the 1990s. The Indian government had appointed itself the exclusive representative of the victims, which excluded individuals from bringing a claim against the MNE. Nonetheless, as of 1998, less than half of the sum had been paid to the victims.

In some extreme cases, litigation in host countries has led to State violence against CSOs and victims.⁹⁰ Some host States have even enacted legislation to criminalize any attempts by their own nationals to sue an MNE in the home State.⁹¹ This was the case in Papua New Guinea, which enacted the Compensation (Prohibition of Foreign Legal Proceedings) Act 1995. This law was designed to protect BHP Billiton, a mining MNE, from potential liability for environmental damage occurring in the Tedi River Basin.⁹² In some cases, victims of corporate abuse have become the defendants, such as in Peru where protestors against a mining project were criminally prosecuted after being tortured and sexually abused on land where the concerned MNE was operating.⁹³

⁸⁹ Emilie Iob, 'Ivory Coast Toxic Waste Victims Still Await Payments' *Voice of America* (Abidjan, 12 November 2015) <<http://www.voanews.com/content/ivory-coast-toxic-waste-victims-still-await-payments/3056111.html>> accessed 30 November 2015.

⁹⁰ Jędrzej Frynas, 'Corporate and State Responses to Anti-Oil Protests in the Niger Delta' (2001) 100 *African Affairs* 27; Taylor, Thompson and Ramasastry (n 5) 24.

⁹¹ Taylor, Thompson and Ramasastry (n 5) 24.

⁹² Joseph (n 5) 5; Tebello Thabane, 'Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles'(2014) 14 *African Human Rights Law Journal* 43 51.

⁹³ Gwynne Skinner and others, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, ECCJ & CORE 2013) 105.

3.2 The judiciary

The lack of an independent and impartial judiciary is a major obstacle for victims of business-related abuse when seeking access to justice in host countries.⁹⁴ This hurdle exists amongst host States, whether fragile, conflict-affected, or post-conflict, as well as countries with stable political regimes.

The lack of independent and impartial judges is particularly problematic in fragile, conflict-affected, and post-conflict States. In the DRC, the culture of corruption is present at all levels of the judiciary and has a serious impact on access to justice for Congolese citizens, especially for poor plaintiffs.⁹⁵ The case against Anvil Mining, a Canadian mining MNE, in the DRC is an illustrative example.⁹⁶ In October 2004, Congolese troops conducted violent reprisals for a minor uprising in Kilwa, a small town in the Katanga province. They engaged in summary executions, rape, torture, pillaging, and other human rights violations. It was alleged that Anvil Mining provided logistical assistance for the military actions.⁹⁷ In July 2005, the Congolese authorities launched a criminal investigation, following pressure from the UN Mission in the DRC, and Congolese and international CSOs. In December 2006, a criminal trial before the Military Court of Katanga started. Charges of war crimes and other violations of international humanitarian law were laid against a number of military personnel and employees of Anvil Mining.

During the proceedings, international and national actors expressed concern about the impartiality of some of the judges and denounced pressure exerted on the public prosecutor.⁹⁸ Ultimately, the court acquitted all the defendants of all charges. It concluded that the deaths in Kilwa were caused by fighting between rebels and the military and did not amount to war crimes. The court further held that the employees of Anvil had been coerced and were not

⁹⁴ Anderson (n 21) 13; 'India' (n 17) 52-52; 'DRC' (n 25) 43; 'Nigeria' (n 28) 44; Prihandono, 'Transnational Corporations and Human Rights Violations in Indonesia' (n 15) 17-18.

⁹⁵ 'DRC' (n 25) 34.

⁹⁶ For a description of this case, see Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 Yale Human Rights and Development Law Journal 127.

⁹⁷ *ibid* 127.

⁹⁸ *ibid* 144.

liable for aiding and abetting the military.⁹⁹ The UN High Commissioner for Human Rights criticized the court's verdict, as well as the military court's jurisdiction over civilians in this case, adding that civilians should be tried before fair and independent civilian courts.¹⁰⁰ As a result of the criminal proceedings in the DRC being unable to deliver justice, victims and their litigators subsequently launched proceedings in other forums, including Canada and Australia. Given the lack of judicial independence or impartiality in conflict-affected and post-conflict States, victims and other litigators may decide to launch proceedings directly in the home State of the MNE. The state of the Libyan judicial system after the Arab Spring of 2011 partly motivated FIDH, a human rights NGO, to start legal proceedings against Amesys, a French IT company, directly in France.¹⁰¹

Even in host countries that have a stable political regime, victims may still face courts which lack the independence and impartiality required by international law. Such was the case when Sherpa, a French NGO, insisted on bringing a case against Rougier, a French company, in France because endemic corruption prevented victims from gaining access to justice in Cameroon.¹⁰² The scarcity of resources allocated to the judiciary in some host countries also provides a fertile ground for corrupt practices.¹⁰³

However, the role of the judiciary in protecting human rights and the environment against corporate abuse in host countries should not be neglected. For instance, the Indian judiciary has played an active role in opening justice to poor and disadvantaged communities by

⁹⁹ *ibid* 144-145.

¹⁰⁰ *ibid* 145.

¹⁰¹ 'The Amesys Case' (FIDH 11 February 2015) 5.

¹⁰² 'Press Release: 7 Cameroonian Farmers Confront the French Rougier Group and its Cameroonian Affiliate SFID Before French Tribunal' (Les Amis de la Terre and Sherpa 2002). The US Department of State has pointed out the link between judiciary corruption and denial of fair public trials in Cameroon. See 'Country Reports on Human Rights Practices for 2014: Cameroon' (*US Department of State*) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dclid=236338>> accessed 30 November 2015. For a discussion of corruption in Cameroon, see Charles Manga Fombad, 'The Dynamics of Record-Breaking Endemic Corruption and Political Opportunism in Cameroon' in John Mukum Mbaku and Joseph Takougang (eds), *The Leadership Challenge in Africa: Cameroon under Paul Biya* (Africa World Press 2004).

¹⁰³ 'DRC' (n 25) 34.

allowing the development of PIL.¹⁰⁴ Furthermore, Indian courts have developed protective case-law on the grounds of the polluter pays and the precautionary principles. In Indonesia, the Constitutional Court has sought to influence the human rights conduct of MNEs.¹⁰⁵ Likewise, the South African Constitutional Court has played a major role in the development of an innovative body of case-law to protect economic, social, and cultural rights.¹⁰⁶ Litigation, supported by NGOs, has forced governments to implement their human rights treaty and constitutional obligations. In Nigeria, judges have progressively shown a greater flexibility in their interpretation of legal statutes and case-law which has, ultimately, benefitted victims in litigation against MNEs.¹⁰⁷ For some authors, in the future, litigation against MNEs may actually rise in Africa due to the lack of governmental control over the judiciary.¹⁰⁸

Regional human rights courts may also play an important role in recognizing the negative impacts of corporate activities on human rights and the role of States in protecting human rights from interference by companies. The role of the African Commission on Human and Peoples' Rights (African Commission) in the *SERAC v Nigeria* case¹⁰⁹ is an illustrative example. In 2001, the African Commission found that Nigeria had violated several rights contained in the Banjul Charter, including the right to a general satisfactory environment favourable to peoples' development, the right to health, and the right to food, in the context of the activities of an oil consortium in the Ogoniland. Two human rights NGOs alleged that an oil consortium's operations had caused the contamination of the environment where the Ogoni People lived, which resulted in environmental degradation, health problems, and human rights violations. The litigants raised the responsibility of Nigeria for providing legal

¹⁰⁴ 'India' (n 17) 5.

¹⁰⁵ Prihandono, 'Transnational Corporations and Human Rights Violations in Indonesia' (n 15) 17-18.

¹⁰⁶ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19. For a discussion of this case, see Cass Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2001) Chicago John Olin Law & Economic Working Paper No 124 <<http://ssrn.com/abstract=269657>> accessed 30 November 2015; Eric Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Colombia Human Rights Law Review* 321.

¹⁰⁷ Frynas, 'Social and Environmental Litigation' (n 6) 375-376.

¹⁰⁸ *ibid* 383.

¹⁰⁹ *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, Decision Regarding Communication 155/96, ACHPR/COMM/A044/1, 27 May 2002.

and military support to the oil consortium and for not monitoring the risks created by the oil activities. The African Commission found that, despite its obligation to protect persons against interference in the enjoyment of their rights, Nigeria facilitated the destruction of the Ogoniland by oil companies, which devastatingly affected the well-being of the Ogonis. It held that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. Amongst various measures, the African Commission called on Nigeria to prosecute officials and individuals involved in human rights violations; to ensure adequate compensation to victims, including relief and resettlement assistance to victims of government sponsored raids; to undertake a comprehensive clean-up of lands and rivers damaged by oil operations; and to provide communities likely to be affected by oil operations meaningful access to regulatory and decision-making bodies.¹¹⁰

The *SERAC* ruling was a landmark in various respects. It represents the African Commission's first articulation of the duties of African governments to monitor and control the activities of MNEs.¹¹¹ In addition, this case shows the potential to bring a class action complaint before the African Commission and the added value of cooperation between national and foreign NGOs in formulating such a complaint.¹¹² At the same time, the ruling's value was limited in a few respects, including the inability to enforce the judgement, the African Commission's restrictive interpretation of the requirement of exhaustion of local remedies, the length of the proceedings (five years), and the failure of the African Commission to give its views about the conduct of private companies.

3.3 Civil society

The existence of an active civil society, which includes NGOs and lawyers, is crucial in being able to bring claims against companies in host countries. For instance, Indian civil

¹¹⁰ For further analysis of the decision, see Dinah Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria) Case No ACHPR/COMM/A044/1' (2002) 96 *The American Journal of International Law* 937.

¹¹¹ *ibid* 941.

¹¹² Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749, 760.

society has been particularly active in challenging corporate activities in courts.¹¹³ Furthermore, litigation against oil companies in Nigeria has emerged partly as the result of campaigns by local pressure groups and the involvement of skilled lawyers.¹¹⁴

However, the limited financial capacity and legal expertise of NGOs to support and participate in legal proceedings is also an obstacle to litigation against MNEs in host States. Often, local NGOs lack the capacity to collect evidence to document the impacts of particular business activities. They may also lack the adequate methodology and expertise to produce credible information which can be used as elements of proof before a court.¹¹⁵ In some countries, NGOs are mainly located in urban areas, far from poor rural areas where corporate abuse occurs. The above may limit the value that NGO support can bring to victims seeking justice.¹¹⁶ Moreover, the scope of support that NGOs can provide to victims of corporate abuse is unevenly divided, often preventing access for those that need it most. Frynas describes how:

[L]egal recourse is limited to groups from selected countries, those with NGO support and financial resources, and crucially depends on available legal remedies. Litigation in Africa has so far focused on a few countries – South Africa, Nigeria, Namibia – rather than the continent’s poorest States. [...] In other words, litigation has a very uneven reach and does not always address some of the most serious corporate wrongdoings in society.¹¹⁷

The existence of cause lawyers in the host country is also an important factor in the development of litigation against MNEs. For instance, the BHRRC recently built an international directory of lawyers working on cases of corporate human rights and

¹¹³ ‘India’ (n 17).

¹¹⁴ Frynas, ‘Social and Environmental Litigation’ (n 6) 375.

¹¹⁵ Interview with lawyer 1 (Fieldwork, 2013); ‘Civil Society Organizations in Resource-Rich Communities’ (n 77) 9.

¹¹⁶ ‘Nigeria’ (n 28) 44.

¹¹⁷ Frynas, ‘Social and Environmental Litigation’ (n 6) 381.

environmental abuse, which includes a growing number of lawyers from host countries.¹¹⁸ In South Africa, some of the cases against MNEs have been brought by a South African lawyer who had previously worked with Leigh Day, a London-based law firm which has challenged the use of English courts in the context transnational litigation against MNEs.¹¹⁹ Scholars have, however, questioned the motivations of some of the lawyers involved in litigation against MNEs.¹²⁰ They argue that lawyers in Nigeria have been attracted by the ‘financial rewards of oil-related litigation.’ They ‘work for “free” for their client during the legal proceedings, but, in return, demand a high share of the compensation payment (which can be as much as half of it if the suit succeeds).’¹²¹ More generally, litigation patterns and the structure and costs of legal representation appear to exclude the poorest from courts.¹²²

4 Litigation in host States v home States

The imperfect situation of access to justice in host States leads us to question whether it would be better to bring transnational litigation against MNEs in home countries. Such a question is regularly a subject of debate amongst scholars and CSOs.¹²³ It is therefore crucial to assess the various arguments for and against litigation in home States versus host States.

Transnational litigation against MNEs raises controversial questions about State sovereignty, economic and legal development in host States, and its efficiency in controlling corporate

¹¹⁸ ‘Directory of Business and Human Rights Lawyers’ (*Business and Human Rights Resource Center*) <<http://business-humanrights.org/en/corporate-legal-accountability/directory-of-business-human-rights-lawyers>> accessed 30 November 2015.

¹¹⁹ Frynas, ‘Social and Environmental Litigation’ (n 6) 374.

¹²⁰ This applies to lawyers in both host and home countries. See Cassels (n 18) 11; *ibid* 374-375. Boon suggests that it seems inappropriate to treat as cause lawyers those who dedicate all of their time to a particular kind of representation but do so for financial reasons with virtually no emotional commitment to any underlying cause. Most lawyers build practices on the best business opportunities rather than out of commitment to a cause. Andrew Boon, ‘Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression’ (2004) 7 *Legal Ethics* 250, 253.

¹²¹ Frynas, ‘Social and Environmental Litigation’ (n 6) 375.

¹²² Anderson (n 21) 9.

¹²³ Joseph (n 5) 148. For an overview of views on the desirability of extraterritorial jurisdiction, see also Curtis Bradley, ‘The Costs of International Human Rights Litigation’ (2001), 2 *Chicago Journal of International Law* 457; Andrea Boggio, ‘The Global Enforcement of Human Rights: The Unintended Consequences of Transnational Litigation’ (2006) 10 *The International Journal of Human Rights* 325; Christen Broecker, ‘“Better the Devil You Know”: Home State Approaches to Transnational Corporate Accountability’ (2008) 41 *New York University Journal of International Law & Politics* 159; Stathis Banakas, ‘Private Law Remedies and Procedures: A Double-Edged Sword’ (2009) 4 *Journal of Comparative Law* 3.

behaviour and providing victims with access to remedy. Joseph argues that the extraterritorial application of home State regulations through litigation ‘arguably impinges on the sovereignty of the territorial State, and perhaps amounts to a form of “judicial imperialism” by developed countries over their former colonies.’¹²⁴ Home States are, therefore, passing judgement over actions otherwise under the traditional jurisdiction of host States.¹²⁵ Similarly, Baxi raises that governments and courts in host States may demonstrate defiant resistance to judgements in home States, as they perceive those judgements as a colonialist critique of legal and judicial systems in host States. Ultimately, Baxi calls for the ‘decolonization of private international law.’¹²⁶ Legal scholars have also argued that transnational litigation against MNEs stunts the development and capacity of host country legal systems to address rogue MNE activity.¹²⁷ Newell suggests that, ‘[as] a development strategy, transnational litigation also does nothing to build up the capacity of legal systems in the South,’ even if cases brought in home State courts may establish important precedents for holding MNEs to account.¹²⁸ Furthermore, transnational litigation against MNEs may threaten foreign direct investment in host States and, therefore, impact detrimentally on economic growth and poverty alleviation in developing countries.¹²⁹ In addition, holding parent companies liable through litigation is not a necessary condition for the improvement of MNEs’ behaviour in the short run.¹³⁰ Moreover, transnational litigation against MNEs in home countries may be disadvantageous on several grounds, including language, access to evidence, and participation of victims in the proceedings. As a result, plaintiffs may be better off suing in the host State,¹³¹ and various actors, such as businesses, international and host

¹²⁴ Joseph (n 5) 12.

¹²⁵ *ibid* 148.

¹²⁶ Upendra Baxi, ‘Justice Deferred: Transnational Lawyering & the Bhopal Gas Tragedy, 30 Years On’ (King’s College, London, 6 July 2015). This argument is in line with the Third World Approaches to International Law (TWAAIL) scholarship, which challenges the colonialist nature of international law. For an overview of TWAAIL arguments, see Luis Eslava and Sundhya Pahuja, ‘Beyond the (Post)Colonial: TWAAIL and the Everyday Life of International Law’ (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America* 195.

¹²⁷ Joseph (n 5) 149.

¹²⁸ Peter Newell, ‘Access to Environmental Justice? Litigating against TNCs in the South’ (2001) 32 *IDS Bulletin* 83, 88.

¹²⁹ Joseph (n 5) 151.

¹³⁰ Broecker (n 123) 201.

¹³¹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (3rd edn, OUP 2009) 310.

State NGOs, and the EU, have argued that justice should be carried out in host countries instead of ‘remote justice.’¹³²

At the same time, transnational litigation against MNEs may be justifiable according to the interests of both home and host States, as well as from an ethical perspective. Muchlinski argues that the strict respect of the territorial principle of State jurisdiction, resulting from the exclusive sovereignty of each State over the territory it controls, may be restrictive of a State’s legitimate interest in the effective enforcement of its law against MNEs.¹³³ In particular, home States may have a legitimate interest to regulate parent companies which are directly involved in human rights or environmental abuse occurring in host countries. Joseph points out that it may sound unjust and immoral to permit corporations to escape liability for human rights abuses simply because the victim is from a developing country when an analogous victim in a developed country could expect redress.¹³⁴ However, Seck argues that home State regulation would gain in legitimacy if its structure gave voice to subaltern local communities in host countries.¹³⁵ Thus, ‘home State regulation, if structured in light of a principle of democratic inclusion, can be conceptualized as an example of transnational governance informed by the counter-hegemonic project of reading subaltern resistance into international law rather than as an illegitimate, if not imperialistic, exercise of unilateral jurisdiction.’¹³⁶ Moreover, in some cases, host States have themselves been the proponents of transnational litigation against MNEs in home States. For instance, the Indian government supported the claims brought against UCC under the ATS in the US.¹³⁷ Transnational litigation against MNEs may become legitimate when host States victims cannot gain access to justice in their country at all. Similarly, a number of NGOs in Africa believe that litigation against the parent company in its home State is ‘the most effective tool to draw attention to

¹³² Supplemental Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party in *Kiobel v Royal Dutch Petroleum Co* (June 2012) 33.

¹³³ Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 126.

¹³⁴ Joseph (n 5) 13.

¹³⁵ Sara Seck, ‘Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?’ (2008) 46 *Osgoode Hall Law Journal* 565, 601.

¹³⁶ *ibid.*

¹³⁷ ‘India’ (n 17) 17.

violations and guarantee compensation for victims.¹³⁸ Furthermore, as seen in Chapter 2, in an era of economic globalization, where MNEs have acquired a great deal of economic freedom and power through foreign direct investment, new demands on MNEs to exercise their power responsibly have emerged. Therefore, transnational litigation against MNEs appears necessary as the sharp end of corporate accountability.¹³⁹

5 Conclusions

Chapter 3 demonstrated that the picture of access to justice in the context of corporate abuse in host countries is more complex than what scholars and NGOs from home States have usually assumed. It should be noted that speaking generally of access to justice in host countries is problematic, since host States are socially, economically, and politically heterogeneous and their legal, procedural, and institutional frameworks vary considerably.

Existing legal frameworks and judicial proceedings, especially in politically stable host States, provide some opportunities for justice that should not be underestimated. In various host States, existing laws and case-law offer potential avenues to hold corporate actors liable for human rights abuse and environmental damage, and to obtain remediation. Legal standards in host States may often be similar to those in home countries, especially when host States are former colonies of home States and were forced to adopt similar legal principles or substantive rules. Furthermore, following occurrences of corporate abuse and failed justice, some host States have started the necessary reforms to improve corporate accountability and access to justice. For instance, the 1984 Bhopal gas leak triggered legal reform in India, through the enactment of protective environmental and compensation legislation. In addition, a growing number of host States, such as Indonesia, Mauritius, and India, are adopting innovative laws to promote the role of companies in society. Host States may also have in place pioneering proceedings to raise environmental and human rights concerns, such as PIL in India, and courts may be sensitive to plaintiffs' demands for justice.

¹³⁸ 'Civil Society Organizations in Resource-Rich Communities' (n 77) 10.

¹³⁹ Halina Ward, 'Foreign Direct Liability: A New Weapon in the Performance Armoury' (The Royal Institute of International Affairs 2000) 6.

However, victims face a number of obstacles to gain access to justice, which are mainly linked to poverty and corruption issues existing in host countries. Those hurdles are particularly exacerbated in fragile, conflict-affected, and post-conflict States. Obstacles include the unwillingness or incapacity of host State governments to regulate MNEs, the lack of legal enforcement, the absence of an independent and impartial judiciary, and limited execution of judgements. Furthermore, civil society actors may lack sufficient financial resources or legal expertise to support litigation against MNEs.

Ultimately, further analysis, through empirical studies of access to justice in the context of corporate abuse in host States, is urgently needed to better understand the litigation opportunities offered by those countries, not only in the context of legal recourses available before State courts but also in the context of alternative dispute resolution mechanisms.

The next chapter gives an account of the emergence of transnational litigation against MNEs in Europe. It also describes the various cases which have taken place in France and the Netherlands.

CHAPTER 4

The development of transnational litigation against multinational enterprises in Europe

1 Introduction

Transnational litigation against MNEs originally started in the US and England in the 1980s-1990s. However, the nature of this litigation has been different in both countries. While victims of business-related human rights abuse and environmental damage brought general tort claims against parent companies of MNEs in England, in the US, they took advantage of the particularities of the ATS to challenge wrongful corporate conduct in foreign countries. In both countries, plaintiffs have nevertheless hoped to gain faster and easier access to financial compensation and to obtain the recognition of the harm suffered.

By contrast, the practice of transnational litigation against MNEs in European civil law countries (eg France, Belgium, the Netherlands, Germany, and Switzerland) appeared more recently.¹ It has developed under various forms, including criminal, tort, and specialized civil law, as a result of litigators using various legal strategies. Nevertheless, in both common and civil law countries, the existence of a corporate accountability movement has been crucial to trigger the emergence of transnational litigation against MNEs. In particular, cause lawyers and CSOs have supported these claims not only to help victims secure access to remedies but also to raise the visibility of MNE impunity towards human rights and the environment and to trigger legal and policy reform.

Until recently, the US was considered to be the global leader in imposing corporate accountability for human rights abuses, as a result of the existence of the ATS and favourable litigation culture. However, the US courts started declining jurisdiction for extraterritorial corporate abuses and, in 2013, the US Supreme Court restricted the scope of the ATS by holding that the ‘presumption against extraterritoriality applies to claims under the ATS, and

¹ For an overview of litigation in Germany and Switzerland, see ‘Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries. The Kik, Lahmeyer, Danzer and Nestlé Cases’ (ECCHR 2015). For a discussion of the only transnational claim against an MNE in Belgium, see Benoît Frydman and Ludovic Hennebel, ‘Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations’ in Manoj Kumar Sinha (ed), *Business and Human Rights* (SAGE 2013).

nothing in the statute rebuts that presumption.² As a result, experts suggest that Europe may become the preferred destination for transnational litigation against MNEs.³

The aim of Chapter 4 is to provide an account of the development and the characteristics of transnational litigation against MNEs in Europe. Chapter 4 starts with a description of tort litigation against MNEs in England. It then describes transnational civil and criminal claims against MNEs in France and the Netherlands. These latter claims represent the main case studies of this thesis, and a more in-depth analysis of their legal and procedural aspects is provided in subsequent chapters.

2 The emergence of tort litigation against MNEs in England

In Europe, transnational litigation against MNEs started in England where the first tort claims were brought against parent companies of MNEs for harm occurring in the context of their subsidiaries' activities in developing countries. These claims have alleged a variety of harms, such as asbestos-related occupational disease,⁴ oil spills and environmental pollution,⁵ toxic waste dumping,⁶ torture and ill treatment.⁷ According to Meeran, a British lawyer of Leigh Day, the London-based law firm that pioneered this type of litigation, the fundamental objectives of tort litigation against MNEs are twofold: to 'provide a level of compensation to a victim which as much as possible reinstates the victim in the position that he or she would

² *Kiobel v Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013).

³ 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) 90-91; Jodie Kirshner, 'Why is the US Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty, and the Alien Tort Statute' (2012) 30 *Berkeley Journal of International Law* 259.

⁴ Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 *International and Comparative Law Quarterly* 1; Richard Meeran, 'Cape Plc: South African Mineworkers' Quest for Justice' (2003) 9 *International Journal of Occupational and Environmental Health* 218.

⁵ *Arroyo v BP Exploration Company (Colombia) Ltd* [2010] EWHC 1643 (QB); *Arroyo v Equion Energia Ltd* [2013] EWHC 3150 (TCC). See also Diane Taylor, 'BP Oil Spill: Colombian Farmers Sue for Negligence' *The Guardian* (London, 11 January 2011) <<http://www.theguardian.com/environment/2011/jan/11/bp-oil-spill-colombian-farmers>> accessed 30 November 2015.

⁶ *Motto v Trafigura Ltd* [2009] EWHC 1246 (QB), [2011] EWCA Civ 1150.

⁷ *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB), [2010] EWHC 160 (QB). See also Ian Cobain, 'Abuse Claims against Peru Police Guarding British Firm Monterrico' *The Guardian* (London, 18 October 2009) <<http://www.theguardian.com/environment/2009/oct/18/british-mining-firm-peru-controversy>> accessed 30 November 2015.

have been in if the negligence had not occurred,' and to 'act as a deterrent against future wrongdoing by the perpetrator and others generally.'⁸

This section provides an overview of the legal and procedural characteristics of transnational litigation against MNEs in England.

2.1 Jurisdiction and the *forum non conveniens* doctrine

Until 2005, plaintiffs wishing to bring tort litigation against MNEs for conduct committed abroad in the English courts had to deal with the doctrine of *forum non conveniens*. This doctrine 'deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the case before it may be more appropriately tried elsewhere.'⁹ The doctrine of *forum non conveniens* was originally invoked to protect the defendant from being harassed by a plaintiff choosing a genuinely inconvenient or inappropriate forum. However, 'it has become in many instances a device for parent companies to escape liability for tortious acts committed abroad.'¹⁰ Critics of *forum non conveniens* point out that this doctrine is simply not adequate to treat claims that arise in modern transnational business patterns and that it limits accessibility of justice by victims.¹¹ The application of this doctrine in England proved problematic in the context of past claims against MNEs.¹²

The significance of this obstacle was particularly visible in two cases raising personal injuries or death caused by exposure to uranium and asbestos: *Connelly v RTZ Corporation Plc*¹³ and *Lubbe v Cape Plc*.¹⁴ In both cases, the parent company applied for a stay of

⁸ Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 City University of Hong Kong Law Review 1, 3.

⁹ Paxton Blair, 'The Doctrine of Forum Non Conveniens in Anglo-American Law' (1929) 29 Columbia Law Review 1, 1. On the doctrine of *forum non conveniens*, see also Ronald Brand and Scott Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (OUP 2007).

¹⁰ Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 Washburn Law Journal 399, 412.

¹¹ *ibid* 413.

¹² Meeran, 'Tort Litigation' (n 8) 11.

¹³ [1996] QB 361 (CA), [1997] UKHL 30, [1998] AC 854, [1999] CLC 533.

proceedings on the grounds that the host State (Namibia and South Africa respectively) was the more appropriate forum to hear the claim. In *Connelly*, the English High Court granted a stay of proceedings on the grounds that Namibia was the appropriate forum for the trial of the action. However, the Court of Appeal later removed the stay¹⁵ and the House of Lords upheld the decision in 1997.¹⁶ As a result, the case remained under English jurisdiction. Similarly, in *Lubbe*, the proceedings were stayed on the grounds that South Africa was the more appropriate forum for the trial of the group action. Ultimately, the House of Lords removed the stay, refusing to decline jurisdiction in favour of South Africa.¹⁷ In both cases, the House of Lords found that a stay would lead to a denial of justice where the plaintiffs could demonstrate, through evidence, such as the absence of adequate funding or legal representation in the host State, that they would be unable obtain justice in the foreign forum.

In the 2005 *Owusu v Jackson* case,¹⁸ the CJEU foreclosed the use of the *forum non conveniens* doctrine in the English courts.¹⁹ The CJEU reasserted that Article 2(1) Regulation (EC) No 44/2001²⁰ was directly applicable to all EU Member States and that this rule could not be derogated from. In particular, the doctrine of *forum non conveniens* was deemed incompatible with the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters,²¹ as it would undermine the principle of legal certainty and the uniform application of European rules of jurisdiction. Consequently, since *Owusu*, *forum non conveniens* is no longer an issue in transnational cases against MNEs in England, thus leaving the way open for subsequent litigation.²²

¹⁴ [1998] EWCA Civ 1351, [2000] UKHL 41.

¹⁵ *Connelly* [1996] (13).

¹⁶ *Lubbe* [1997] (14).

¹⁷ *Lubbe* [2000] (14).

¹⁸ Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

¹⁹ John Burke, 'Foreclosure of the Doctrine of Forum Non Conveniens under the Brussels I Regulation: Advantages and Disadvantages' (2008) 3 The European Legal Forum I-121.

²⁰ Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

²¹ Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (adopted 27 September 1968, entered into force 1 February 1973) 1262 UNTS 153.

²² Meeran, 'Tort Litigation' (n 8) 14.

2.2 Corporate liability

In the majority of claims against MNEs, plaintiffs have raised the tort liability of the parent company for its negligence arising from a breach of a duty of care.²³ In England, judges have progressively accepted ‘to be more creative and influential in solving the legal problems before them, which enhances the chances of success for plaintiffs who are bringing novel legal arguments.’²⁴ This was particularly visible in *Guerrero*²⁵ and *Chandler v Cape Plc.*²⁶

In *Guerrero*, most of the plaintiffs were Peruvian farmers who had participated in a protest against the proposed development of a mine at Rio Blanco by Monterrico Metals Plc (Monterrico), a UK-based company, in the summer of 2005. During the protest, the plaintiffs were handcuffed and taken blindfold into the mining site where they were arbitrarily detained and tortured for three days by a task force of security guards and police forces.²⁷ In 2009, the plaintiffs brought a tort claim before the English High Court against Monterrico and Rio Blanco Copper SA (Rio Blanco), its indirect Peruvian subsidiary.²⁸ They argued that the companies’ officers should have intervened to prevent the human rights abuse they suffered and were otherwise responsible for their injuries.²⁹ With regard to the parent company, the plaintiffs pleaded that Monterrico instigated, aided, counselled the trespass to their persons, conspired to cause them injury, and conspired to use unlawful means. They also held that Monterrico owed them ‘a duty of care to take reasonable care to avoid foreseeable harm to them and [was] liable in negligence in respect of its own failures to ensure adequate risk management of the mines operation.’³⁰

In May 2009, Monterrico announced its intention to de-list from the Alternative Investment Market, a sub-market of the London Stock Exchange. This announcement raised concerns

²³ *ibid* 3.

²⁴ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004) 16.

²⁵ *Guerrero* (n 7).

²⁶ [2011] EWHC 951 (QB), [2012] EWCA Civ 525.

²⁷ Some women were sexually abused, two protesters were shot in their legs, one man lost an eye to gunshot wounds, and one man suffered a fatal gunshot. See Cobain (n 7).

²⁸ *Guerrero* [2009] (n 7) [4].

²⁹ *ibid* [8].

³⁰ *ibid* [11].

that Monterrico might transfer assets out of England, which would have prevented the plaintiffs from collecting damages had their action been successful. The claimants applied for a freezing injunction, which was granted by the English High Court in June 2009. Monterrico was restrained from disposing of assets to an extent that would leave it with less than £7.2m in England. This freezing injunction was made permanent for £5m in October 2009.³¹ Although the injunction did not deal directly with corporate liability, the English High Court showed inclination to consider liability claims against the companies, in particular Monterrico, for the abuse suffered by the plaintiffs. In particular, Mrs Justice Gloster found that the claimants had a ‘good arguable case’:

The alleged facts as to Monterrico’s responsibility and participation in the alleged brutality against the protesters would appear to be sufficient to found a cause of action. On any basis the facts are keenly disputed to such an extent that it is impossible for me to resolve them in any meaningful way on an interim application. [...] the evidence in relation to the participation, or part played, by Monterrico’s employees or officers, whether actually at the mining site or behind the scenes, is not so clear cut in my judgment as to exonerate the company conclusively from any legal responsibility for the brutality which it appears occurred as a result of the conduct of the police.³²

In July 2011, a few months before the start of the trial, Monterrico offered to compensate the claimants and to cover their legal costs in return for the withdrawal of their claims. However, Monterrico did not admit liability for the harm suffered by the claimants. Ultimately, there was no judgement to establish the liability of Monterrico or Rio Blanco. Nonetheless, this case is significant for demonstrating that transnational claims against MNEs have progressively gained credibility in England. In particular, the English courts appear to be open to hold parent companies liable for harm arising out of their subsidiary’s activities in host countries.

³¹ *ibid.*

³² *ibid* [26-27].

Chandler opened the door to liability of parent companies when they breach their duty of care towards their subsidiaries' employees. Chandler was employed by Cape Building Products Ltd (Cape Products) in England between 1959 and 1962. Cape Products was a wholly-owned subsidiary of Cape Plc that manufactured asbestos products. In 2007, Chandler discovered that he had contracted asbestosis, as a result of exposure to asbestos during his employment with Cape Products. However, by that time, Cape Products no longer existed and its remaining insurance policies excluded asbestosis. Therefore, Chandler brought a claim for damages against the parent company Cape Plc for breach of its duty of care towards Chandler. In 2011, the English High Court ruled that Cape Plc was liable to Chandler on the basis of the common law concept of assumption of responsibility.³³ Applying the three-stage test in *Caparo Industries Plc v Dickman* (1990) for determining whether the situation gives rise to a duty of care, the High Court found that Cape Plc owed, and had breached, a duty of care to Chandler. First, the defendant should have foreseen the risk of injury to the claimant. Second, there was sufficient proximity between Chandler and Cape Plc. Third, it was fair, just, and reasonable for a duty of care to exist. Cape Plc appealed against that decision.

In 2012, the Court of Appeal upheld the English High Court's decision and found that Cape Plc owed a direct duty of care to the employees of Cape Products.³⁴ Given Cape Plc's superior knowledge about the nature and management of asbestos risks, it was appropriate to find that Cape Plc assumed a duty of care either to advise Cape Products on what steps it had to take in light of the knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. In this case, Cape Plc failed to advise on precautionary measures.³⁵ Importantly, the Court of Appeal provided guidance on the conditions under which a parent company could be held liable for harm suffered by its subsidiaries' employees:

³³ *Chandler* [2011] (n 26).

³⁴ *Chandler* [2012] (n 26).

³⁵ *ibid* [78]-[79].

In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.³⁶

Chandler is a landmark case in the development of parent company liability for the harm caused by their subsidiaries in the context of corporate group activities. However, in this case, both the parent company and the subsidiary were registered in England and the subsidiary's activities took place in England. Therefore, it remains uncertain whether the reasoning in *Chandler* would apply to a situation where a parent company is registered in England while the subsidiary is registered in a different country. While waiting for a case to raise such an issue in England, the first interpretation of *Chandler* was given in 2013 by the District Court of The Hague in the Netherlands in the case against Shell, an energy MNE.³⁷ As will be seen in Chapter 6, the Dutch Court refused to apply the reasoning of the Court of Appeal in *Chandler* to situations where the subsidiary is established in a different country than the parent company.

³⁶ *ibid* [80].

³⁷ For a description of the case, see Section 3.2.2 of Chapter 4 of this thesis.

2.3 Procedure

Flexible rules on access to evidence and group action have contributed to make England an attractive forum for transnational claims against MNEs. Nonetheless, the high costs of these lawsuits remain problematic, and recent reforms regarding legal aid and cost-recovery are likely to reduce accessibility of English courts by victims of business-related abuse in host countries.

2.3.1 Access to evidence

Plaintiffs must be able to prove that the parent company had a role in causing the harm to have a cause of action for liability against the parent company. However, MNEs are often in possession of documents containing important evidence. Therefore, it is crucial for plaintiffs to be able to gain access to such material. In England, despite the existence of a number of restrictions, disclosure rules have proved to be advantageous to plaintiffs.³⁸ Furthermore, English courts have showed inclination to order disclosure of documents needed by claimants. For instance, in *Vava v Anglo American South Africa Ltd*,³⁹ the English High Court held that if no orders were to be made requiring the MNE to produce documents, ‘there [was] a very great risk that the claimants [would] be contesting the jurisdiction issue at an unfair disadvantage and that must be addressed.’⁴⁰ As a result, the English disclosure system has been the most favourable to plaintiffs in transnational litigation against MNEs in Europe to date. It has allowed plaintiffs to demonstrate the parent company’s role in the cause of the harm. Importantly, it has reduced the inequality of arms between the parties by improving both plaintiffs’ opportunities to put pressure on MNEs to reach a fast resolution of the dispute, and their capacity to negotiate strategically. Furthermore, when coupled with the existence of transnational activist networks working on corporate accountability issues, the English disclosure system has benefitted plaintiffs in other European countries.

³⁸ Gwynne Skinner and others, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ (ICAR, ECCJ & CORE 2013) 53.

³⁹ [2012] EWHC 1969 (QB).

⁴⁰ *ibid* [69].

In *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd* case,⁴¹ in April 2011, Leigh Day filed a tort claim before the English High Court on behalf of a Nigerian fishing and farming community known as the Bodo City community (Bodo community) against Shell Petroleum Development Company of Nigeria Ltd (SPDC). The claimants sought compensation for the harm they suffered following two successive oil spills, as well as an extensive clean-up of the oil spills and environmental remediation. During the English proceedings, SPDC was required to disclose a number of documents. As will be seen later in this thesis, this had consequences for the proceedings against SPDC and the parent company of Shell in the Netherlands where Nigerian plaintiffs have subsequently raised the information disclosed in England as evidence before the Dutch courts.⁴²

2.3.2 Group action

The availability of collective redress in England has allowed large numbers of victims of corporate abuse to seek justice. For instance, 30,000 claimants brought a group action in *Motto*⁴³ while 15,600 plaintiffs filed a tort claim in *Bodo*. Court procedural rules usually determine the process for seeking collective redress and two routes are possible: 1) the representative action; and 2) the Group Litigation Order (GLO).⁴⁴ In most claims against MNEs, litigants have favoured GLO, which has various advantages. GLO is flexible, obliges the lawyer representing the lead claimants to take instructions from all members of the group, and it binds those who ‘opt-in’ by decisions made for the group. However, GLO requires considerable negotiation between lawyers of each party to the case and courts have a lot of discretion in deciding whether to allow it.⁴⁵ Furthermore, in *Motto*, the MNE required that a minimum of 75% of the claimants accept the terms of the settlement before it could become

⁴¹ [2014] EWHC 1973 (TCC).

⁴² ‘Statement of Appeal Regarding the Dismissal of the Motion to Produce Documents by Virtue of Section 834A DCCP (Interlocutory Judgement District Court of The Hague 14-09-2011)’ (Prakken d’Oliveira 2014) para 8.

⁴³ *Motto* (n 6).

⁴⁴ Skinner and others (n 38) 65. See also Neil Andrews, ‘Multi-Party Proceedings in England: Representative and Group Actions’ (2001) 11 *Duke Journal of Comparative and International Law* 249.

⁴⁵ Skinner and others (n 38) 65.

enforceable.⁴⁶ This practice can pressure claimants into accepting settlements with which they disagree.

2.3.3 Litigation costs

The transnational nature of claims against MNEs and the complexity of the legal issues at stake render this type of litigation particularly costly for plaintiffs. In particular, evidence gathering and representation of large groups of claimants exacerbate litigation costs and lawyers' fees. Excessive litigation costs raise a number of issues relating to accessibility of English courts by poor foreign victims. For instance, they generally deter law firms from engaging in transnational claims against MNEs.

In *Motto*, Leigh Day undertook to represent 30,000 claimants on a conditional fee basis, also known as a 'no win no fee.' This means that, in general, if the plaintiff loses, the lawyer will recover no fees, and, if the plaintiff wins, the lawyer will claim fees, but they will almost always be paid by the defendants.⁴⁷ When acting on such a basis, lawyers can charge a 'success fee,' which is capped at a maximum of 100% of the lawyer's ordinary fee, and the success fee is treated as part of the recoverable costs if the defendants have to pay the claimant's costs.⁴⁸ Moreover, Leigh Day also took on the full costs of evidence gathering in Ivory Coast.⁴⁹ Ultimately, the group action took a huge amount of logistical organization and required a large sum of financial resources.⁵⁰ In the out-of-court settlement, Trafigura agreed to pay the costs of the claimants.⁵¹ Nonetheless, a new judicial battle took place when Leigh Day presented a £105m bill to Trafigura for the entirety of its costs and sought a 100%

⁴⁶ *Motto* [2011] (n 6) [21].

⁴⁷ *ibid* [18].

⁴⁸ *ibid*.

⁴⁹ 'The Toxic Truth about a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Côte d'Ivoire' (Amnesty International & Greenpeace Netherlands 2012) 161.

⁵⁰ Afua Hirsch and Rob Evans, 'Lawyers for Claimants in Trafigura Case Seek £105m in Costs' *The Guardian* (London, 10 May 2010) <<http://www.theguardian.com/world/2010/may/10/trafigura-claimants-lawyers-costs-bill>> accessed 30 November 2015.

⁵¹ *Motto* [2011] (n 6) [22].

success fee.⁵² Trafigura contested the bill, which, it found, was ‘staggeringly high.’⁵³ The costs claim also stirred controversy amongst lawyers and litigation experts.⁵⁴ Leigh Day came under attack for unusually high costs, seeking what was perceived as a huge success fee, and for lack of costs management.⁵⁵ In October 2011, the Court of Appeal upheld an earlier ruling which had reduced Leigh Day’s success fee from 100% to 58%.⁵⁶ However, the parties reached a confidential agreement in December 2011.⁵⁷

The recent entry into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) is likely to affect funding in transnational claims against MNEs. To date, Leigh Day was able to fund its cases based on its ability to recover the full legal costs, success fees, and litigation insurance premiums from the defendant. However, LASPO has generally eliminated the recovery of success fees and insurance premiums.⁵⁸ Furthermore, legal fees for a successful claimant will now have to be paid out of the claimant’s damages and they cannot exceed 25% of the damages.⁵⁹ Finally, it introduced a new test of proportionality in costs assessment. Lawyers and NGOs have contended that LASPO is likely to restrict funding in transnational claims against MNEs, making claims against MNEs even less attractive for other law firms.⁶⁰ In 2011, Ruggie, in his capacity as SRSG, also wrote to the UK Minister of Justice to express his concerns that the proposed reforms would ‘constitute a significant barrier to legitimate business-related human rights claims being

⁵² Katy Dowell, ‘CoA Agrees That Leigh Day Must Reduce Trafigura Success Fee’ (*The Lawyer*, 12 October 2011) <<http://www.thelawyer.com/coa-agrees-that-leigh-day-must-reduce-trafigura-success-fee/1009750.article>> accessed 30 November 2015.

⁵³ Hirsch and Evans (n 50).

⁵⁴ *ibid.*

⁵⁵ Since cause lawyers tend to attract hostility from other lawyers and cause lawyering is often associated to a pure quest for justice, any attempts by lawyers to obtain more remunerative cases may be perceived as ambiguous, even contradictory, with the aims of cause lawyering. Therefore, it is not surprising to see that litigation costs are used by other lawyers and businesses to delegitimize the motives and activities of cause lawyers in transnational litigation against MNEs. See Andrew Boon, ‘Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression’ (2004) 7 *Legal Ethics* 250.

⁵⁶ *Motto* [2011] (n 6).

⁵⁷ ‘£105m Trafigura Costs Dispute Settles, Leaving Lawyers Seeking Clarity on Interest’ (*Legal Futures*, 18 January 2012) <<http://www.legalfutures.co.uk/latest-news/105m-trafigura-costs-dispute-settles-leaving-lawyers-seeking-clarity-on-interest>> accessed 30 November 2015.

⁵⁸ Michael Goldhaber, ‘Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard’ (2013) 3 *UC Irvine Law Review* 127, 133.

⁵⁹ Skinner and others (n 38) 59.

⁶⁰ *ibid.* 134.

brought before UK courts in situations where alternative sources of remedy are unavailable.⁶¹

2.4 Out-of-court settlements

In England, a large number of transnational claims against MNEs have ended in out-of-court settlements between claimants and MNEs.⁶² Settlements are generally hailed by cause lawyers, as they are said to offer a faster solution to lengthy and complex disputes, provide plaintiffs with financial compensation, and limit litigation costs. However, the practice of out-of-court settlements in England demonstrates that they can be difficult to negotiate and implement. Furthermore, they do not ensure that victims have access to remedy and they commonly lead to a denial of liability by MNEs. Chapter 8 of this thesis provides a detailed analysis of the issues arising out of out-of-court settlements.

3 Description of transnational claims against MNEs in France and the Netherlands

Over the last decade, transnational litigation against MNEs has significantly grown in other European countries, including France and the Netherlands. The emergence of cause lawyers and NGOs specifically dedicated to corporate accountability issues has contributed to such developments. In particular, these actors have demonstrated considerable ability and flexibility to use various legal strategies to hold the parent companies of MNEs to account. As a result, noteworthy legal developments have taken place, particularly in relation to court jurisdiction and liability of parent companies. However, plaintiffs continue to face a number of obstacles (eg the prosecution's reluctance to initiate criminal proceedings against MNEs; restricted access to evidence).

This section describes the proceedings in the various transnational cases against MNEs which have taken place in France and the Netherlands to date. An analysis of the legal and procedural aspects of these cases is provided in the subsequent chapters of this thesis.

⁶¹ Letter from John Ruggie to Jonathan Djanogly (16 May 2011) 2.

⁶² For instance, see *Motto* (n 6); *Bodo* (n 41).

3.1 Case studies in France

Transnational litigation against MNEs in France has been noticeable in recent years. French litigation is characterized by the diversity of proceedings used by cause lawyers to hold parent companies of MNEs to account, and the nature of the successes achieved to date.

3.1.1 Illegal deforestation in Cameroon (Rougier)

In the *Rougier* case, in March 2002, a group of Cameroonian villagers and les Amis de la Terre, with advice from Sherpa, a French NGO, initiated criminal proceedings against Rougier (a French timber company), SFID (its Cameroonian subsidiary), and their executive directors by bringing a civil action (*plainte avec constitution de partie civile*) before the examining magistrate (*juge d'instruction*) for Paris.⁶³ The plaintiffs alleged that they suffered harm from the destruction of their agricultural resources and source of income after SFID had illegally cut down trees and built roads on their plantations. They accused the defendants of various criminal offences, including criminal destruction of property, forgery and use of forgery (*faux et usage de faux*), fraud, receiving (*recel*), and corruption of governmental officials. In particular, they alleged that Rougier and its directors had committed receiving⁶⁴ by accepting dividends from SFID which resulted from the commission of the illegal acts.

In June 2003, the examining magistrate dismissed the complaint. The plaintiffs appealed this decision before the Paris Court of Appeal, which upheld the dismissal⁶⁵ on the grounds that, pursuant to Article 113-8 French Criminal Code, the prosecution of misdemeanours could only be instigated at the behest of the prosecutor. In addition, pursuant to Article 113-5 French Criminal Code, there could be no proceedings in France since there had not been any final judicial decision in Cameroon.⁶⁶ Prior to the proceedings in France, the plaintiffs had sought to initiate criminal proceedings in Cameroon. However, in August 2000, the

⁶³ The role of victims in French criminal proceedings is further explained in Section 2.2.1 of Chapter 7 of this thesis.

⁶⁴ Article 321-1 French Criminal Code provides that receiving 'is the concealment, retention or transfer of a thing, or acting as an intermediary in its transfer, knowing that that thing was obtained by a felony or misdemeanour. Receiving is also the act of knowingly benefitting in any manner from the product of a felony or misdemeanour.'

⁶⁵ Chambre de l'Instruction, CA Paris 13 February 2004.

⁶⁶ Further analysis of this case is provided in Section 3.3 of Chapter 5 of this thesis.

prosecutor in Cameroon had dismissed their complaint. The plaintiffs lodged an appeal with the French Court of Cassation, which dismissed it in April 2005.⁶⁷

3.1.2 Forced labour in Myanmar (Total)

In the *Total* case, in August 2002, a group of Burmese villagers, with advice from Sherpa, initiated criminal proceedings against three executive directors of Total, a French oil and gas MNE, by bringing a civil action before the examining magistrate for Nanterre. The claim was related to the construction of the Yadana gas pipeline, a natural gas development project in Myanmar operated by various foreign and national companies, including Total. The project was, and continues to be, plagued by various human rights abuses, including forced labour, land confiscation, forced relocation, rape, torture, and murder.⁶⁸ The plaintiffs faced a major obstacle to finding an appropriate legal basis for the human rights abuses they had suffered. Indeed, at the time of the facts, the French Criminal Code did not criminalize forced labour, in breach of France's obligations under international human rights law. Therefore, the plaintiffs had to find alternative legal bases. Ultimately, they alleged the defendants were criminally liable for abduction and illegal confinement (*séquestration*). Although it was not directly concerned by the proceedings, Total contested the admissibility of the civil action. It requested the dismissal of the complaint on the grounds that illegal confinement did not include forced labour. It also invoked the application of a statute of limitations.

In May 2004, the prosecutor requested the dismissal of the complaint on the grounds that the facts did not qualify as criminal offences under French law. Nonetheless, the examining magistrate rejected the prosecutor's request and continued the judicial enquiry. The prosecutor appealed this decision before the Versailles Court of Appeal, which dismissed the appeal and ordered the continuation of the judicial enquiry in June 2004. The Court of Appeal held that the prosecutor did not have jurisdiction to request the dismissal of the case

⁶⁷ Cass crim 12 April 2005, n° 04-82318.

⁶⁸ See 'Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)' (EarthRights International 2009).

at this stage. However, in November 2005, the plaintiffs and Total settled out-of-court. The examining magistrate subsequently dismissed the complaint in June 2006.⁶⁹

3.1.3 International law violations in Palestine (Alstom & Veolia)

In the *Alstom* case, in February 2007, Association France Palestine Solidarité (AFPS) and the Palestinian Liberation Organisation (PLO) brought a civil claim against Alstom and Veolia, two French energy and transportation MNEs, before the Nanterre Regional Court (*Tribunal de grande instance*).⁷⁰ The plaintiffs sought the annulment of various concession contracts concluded between Israel and Citypass, a joint venture in which Alstom and Veolia participated, to build a light rail system in the occupied West Bank. They also requested an injunction prohibiting the defendants from performing the contract and claimed damages. The plaintiffs argued that the contracts were illicit because they related to a project which violated international law, including international humanitarian law conventions and customary international law.⁷¹

On 15 April 2009, the Nanterre Regional Court held that it had jurisdiction to hear the claim.⁷² However, it rejected that PLO had legal standing as well as the plaintiffs' request to force the defendants to disclose a number of documents. The defendants appealed this decision, but the Versailles Court of Appeal⁷³ and the French Court of Cassation⁷⁴ successively upheld it. The proceedings on the merits nevertheless continued. However, on 30 May 2011, the Nanterre Regional Court rejected the plaintiffs' claim,⁷⁵ and the Versailles Court of Appeal⁷⁶ and the French Court of Cassation successively upheld the ruling. Finally, the plaintiffs lodged an application with the ECtHR, which was rejected in April 2015. In

⁶⁹ Frydman and Hennebel (n 1).

⁷⁰ 'Communiqué sur l'État de la Procédure Engagée par l'AFPS et l'OLP Relative à la Construction et à l'Exploitation d'un Tramway à Jérusalem' (AFPS, 2 October 2008) <<http://www.france-palestine.org/Communique-sur-l-etat-de-la>> accessed 30 November 2015.

⁷¹ Noah Rubins and Gisèle Stephens-Chu, 'Introductory Note to AFPS and PLO v Alstom and Veolia (Versailles Ct App)' (2013) 52 *International Legal Materials* 1157, 1157.

⁷² TGI Nanterre 15 April 2009, n° 07/2902.

⁷³ CA Versailles 17 December 2009, n° 09/04772, 09/04795.

⁷⁴ Cass civ (2) 10 February 2011.

⁷⁵ TGI Nanterre 30 May 2011, n° 10/02629.

⁷⁶ CA Versailles 22 March 2013, n° 11/05331.

parallel to these civil proceedings, AFPS initiated proceedings before the Paris Administrative Court (*Tribunal administratif*) in which it raised the liability of the French State for support provided to the two MNEs. However, the Administrative Court and, later on, the French Administrative Supreme Court (*Conseil d'État*) rejected the claim.⁷⁷

3.1.4 Labour rights abuse in Gabon (COMILOG)

In the *COMILOG* case, COMILOG is a Gabonese mining company created in 1953 when the country was under French colonial rule. It partly belongs to Eramet, a French mining MNE. COMILOG was in charge of the exploitation of manganese in Gabon, and its transportation to the Republic of Congo, until 1991 when it suddenly stopped its activities in the Republic of Congo following a transportation accident. More than 1,000 Congolese employees were left without employment and did not receive any financial compensation from COMILOG. In 2003, Gabon, the Republic of Congo, and COMILOG reached an agreement to compensate the former employees. However, none of the employees received any compensation.

In November 2007, with Sherpa's legal advice, around 900 employees filed a civil claim before the Paris Labour Court against COMILOG and some of its subsidiaries, including COMILOG International and COMILOG France. The plaintiffs alleged that COMILOG had dismissed them without just and sufficient cause and claimed damages. They also alleged they had been unable to obtain justice in their country. Moreover, they requested that COMILOG France and COMILOG International produced a number of documents.⁷⁸

On 26 January 2011, the Paris Labour Court (*Conseil de prud'hommes*) ruled it was incompetent to hear the claims and rejected that the plaintiffs had faced a denial of justice in their own country.⁷⁹ However, on 20 June 2013, the Paris Court of Appeal overturned this judgement and recognized that the French courts had jurisdiction to hear the claims against COMILOG France and COMILOG International while postponing its decision regarding

⁷⁷ *ibid.*

⁷⁸ Conclusions, 17 June 2010, n° 09/10495 (*Akala v COMILOG*).

⁷⁹ Conseil des Prud'Hommes Paris 26 January 2011, n° F 08/06791.

COMILOG.⁸⁰ In addition, it ordered COMILOG France and COMILOG International to disclose a number of documents. On 28 January 2015, the French Court of Cassation upheld the Court of Appeal's ruling.⁸¹ On 10 September 2015, in a landmark ruling, the Paris Court of Appeal accepted to hear the claims against COMILOG and condemned the Gabonese company to pay financial compensation to around 600 plaintiffs who proved that they had been unable to obtain justice in the Republic of Congo.⁸²

3.1.5 Occupational disease in Niger (AREVA)

In the *AREVA* case, in October 2010, the family of Serge Venel brought a civil claim for damages against AREVA, the French parent company of a nuclear energy MNE, and AREVA Nc, its subsidiary, before the Melun Social Security Tribunal (*Tribunal des affaires de la sécurité sociale* or TASS).⁸³ The plaintiffs alleged that Venel was exposed to dangerous levels of radioactive substances while working at the Nigerien uranium mine of COMINAK, a joint venture between AREVA Nc and the State of Niger, between 1978 and 1984. As a result of exposure, Venel died of a lung cancer in 2009. Although COMINAK was the contractual employer of Venel, the plaintiffs argued that AREVA Nc, as the co-employer of Venel,⁸⁴ knew the risk Venel was exposed to and failed to act according to its duty to protect him, for example by ensuring Venel wore a mask or other types of protection. The defendants held the claim was inadmissible because there was no legal relationship between COMINAK, and AREVA Nc and AREVA. Furthermore, they claimed that Nigerien law, and not French law, was applicable to the dispute, because Nigerien law governed the employment contract between Venel and COMINAK, which had been furthermore enforced in Niger.

⁸⁰ CA Paris 20 June 2013, n° 08/07365. The Court of Appeal postponed its decision regarding the French courts' jurisdiction over COMILOG because the communication of a piece of evidence was necessary to decide the matters regarding COMILOG.

⁸¹ Cass soc 28 January 2015, n° 13-22.994 to 13-23.006.

⁸² Concepcion Alvarez, 'Devoir de Vigilance: Une Filiale Gabonaise d'Eramet Condamnée par la Justice Française à Indemniser ses Ex-Salariés' (*Novethic*, 14 September 2015) <<http://www.novethic.fr/empreinte-sociale/sous-traitance/isr-rse/26-ans-apres-la-justice-francaise-donne-raison-aux-salaries-congolais-de-la-comilog-143600.html>> accessed 30 November 2015.

⁸³ The TASS rules on disputes between the French insurance fund and its users.

⁸⁴ For further analysis of the theory of 'co-employment,' see Section 3.5.1 of Chapter 6 of this thesis.

On 11 May 2012, the TASS accepted that AREVA Nc was Venel's co-employer and was liable for gross negligence (*faute inexcusable*).⁸⁵ Furthermore, it considered AREVA Nc's voluntary commitments in the field of CSR to find the company liable. However, on 24 October 2013, the Paris Court of Appeal overturned the judgement.⁸⁶ It rejected that AREVA Nc was Venel's co-employer and held that, as a result, only COMINAK could be held liable. Moreover, it rejected that AREVA Nc's voluntary commitments could demonstrate the company's liability. On 22 January 2015, the French Court of Cassation upheld the ruling of the Court of Appeal.⁸⁷

3.1.6 Other cases

Overall, around a dozen claims alleging human rights abuse or environmental damage have been brought against MNEs in France. While the French courts have heard some of these claims, many of them have been dismissed during the early stages of the proceedings. This section gives an overview of claims which were dismissed at an early stage or have known limited progress to date.

3.1.6.1 Toxic waste dumping in Ivory Coast (Trafigura)

Following the toxic waste dumping in Abidjan,⁸⁸ in June 2007, FIDH, a French NGO, filed a criminal complaint on behalf of a group of Ivorian victims against Claude Dauphin (Trafigura's chairman) and Jean-Pierre Valentini (a senior manager) with the prosecutor for Paris.⁸⁹ FIDH's complaint alleged administration of noxious substances, manslaughter, corruption, and criminal offences related to transboundary movements of hazardous waste.⁹⁰

In April 2008, the prosecutor declined to investigate further after having conducted a preliminary enquiry. According to NGO reports, this decision was made on various grounds, including the lack of lasting attachment to the French territory of Dauphin and Valentini, the

⁸⁵ TASS Melun 11 May 2012, n°10-00924/MN.

⁸⁶ CA Paris 24 October 2013, n° 12/05650, 12/05777, 12/05651.

⁸⁷ Cass civ 22 January 2015, No 13-28.414.

⁸⁸ For a description of the facts, see Section 3.1 of Chapter 3 of this thesis.

⁸⁹ 'L'Affaire du "Probo Koala" ou la Catastrophe du Déversement des Déchets Toxiques en Côte d'Ivoire' (FIDH, LIDHO and MIDH 2011) 43.

⁹⁰ *ibid.*

fact that the companies involved were established outside the French territory, and the existence of simultaneous criminal proceedings in Ivory Coast and the Netherlands.⁹¹ While FIDH appealed this decision, no further progress has been made on this case.⁹²

3.1.6.2 Illegal deforestation & war crimes in Liberia (DLH)

In the *DLH* case, in November 2009, various French and British NGOs (Sherpa, Greenpeace France, les Amis de la Terre, and Global Witness) and a Liberian national filed a criminal complaint with the prosecutor for Nantes against DLH France and DLH Nordisk A/S, two companies of the timber MNE DHL.⁹³ The plaintiffs argued that, between 2001 and 2003, the companies purchased, imported into France, and distributed across Europe timber from Liberian companies which were directly involved in human right abuse and war crimes under Charles Taylor's regime. The complaint alleged influence peddling and destruction of property.

In 2010, the prosecutor opened a preliminary enquiry. However, in February 2012, the case was transferred to the prosecutor for Montpellier where DLH France had the head office of its second factory. In February 2013, the prosecutor dismissed the claim for lack of evidence. In March 2014, the plaintiffs initiated new criminal proceedings by bringing a civil action before the examining magistrate for Montpellier against the companies.⁹⁴ The case was pending at the time of writing.

3.1.6.3 Misleading commercial practices in France (Samsung & Auchan)

In two cases, a group of French CSOs brought criminal proceedings against MNEs for misleading commercial practices. First, in February 2013, three CSOs (Sherpa, Peoples

⁹¹ *ibid*; 'The Toxic Truth' (n 49) 168.

⁹² 'L'Affaire du PROBO KOALA Relancée: Le Président de TRAFIGURA Passible de Poursuites aux Pays-Bas - Quid de la Procédure en France?' (*FIDH*, 3 February 2012) <<https://www.fidh.org/fr/themes/actions-judiciaires/actions-judiciaires-contre-des-etats/Affaire-Cote-d-Ivoire-dechets/L-affaire-du-PROBO-KOALA-relancee>> accessed 30 November 2015.

⁹³ 'L'Entreprise Forestière Internationale DLH Accusée d'Avoir Financé la Guerre au Libéria' (*Global Witness*, 18 November 2009) <<https://www.globalwitness.org/en/archive/7641/>> accessed 30 November 2015.

⁹⁴ 'Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War' (*Global Witness*, 12 March 2014) <<https://www.globalwitness.org/en/archive/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-0/>> accessed 30 November 2015.

solidaires, and Indecosa-CGT) filed a criminal complaint against Samsung France, the French subsidiary of the South Korean MNE Samsung, with the prosecutor for Bobigny. This complaint was brought following a report of China Labor Watch describing labour rights abuse in Samsung's factories in China.⁹⁵ Second, in April 2014, three NGOs (Sherpa, Collectif éthique sur l'étiquette, and Peuples solidaires) filed a criminal complaint against Auchan, a French retailing MNE, with the prosecutor for Lille.⁹⁶ This complaint was brought following the collapse of the Rana Plaza factory in Bangladesh in April 2013.⁹⁷ In both cases, the CSOs alleged that the companies had deceived French consumers by providing false information about the working conditions in their factories. They also accused the companies of violating their voluntary commitments in the field of CSR. In both cases, the prosecutor opened a preliminary enquiry, but the complaints were dismissed in 2015. However, the plaintiffs in the second case initiated new criminal proceedings by bringing a civil action directly before the examining magistrate for Lille in June 2015.⁹⁸ The case was pending at the time of writing.

The characteristics of these two complaints differ from those of other transnational claims against MNEs. First, the legal proceedings did not aim at providing financial compensation to victims. Instead, the plaintiffs were CSOs seeking to challenge the veracity of MNEs' statements with regard to their social commitments and to demonstrate the limits of CSR instruments in regulating MNEs. Second, the plaintiffs sought to pressure the MNEs to change their behaviour vis-à-vis victims. This was particularly visible in the case against Auchan, as, until the complaint, the MNE had refused to participate in a financial fund

⁹⁵ 'Exploitation d'Enfants et Conditions de Travail Indignes: Samsung Accusée de Bafouer ses Engagements Éthiques en Chine' (*Sherpa*, 26 February 2013) <<http://www.asso-sherpa.org/conditions-de-travail-indignes-sherpa-et-ses-partenaires-portent-plainte-contre-samsung-pour-publicite-trompeuse#.VldFZLv81Og>> accessed 30 November 2015.

⁹⁶ 'Le Groupe Auchan Visé par une Plainte pour Pratique Commerciale Trompeuse dans le Cadre de l'Effondrement du Rana Plaza' (*Sherpa*, 24 April 2014) <<http://www.asso-sherpa.org/le-groupe-auchan-vise-par-plainte-pour-pratique-commerciale-trompeuse-dans-le-cadre-de-leffondrement-du-rana-plaza#.Vlg4Lbv81Og>> accessed 30 November 2015.

⁹⁷ 'Bangladesh Factory Collapse Toll Passes 1,000' *BBC News* (London, 10 May 2013) <<http://www.bbc.com/news/world-asia-22476774>> accessed 30 November 2015.

⁹⁸ 'Rana Plaza 2 Ans Déjà – Plainte contre Auchan pour Pratiques Commerciales Trompeuses: Les Associations se Constituent Partie Civile' (*Sherpa*, 8 June 2015) <<http://www.asso-sherpa.org/rana-plaza-2-ans-deja-plainte-contre-auchan-pour-pratiques-commerciales-trompeuses-les-associations-se-constituent-partie-civile#.VbkrMflVhBc>> accessed 30 November 2015.

created to compensate the victims of the Rana Plaza collapse. Third, the complaints also raised visibility around parallel corporate accountability campaigns, such as the Bill relating to the duty of care of parent and controlling companies (French Bill on duty of care),⁹⁹ which was, at that time, before the French Parliament. Fourth, the complaint against Samsung did not target the South Korean parent company, but the French subsidiary. This demonstrates the adaptive capacity and legal creativity of French CSOs to hold MNEs accountable.

3.1.6.4 Protection of privacy & torture in Libya (Amesys)

In the *Amesys* case, in October 2011, FIDH and LDH filed a criminal complaint against Amesys, a French IT company, with the prosecutor for Paris. They alleged that Amesys was complicit in acts of torture, prohibited under French law and international law, committed by the Gaddafi regime before the Arab Spring. The NGOs accused Amesys of providing the Libyan government with software, equipment, and assistance, which subsequently led to the arrest and torture of several individuals.¹⁰⁰

In April 2012, the prosecutor dismissed the complaint, stating that the alleged acts did not qualify as crimes.¹⁰¹ However, in May 2012, an examining magistrate of the War Crimes Unit of the Paris Regional Court ordered a criminal investigation. The prosecutor appealed this decision, but, in January 2013, the Paris Court of Appeal rejected this appeal. The case was pending at the time of writing.¹⁰²

3.1.6.5 Forced labour and modern slavery in Qatar (Vinci)

In the *Vinci* case, in March 2015, Sherpa filed a criminal complaint against Vinci, a French construction company, and the French executive directors of its Qatari subsidiary with the prosecutor for Nanterre.¹⁰³ Sherpa claimed that Vinci was involved in human rights abuses

⁹⁹ Proposition de loi n° 2578 du 11 février 2015 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. Earlier versions of this Bill were presented in 2013.

¹⁰⁰ Skinner (n 38) 81.

¹⁰¹ *ibid.*

¹⁰² 'The Amesys Case' (FIDH 2015).

¹⁰³ 'Mondial 2022 au Qatar : Sherpa Porte Plainte contre Vinci Construction et les Dirigeants de sa Filiale au Qatar QDVC' (*Sherpa*, 23 March 2015) <<http://www.asso-sherpa.org/mondial-2022-au-qatar-sherpa-porte->

committed during the construction of arenas for the 2022 FIFA World Cup in Qatar. The complaint alleged forced labour, slavery, and receiving stolen property.

In April 2015, the prosecutor opened a preliminary enquiry.¹⁰⁴ In parallel, Vinci brought various libel actions against Sherpa and its staff members, claiming significant damages. However, in June 2015, the Paris Regional Court rejected Vinci's claims.¹⁰⁵ The case was pending at the time of writing. Importantly, Sherpa's complaint coincided with the debate on the French Bill on duty of care in the French Parliament. Sherpa used this complaint as an opportunity to urge French policy-makers to enact the bill.¹⁰⁶

3.1.6.6 Land grabbing in Cambodia (Bolloré)

In the *Bolloré* case, in July 2015, a group of Cambodians brought a tort claim against Bolloré, a French MNE, and Compagnie du Cambodge, a subsidiary of Bolloré, before the Nanterre Regional Court.¹⁰⁷ The plaintiffs claimed damages for land grabbing, environmental destruction, and human rights abuse in Cambodia. This is the first tort claim against an MNE in France since the emergence of transnational litigation against MNEs. The case was pending at the time of writing.

3.2 Case studies in the Netherlands

Over the past decade, transnational litigation against MNEs in the Netherlands has received a lot of international attention. The tort claim against Shell for oil pollution in Nigeria, the first tort claim to occur in Europe outside of England, and the criminal claim against Trafigura for toxic waste dumping in Ivory Coast have been particularly emblematic. Nevertheless, the

plainte-contre-vinci-construction-et-les-dirigeants-de-sa-filiale-au-qatar-qdvc#.VRGd0eH9miw> accessed 30 November 2015.

¹⁰⁴ 'Accusations de Travail Forcé au Qatar: Enquête sur Vinci Ouverte à Nanterre' *Le Parisien* (Paris, 25 April 2015) <<http://www.leparisien.fr/flash-actualite-sports/accusations-de-travail-force-au-qatar-enquete-sur-vinci-ouverte-a-nanterre-25-04-2015-4723901.php#xtref=https%3A%2F%2Fwww.google.co.uk%2F>> accessed 30 November 2015.

¹⁰⁵ 'Vinci Échoue à Faire Condamner Sherpa pour Atteinte à la Présomption d'Innocence' *Le Moniteur* (Paris, 30 June 2015) <<http://www.lemoniteur.fr/article/vinci-echoue-a-faire-condamner-sherpa-pour-atteinte-a-la-presomption-d-innocence-28983008>> accessed 30 November 2015.

¹⁰⁶ 'Mondial 2022 au Qatar' (n 103).

¹⁰⁷ Dan Israel, 'Bolloré Attaqué en France pour ses Plantations au Cambodge' *Mediapart* (Paris, 28 July 2015) <<http://www.mediapart.fr/article/offert/00e872ed766ee319161b3513f8f2066d>> accessed 30 November 2015.

development of transnational litigation against MNEs in the Netherlands has been less spectacular in comparison with litigation in France in terms of number of claims, litigation strategies, and results.

3.2.1 Toxic waste dumping in Ivory Coast (Trafigura)

Following the toxic waste dumping in Abidjan,¹⁰⁸ various proceedings have taken place in the Netherlands. Given the complexity of the proceedings, the following section offers a simplified description of the litigation against Trafigura.

A first set of criminal proceedings focused on the events that occurred in the Netherlands. In June 2008, the Dutch prosecutor brought charges against Trafigura Beheer BV (Trafigura BV) and one executive of Trafigura Ltd for illegal export of hazardous waste to Ivory Coast and other criminal offences.¹⁰⁹ In July 2010, the Amsterdam District Court found that the defendants were guilty of delivering and concealing hazardous goods, and condemned Trafigura BV to pay a €1m fine.¹¹⁰ In December 2011, the Amsterdam Court of Appeal upheld the ruling and the fine against Trafigura BV. It held that ‘Trafigura [BV] failed to disclose the harmful nature of the waste to APS, knowing that the waste was harmful for life and/or health and moreover that Trafigura [BV] illegally exported the waste to Ivory Coast.’¹¹¹ Trafigura BV and the prosecutor appealed this ruling to the Dutch Supreme Court (*Hoge Raad*).¹¹²

In parallel, in 2008, Claude Dauphin, Trafigura’s chairman, was initially charged with various criminal offences, including the illegal export of waste from the Netherlands. No progress was made until January 2012 where the Amsterdam Court of Appeal decided that Dauphin could be prosecuted. Dauphin challenged the jurisdiction of the Dutch Court and the absence of evidence, but the Court of Appeal dismissed his claim.

¹⁰⁸ For a description of the facts, see Section 3.1 of Chapter 3 of this thesis.

¹⁰⁹ ‘The Toxic Truth’ (n 49) 156.

¹¹⁰ However, in July 2011, the Court of Appeal annulled the verdict against Trafigura Ltd’s executive.

¹¹¹ ‘The Toxic Truth’ (n 49) 159.

¹¹² *ibid.*

Ultimately, in November 2012, the prosecutor and Trafigura BV reached an out-of-court settlement after which the criminal proceedings against Trafigura BV and Dauphin were withdrawn. Neither the MNE nor its chairman faced any conviction or admitted liability. The prosecutor stated in justification of his decision that ‘continuing the proceedings might take many more years,’ but ‘the cases will be concluded in a way that makes clear that violation of international regulations for hazardous waste will not be tolerated.’¹¹³ However, NGOs, such as Greenpeace, criticized the settlement for being ‘a very weak slap on the wrist for a large corporation like Trafigura.’¹¹⁴

A second set of criminal proceedings focused on the events that occurred in Ivory Coast. In 2008, the Dutch prosecutor decided not to investigate potential criminal offences in Ivory Coast. However, in 2009, Greenpeace appealed this decision. In April 2011, the Court of Appeal of The Hague held that the Dutch courts did not have jurisdiction for events in Ivory Coast and rejected Greenpeace’s complaint.¹¹⁵

A new set of civil proceedings was recently initiated. In February 2015, a group of French and Dutch lawyers brought a tort claim against Trafigura on behalf of more than 110,000 Ivorian victims before the Dutch courts.¹¹⁶ They alleged that the MNE caused bodily, moral, and economic injury to the plaintiffs and they requested that Trafigura pay each plaintiff €2,500 in damages and clean up the pollution. It appears that the victims in these proceedings did not receive compensation following the out-of-court settlement in England. The case was pending at the time of writing.

¹¹³ ‘Trafigura’s Punishment Final, Top Executive Settles’ (*Openbaar Ministerie*, 16 November 2012) <<http://www.om.nl/onderwerpen/milieucriminaliteit/@31000/trafigura-punishment/>> accessed 30 November 2015.

¹¹⁴ ‘Trafigura Fine a Set-Back for Africa’s Environmental Justice’ (*Greenpeace Africa*, 21 November 2012) <<http://www.greenpeace.org/africa/en/News/news/Greenpeace-Trafigura-fine-a-set-back-for-Africas-environmental-justice/>> accessed 30 November 2015.

¹¹⁵ CA The Hague 12 April 2011, NJFS 2011, 137. See also ‘The Toxic Truth’ (n 49) 160.

¹¹⁶ ‘100,000 Victims of Ivory Coast Toxic Spill Launch Dutch Suit’ *AFP* (The Hague, 20 February 2015) <<http://news.yahoo.com/100-000-victims-ivory-coast-toxic-spill-launch-164550722.html>> accessed 30 November 2015.

3.2.2 Oil pollution in Nigeria (Shell)

In the *Shell* case, in May 2008, several victims of oil spills in Nigeria and Milieudefensie, the Dutch branch of Friends of the Earth, brought a tort claim against Royal Dutch Shell Plc (Shell Plc), the parent company of Shell,¹¹⁷ and SPDC, its Nigerian subsidiary, before the Dutch courts. The plaintiffs claimed that both companies were liable for the environmental and economic damages they had suffered. The defendants denied Shell Plc's liability for the harm caused by its Nigerian subsidiary and contested the Dutch courts' competence to hear tort claims against SPDC.¹¹⁸ However, in December 2009, the District Court of The Hague held it had jurisdiction to hear the claims.¹¹⁹ Despite this first success, the claimants suffered a blow in September 2011 when the District Court rejected their request to access evidence in the defendants' possession.¹²⁰

In January 2013, the District Court sentenced SPDC to pay damages in one of the claims while dismissing the other claims. In the first claim, the District Court held that, pursuant to Nigerian Law, SPDC had violated its duty of care and was therefore liable in tort for negligence.¹²¹ In the other claims, the District Court found that the contested oil spills had not been caused by defective maintenance by SPDC, which had taken sufficient precautions to prevent sabotage from its underground oil pipelines, but by sabotage from third parties. Applying Nigerian law, the District Court found that an oil company is not liable for oil spills caused by sabotage.¹²² As regards the liability of Shell Plc, the District Court dismissed all the claims, since, under Nigerian law, a parent company is not obliged to prevent its subsidiaries from harming third parties abroad. Both the claimants and the corporate defendants appealed this ruling.

¹¹⁷ Shell Plc is incorporated in England and Wales but has its headquarters in The Hague.

¹¹⁸ 'Motion for the Court to Decline Jurisdiction and Transfer the Case, Also Conditional Statement of Defense in the Main Action' (De Brauw Blackstone Westbroek 13 May 2009).

¹¹⁹ DC The Hague 30 December 2009 Judgement in Motion Contesting Jurisdiction, 330891/HAZA09-579.

¹²⁰ DC The Hague 14 September 2011, Judgement in the Ancillary Actions Concerning the Production of Exhibits and in the Main Actions, 337050/HAZA09-1580 (*Akpan v Royal Dutch Shell Plc*); 330891/HAZA09-0579 (*Oguru v Royal Dutch Shell Plc*); 337058/HAZA09-1581 (*Dooh v Royal Dutch Shell Plc*).

¹²¹ DC The Hague 30 January 2013, C/09/337050/HAZA09-1580 (*Akpan*).

¹²² DC The Hague 30 January 2013, C/09/330891/HAZA09-0579 (*Oguru*); C/09/337058/HAZA09-1581 (*Dooh*).

In September 2013, the claimants filed a motion to request the defendants to produce specific documents.¹²³ In October 2014, new information emerged from the *Bodo* case in England. It appeared that the documents made public by SPDC during the disclosure stage of the English litigation showed that the company did not take precautionary steps to avoid oil spills in the Niger Delta as it had claimed before the Dutch courts.¹²⁴ Some of this information was directly relevant to the Dutch case and used by plaintiffs during the proceedings. The case was pending at the time of writing.

3.2.3 War crimes and crimes against humanity in Palestine (Riwal)

In the *Riwal* case, March 2010, Al-Haq, a Palestinian NGO, submitted a criminal complaint to the prosecutor for Rotterdam against Lima Holding BV and other companies of the Riwal group, as well as a number of executive directors.¹²⁵ Al-Haq alleged that, since 2004, the companies had contributed to the commission of war crimes and crimes against humanity in the Netherlands and/or the Occupied Palestinian Territory. The complaint referred directly to contributions of the Riwal companies to the construction of the wall and illegal settlements by Israel in the West Bank.¹²⁶

Following the complaint, the prosecutor opened an investigation into the Riwal group's activities in Israel and the Occupied Palestinian Territory. However, in 2013, he decided that it would not initiate criminal proceedings against the Riwal group, despite evidence that Lima Holding BV had been involved in renting out cranes and aerial working platforms used in the construction of the wall and the settlements.¹²⁷ The prosecutor explained that the company had provided a limited contribution to the building of the wall and the settlements. Furthermore, the company had confirmed that it was no longer working in Israel and the

¹²³ 'Motion to Produce Documents' (Prakken d'Oliveira 10 September 2013) 200.126.843 (*Dooh*); 200.126.849 (*Milieudefensie v Royal Dutch Shell Plc*); 200.126.834 (*Oguru*).

¹²⁴ Amelia Smith, 'Shell Lied to Dutch Court About Oil Spills in Nigeria, Say Friends of the Earth' *Newsweek* (17 November 2014) <<http://europe.newsweek.com/shell-lied-dutch-court-about-oil-spills-nigeria-say-friends-earth-284900>> accessed 30 November 2015.

¹²⁵ 'Corporate Complicity, Access to Justice and the International Legal Framework for Corporate Accountability' (International Commission of Jurists 2013) 4.

¹²⁶ 'Al Haq/Report of War Crimes and Crimes against Humanity by Riwal' (Complaint to National Public Prosecutor's Office) (Böhler Advocaten 15 March 2010).

¹²⁷ Letter of Dismissal from National Public Prosecutor's Office to Mr Van Eijck (14 May 2013).

West Bank. Finally, the prosecutor held that the case was very complex, would require a significant amount of resources, and that further required investigation in Israel would probably not be possible due to lack of cooperation from the Israeli authorities.

4 Conclusions

When access to justice in the host State is impossible, it is said that transnational litigation against MNEs in the home country may offer victims of corporate abuse the most viable opportunity to access justice. To date, this type of litigation has mainly occurred in common law countries, such as the US. Nonetheless, the restrictive interpretation of the ATS by the US courts and the increasing number of claims in European civil law States may result in Europe becoming the primary venue for transnational claims against MNEs.

Until now, England has been the leading European country where MNEs have faced transnational liability claims. The existence of active cause lawyers, flexible rules on access to evidence and group action, the abandonment of the *forum non conveniens* doctrine, and the opportunity to secure financial compensation through out-of-court settlements with MNEs have contributed to the emergence of transnational litigation against MNEs in England. However, this type of litigation presents a number of limits. Litigators have relied exclusively on the use of tort law as a litigation strategy, neglecting the opportunities offered by other types of proceedings. They have also focused excessively on obtaining financial compensation through out-of-court settlements, limiting the pursuit of other objectives such as the development of legal standards of corporate accountability for MNEs.

By contrast, litigators in France and the Netherlands have used diverse legal strategies, such as criminal or labour proceedings, to hold companies liable in the context of MNE activities. Nonetheless, if some victories have been won on various aspects, such as court jurisdiction, a number of obstacles still exist, such as accessing evidence and reluctance by prosecutors and judges to hold MNEs to account. As a result, the success of transnational litigation against MNEs to hold parent companies liable in the context of their foreign activities and to secure remediation to victims remains limited in European civil law countries. Ultimately, it appears

that both host and home States face some obstacles to holding MNEs liable for human rights and environmental abuse and offer remediation to victims.

The next chapter focuses on issues of jurisdiction and applicable law in the context of civil and criminal proceedings against MNEs in France and the Netherlands.

CHAPTER 5

Jurisdiction and applicable law in transnational claims against multinational enterprises in France and the Netherlands

1 Introduction

Transnational litigation against MNEs raises a number of legal questions regarding whether the host or the home State courts should have jurisdiction to hear tort or civil claims, and whether to apply the host or the home State law to the case. Similarly, criminal authorities in home countries must decide whether they are competent to pursue companies for criminal offences taking place in host countries. Therefore, the rules governing such aspects are crucial, as they directly affect whether victims of corporate harm can access the legal system of MNEs' home country to obtain a remedy.¹ In European home countries, the harmonization of private international law in the EU has had a direct effect on the content of these rules in civil matters at the domestic level. As a result, France and the Netherlands share, to some extent, similar rules relating to jurisdiction and the law applicable to civil claims.

The aim of Chapter 5 is to understand the effect of rules governing the exercise of jurisdiction by French and Dutch courts and the choice of the law applicable to transnational civil transnational claims against MNEs. It also explores the situations where French and Dutch criminal authorities may be entitled to sue MNEs for criminal offences taking place in host countries. Chapter 5 starts by describing the EU regime of private international law and its impact on domestic litigation against MNEs in France and the Netherlands. It then provides a summary of domestic procedural rules regarding the exercise of criminal jurisdiction by both French and Dutch courts over extraterritorial criminal offences.

¹ Ebbesson argues that the choice of law has justice implications because the distribution of burdens and benefits as well as the opportunities for participation depend on the values and priorities reflected in the law to be applied. See Jonas Ebbesson, 'Piercing the State Veil in Pursuit of Environmental Justice' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 282.

2 The influence of European private international law on transnational civil claims against MNEs

Private international law governs transnational disputes that arise from the interactions between private persons. Therefore, it is directly relevant to the study of transnational civil claims against MNEs in France and the Netherlands. First, this type of litigation involves private parties from various countries, including host State plaintiffs and MNEs with their statutory seat, central administration, or main place of business in France or the Netherlands. Second, in some cases, the damage may have occurred in the host country while the event giving rise to the damage may have occurred in the home country. Third, litigators have brought transnational claims against MNEs under various branches of civil law, including tort and labour law, to which private international law applies.

When faced with a civil claim against an MNE for harm occurring in a host country, French and Dutch courts must assess whether they are competent to hear the claim and which law should be applied. Domestic rules of private international law normally guide judges in this exercise. However, a number of EU regulations have harmonized such rules across Member States, including France and the Netherlands. In particular, two regulations have a direct impact on whether civil claims can be brought against MNEs in EU home countries: Regulation 44/2001 (Brussels I Regulation),² which defines the rules domestic courts must apply when they assess whether they are competent to hear a claim; and Regulation 864/2007 (Rome II Regulation),³ which defines the rules domestic courts must apply when they assess the law applicable to a claim. Each will be described in turn below.

2.1 Court jurisdiction over civil claims against MNEs

The Brussels I Regulation provides that domestic courts in EU Member States, including France and the Netherlands, have jurisdiction over companies domiciled in their territory.⁴

² Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.

³ Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

⁴ According to its Article 1, the Brussels I Regulation shall apply to civil and commercial matters regardless of the nature of the court. This means that specialized civil courts, such as labour courts, must apply the regulation.

However, each Member State is free to determine which court is competent to hear civil claims against defendants domiciled outside of the EU, such as companies based in host States.

2.1.1 The Brussels I Regulation

Under the Brussels I Regulation, different rules of court jurisdiction will apply to transnational civil claims against MNEs depending on whether the corporate defendant is domiciled in an EU Member State.

2.1.1.1 EU defendant

According to Article 2(1) Brussels I Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. When the defendant is a company, or a legal person, the defendant is domiciled wherever it has its statutory seat, its central administration, or its principal place of business.⁵ Therefore, the court of a Member State will have jurisdiction to hear a civil claim against the member of an MNE if it has its statutory seat, its central administration, or its principal place of business in that State. For instance, in *Alstom*, the Nanterre Regional Court held it had jurisdiction to hear the claims against Alstom and Veolia, as both defendants had their statutory seat in France.⁶ Similarly, in *Shell*, the District Court of The Hague decided to exercise jurisdiction over the parent company Shell Plc because it was headquartered in the Netherlands.⁷

2.1.1.2 Non-EU defendant

The situation is different for defendants which are not domiciled in a Member State, such as foreign subsidiaries of MNEs. Article 4(1) Brussels I Regulation provides that the law of each Member State determines the jurisdiction of its courts in such a situation (ie subsidiary

⁵ Brussels I Regulation, Article 60(1).

⁶ TGI Nanterre 15 April 2009, n° 07/2902.

⁷ DC The Hague 30 December 2009, Judgement in Motion Contesting Jurisdiction, 330891/HAZA09-579.

jurisdiction). Therefore, there is no uniform approach between Member States in determining whether to exercise jurisdiction over defendants domiciled in foreign countries.⁸

In France, jurisdiction over defendants domiciled in a foreign country is determined by a combination of rules on ordinary jurisdiction and privileged jurisdiction contained in the French Code of Civil Procedure (*Code de procédure civile*).⁹ Under French law, the ‘territorially competent court is [...] that of the place where the defendant lives.’¹⁰ In tort matters, a plaintiff may also bring a claim, at his choosing, before ‘the court of the place of the event causing liability’ or before the court of the place where the damage was suffered.¹¹ In the context of transnational civil litigation against MNEs, French law does not allow foreign plaintiffs to sue a non-EU domiciled subsidiary before French courts, as French law requires a nexus with France.

Nonetheless, based on Article 42(2) French Code of Civil Procedure, French courts have developed rules for the consolidation of claims in cases including co-defendants.¹² As a result, a defendant domiciled in a foreign State can be sued before a French court as a co-defendant in proceedings brought against another defendant domiciled in France. If the plaintiffs decide to sue a French parent company and its foreign subsidiary together, they may choose to bring the case before the court of the place where one of the entities is domiciled (eg France if the parent company is domiciled in France).¹³ However, a number of criteria must be met for French courts to have jurisdiction. First, the claims against both defendants must bear ‘close connected links.’ Therefore, the object of the dispute has to be identical. Second, one of the defendants must be domiciled in France. As a result, French courts lack jurisdiction if the

⁸ Arnaud Nuyts, ‘Study on Residual Jurisdiction - Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations’ (Report prepared for the European Commission, 2007) 21.

⁹ Pierre Raoul-Duval and Marie Stoyanov, ‘Comparative Study of “Residual Jurisdiction” in Civil and Commercial Disputes in the EU: National Report for France’ (Report prepared for the European Commission, 2007) 6.

¹⁰ French Code of Civil Procedure, Article 42(1). For a translated version of the French Code of Civil Procedure, see Yves-Antoine Tsegaye, ‘Code of Civil Procedure’ (*Legifrance*, 30 September 2005) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

¹¹ French Code of Civil Procedure, Article 46.

¹² Raoul-Duval (n 9) 14.

¹³ French Code of Civil Procedure, Article 42(2).

only basis for jurisdiction lies in a choice-of-court clause or if one of the defendants is a French national. Third, the defendant must be ‘an actual, serious defendant in order to avoid any fraudulent choice of jurisdiction by initiating a fictitious claim against a French resident.’¹⁴

French courts have also developed the rule of ‘denial of justice’ (*déni de justice*), which is similar to the *forum necessitatis* rule.¹⁵ Accordingly, French courts may exercise jurisdiction over claims for which they would normally have no jurisdiction as long as two requirements are met. First, the plaintiff must prove it is impossible for him to bring the case in a foreign court. Impossibility can be based either on factual grounds (eg the plaintiff would be seriously threatened if he returned to the foreign country) or legal grounds (eg the plaintiff can show that the foreign court has already ruled it does not have jurisdiction). If a foreign court rules that the case is inadmissible or dismisses the case on the merits, a denial of justice cannot be found, as the exercise of *forum necessitatis* would be deemed inappropriate.¹⁶ Second, there must be some nexus with French courts.¹⁷ This requirement is usually easily achieved, as the most stringent case-law merely requires that the plaintiff has his habitual residence in France.¹⁸

In transnational civil claims against MNEs, until recently, jurisdiction based on denial of justice had received mixed reception from French courts. However, this trend appears to be changing.

In *COMILOG*, the plaintiffs claimed that the Paris Labour Court had jurisdiction to hear the claims against COMILOG on various grounds.¹⁹ First, they argued that, pursuant to Article

¹⁴ Raoul-Duval (n 9) 14.

¹⁵ Stephanie Redfield, ‘Searching for Justice: The Use of Forum Necessitatis’ (2014) 45 *Georgetown Journal of International Law* 893, 911.

¹⁶ *ibid* 912.

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ Conclusions, 17 June 2010, n° 09/10495 (*Akala v COMILOG*).

15 French Civil Code (*Code civil*),²⁰ French courts had jurisdiction over COMILOG, since the company was French at the time of its creation. They also alleged that the Paris Labour Court was the relevant tribunal to hear the claims on the grounds of Article R 1412-1 French Labour Code (*Code du travail*), which provides that an employee may bring a claim before the labour court of the place where the agreement was contracted or of the place where the employer is established. Second, the plaintiffs claimed that French courts should exercise jurisdiction over an international dispute when one of the parties cannot possibly bring a claim before a foreign court, even in the absence of significant links with France or when the defendant does not have French nationality. This was the case for the plaintiffs who had been denied justice in the Republic of Congo. To support their claim, they invoked the right to a fair trial and the right to access a court under Article 6(1) ECHR. In particular, they held that, '[p]ursuant to Article 6(1) ECHR, the right of access to a court is breached when one of the parties cannot bring a claim in front of any courts. In such situation, French courts have international jurisdiction based on the principle of denial of justice.'²¹

However, in 2011, the Paris Labour Court ruled it was incompetent to hear the claims against all the defendants, including COMILOG.²² It found the case had no nexus with France, given that COMILOG was a Gabonese company and that all the plaintiffs were of Congolese nationality. Furthermore, it rejected the existence of denial of justice in the plaintiffs' country:

The denial of justice cannot be based on the fact that French judges would have reasons to suspect foreign courts or the manner in which justice is administered in the country which normally has jurisdiction, or the fact that the outcome of the merits of the case in the way it could be obtained abroad goes against French public policy.²³

²⁰ Article 15 French Civil Code provides that a 'French person may be brought before a court of France for obligations contracted by him in a foreign country, even with an alien.' For a translated version of the French Civil Code, see David Gruning, 'Civil Code' (*Legifrance*, 1 July 2013) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

²¹ Conclusions (n 19) 3 (author's translation).

²² Conseil des Prud'Hommes Paris 26 January 2011, n° F 08/06791.

²³ *ibid* (author's translation).

The Labour Court concluded that the plaintiffs had not sufficiently demonstrated that they could not materially access courts in Gabon or the Republic of Congo.

However, the Paris Court of Appeal overturned the Labour Court's ruling, and accepted that the French courts had jurisdiction over COMILOG France and COMILOG International pursuant to Article 15 French Civil Code and Article 42(2) French Code of Civil Procedure.²⁴ Importantly, in a landmark ruling of September 2015, the Paris Court of Appeal accepted that the French courts had jurisdiction over COMILOG on the grounds that around 600 claimants, proving they had brought a claim in the Republic of Congo, had been denied justice.²⁵

In *Alstom*, in 2009, the Nanterre Regional Court held it had jurisdiction over the corporate defendants, as both companies were French and had their statutory seat in France. However, it raised that:

Given the risk of a denial of justice inherent in the nature of this dispute, the French court is, *prima facie*, competent to solve the dispute in order to guarantee the free access to justice by the parties involved, in pursuance of Article 6(1) ECHR. It is well established that the risk of denial of justice is a criterion for the jurisdiction of French courts as soon as the dispute has a connection with France, which is the case in the circumstances of the present case, the defendants being French companies based in France, Alstom recognizing that its plants in La Rochelle, Le Mans, Le Creusot, Villeurbanne, and Tarbes are producing 46 cars of the Jerusalem tramway.²⁶

In the Netherlands, Articles 2 and 3 Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) provide for general rules of jurisdiction over foreign companies not domiciled in the EU. Two situations can be distinguished. First, if the legal proceedings are

²⁴ CA Paris 20 June 2013, n° 08/07365.

²⁵ Concepcion Alvarez, 'Devoir de Vigilance: Une Filiale Gabonaise d'Eramet Condamnée par la Justice Française à Indemniser ses Ex-Salariés' (*Novethic*, 14 September 2015) <<http://www.novethic.fr/empreinte-sociale/sous-traitance/isr-rse/26-ans-apres-la-justice-francaise-donne-raison-aux-salaries-congolais-de-la-comilog-143600.html>> accessed 30 November 2015.

²⁶ *Alstom* (n 6) (author's translation).

initiated by a writ of summons, the Dutch courts will have jurisdiction if the defendant has his domicile or habitual residence in the Netherlands.²⁷ Second, if the legal proceedings are initiated by a petition, the Dutch courts will have jurisdiction under three circumstances: 1) when the petitioner, or one of the petitioners, has his domicile or habitual residence in the Netherlands; 2) when the petition relates to proceedings which are, or have to be, initiated, by a writ of summons and which fall under the jurisdiction of the Dutch courts; or 3) when the legal proceedings are otherwise sufficiently connected with the Dutch legal sphere.²⁸

The application of these rules of jurisdiction rather limits the number of situations where domestic courts will be competent to hear transnational claims against foreign subsidiaries. First, the foreign subsidiary and the plaintiffs are usually domiciled in the host country, not in the Netherlands. Second, plaintiffs may struggle to demonstrate that the legal proceedings are sufficiently connected with the Dutch legal sphere in cases where they have limited access to evidence.

Nevertheless, there are a number of additional grounds on which Dutch courts may exercise jurisdiction over transnational claims against MNEs involving host State subsidiaries. For instance, in the context of tort proceedings, Dutch courts have jurisdiction if the event that caused the damage occurred in the Netherlands.²⁹ Furthermore, Dutch law enables consolidation of claims in cases of co-defendants and, as a result, plaintiffs may sue a parent company together with its foreign subsidiary before the Dutch courts. Article 7(1) Dutch Code of Civil Procedure provides that, when the Dutch court has jurisdiction over one of the defendants, it has also jurisdiction over the other defendants involved in the same proceedings, provided that the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing. For instance, in *Shell*, the District Court of The Hague found that, since the same set of facts in Nigeria had to be assessed in

²⁷ Dutch Code of Civil Procedure, Article 2.

²⁸ *ibid* Article 3.

²⁹ *ibid* Article 6(e).

respect of the claims against both Shell Plc and SPDC, there was a connection to such an extent that reasons of efficiency justified a joint hearing of the claims.³⁰

Another useful provision for plaintiffs is Article 9 Dutch Code of Civil Procedure which provides for the application of the *forum necessitatis* rule. Dutch courts may exercise jurisdiction over claims that have no nexus with the Dutch legal order if, for instance, a civil case outside the Netherlands appears to be impossible.³¹ Similar to France, impossibility may be based on factual or legal impossibility. Factual impossibility may include circumstances beyond the foreign country's control, such as natural disasters or war, while legal impossibility may be demonstrated by denial of access to a tribunal due to race or religion.³² Moreover, Dutch courts may have jurisdiction if the legal proceedings have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to the judgement of a foreign court.³³ While Dutch courts have used the *forum necessitatis* rule to accept jurisdiction, even when no sufficient connection with the Netherlands exists, they have also refused to accept jurisdiction over claims based on prohibitively high litigation costs in the alternative forum.³⁴

2.1.2 The recast Brussels I Regulation

Following the review of the Brussels I Regulation, a recast version came into force on 10 January 2013.³⁵ The basic jurisdictional rules in the recast Brussels I Regulation remain the same as in the original version. The starting point is the domicile of the defendant. Persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.³⁶ Furthermore, if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that

³⁰ *Shell* (n 7) [3.4]-[3.7].

³¹ Dutch Code of Civil Procedure, Article 9 (b).

³² Redfield (n 15) 913.

³³ Dutch Code of Civil Procedure, Article 9(c).

³⁴ Redfield (n 15) 914.

³⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2012] OJ L351/1 (recast Brussels I Regulation).

³⁶ *ibid* Article 4(1).

Member State.³⁷ Ultimately, the recast Brussels I Regulation did not extend the general rules of jurisdiction to non-EU domiciled defendants, as had been suggested by the EC.³⁸ During the review, this suggestion had been highly contested by corporate accountability CSOs and litigators, who claimed it would restrict the opportunities for foreign victims of business-related abuses to be heard in courts of EU Member States.³⁹ It should also be noted that the recast Brussels I Regulation did not incorporate a proposal to include the rule on *forum necessitatis* as suggested by the EC.⁴⁰

The recast Brussels I Regulation did, however, introduce novel provisions on *lis pendens*.⁴¹ The courts of Member States have discretion to stay proceedings in favour of foreign courts of non-EU countries, but only in limited circumstances, such as in the case of pending proceedings before foreign courts. Interestingly, these new rules apply only to proceedings over which the courts of Member States have jurisdiction based on the EU domicile of the defendant. Furthermore, they distinguish between two situations. First, a Member State's court is seized of an action involving the same cause of action and between the same parties as the proceedings pending before the court of a third State (Article 33). Second, a Member State's court is seized of an action related to the action in the court of a third State (Article 34).

The new rules on *lis pendens* introduced by the recast Regulation may be problematic for bringing transnational claims against MNEs. One of the main difficulties faced by a majority of plaintiffs is to satisfy the requirement of jurisdictional nexus with the courts of Member States, to which the application of Articles 33 and 34 adds further difficulty. Even when it has jurisdiction to hear a claim against either an EU-domiciled parent company or an EU-domiciled parent company together with its foreign subsidiary, a Member State's court can stay proceedings if proceedings are pending before the host State court. Consequently, the

³⁷ *ibid* Article 6(1).

³⁸ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters' COM(2010) 748 final, 4.

³⁹ 'Submission on Brussels I Regulation Legislative Proposal' (Amnesty International 2011) 3.

⁴⁰ Proposal 2010 (n 38) Article 26.

⁴¹ Recast Brussels I Regulation, Articles 33 and 34.

new rules on *lis pendens* can seriously impede the opportunities for victims to bring a claim against an MNE in the home country. At the same time, the new provisions provide for a flexible mechanism allowing the court to stay or continue the proceedings. This could be helpful from the plaintiffs' perspective. Indeed, a Member State's court must consider several aspects before staying the proceedings, including the proper administration of justice. When doing so, the court should assess all the circumstances of the case before it, such as whether the third State's court can give judgement within a reasonable time.⁴² Courts of Member States may continue proceedings based on the proper administration of justice when legal proceedings against MNEs may be lengthy and questionable in terms of fairness and impartiality in host countries with a weak legal and judicial system.

2.2 Law applicable to civil claims against MNEs

The Rome II Regulation defines the conflict-of-law rules applicable to non-contractual obligations in civil and commercial matters in cross-border disputes. It extends the European harmonization of private international law already advanced by the Brussels I Regulation.⁴³ The Rome II Regulation is directly relevant in determining the law governing a civil claim against an MNE in France and the Netherlands. However, the Rome II Regulation applies to events giving rise to damage which occur after its entry into force (11 January 2009).⁴⁴ Consequently, the Rome II Regulation does not apply to claims raising the liability of an MNE for an event giving rise to damage which occurred before 11 January 2009. For those claims, Dutch and French domestic rules prior to the Rome II Regulation govern the determination of the substantial applicable law.

⁴² Recast Brussels I Regulation, Recital 24.

⁴³ Commission, 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations' COM(2003) 427 final, 4 (Proposal Rome II Regulation).

⁴⁴ Rome II Regulation, Articles 31 and 32. Furthermore, the CJEU interpreted that the Rome II Regulation applies only to events giving rise to damage occurring after 11 January 2009. See Case C-412/10 *Deo Antoine Homawoo v GMF Assurances SA* [2011] ECR I-11603.

2.2.1 Domestic rules

French private international law has not been codified yet and, as a result, most French conflict-of-law rules mainly derive from case-law.⁴⁵ Pursuant to a consistent case-law from the French Court of Cassation,⁴⁶ the law of the place where the tort (*delict*) occurred (*lex loci delicti commissi*) applies to a dispute raising a *delict* or a *quasi-delict*.⁴⁷ This rule can only be derogated from when the foreign law is adverse to public policy.⁴⁸ However, French courts have faced difficulties applying *lex loci delicti commissi* in practice. This is particularly true when the *delict* occurred in different countries.⁴⁹ To solve this issue, French courts have chosen to apply the law of the country with the closest connection with the *delict* or *quasi-delict*. They have also elected to apply the law of the forum (*lex fori*) when one element of the *delict* was located in France.

One problem arises in the case of ‘complex’ *delicts*. For these *delicts*, the place of the harmful event and the place where the loss is sustained are spread over several countries. This can be the situation in some transnational civil claims against MNEs, especially when the parent company, based in the home country, made or contributed to the act leading to the damage in the host country. When the applicable law is the law of the place where the *delict* occurred, it can be the law of both the place of the act itself (*lex loci actus*) and the place of the resulting damage (*lex damni*). French courts have been inconsistent in choosing between the law where the act itself occurred and the law where the damage was sustained.⁵⁰ The French Court of Cassation usually rejects *lex damni* in favour of the application of *lex loci actus*.⁵¹ At the same time, French courts have also applied *lex fori* in some cases, and the French Court of Cassation has confirmed this on several occasions.⁵²

⁴⁵ Yvon Loussouarn, Pierre Bourel and Pascal de Vareilles-Sommières, *Droit International Privé* (9th edn, Dalloz 2007) 186.

⁴⁶ Cass civ 25 May 1948, D 1948 357 (*Lautour v Guiraud*).

⁴⁷ Under French law, a *delict* involves a tort that is intentionally caused, while a *quasi-delict* involves a tort that is negligently caused.

⁴⁸ Loussouarn (n 45) 225.

⁴⁹ *ibid.*

⁵⁰ *ibid* 549.

⁵¹ Cass civ 23 January 2007, D 2007, AJ 503; *ibid* 550.

⁵² *ibid* 550-552.

Two specific situations should be distinguished here: damage resulting from environmental pollution and damage resulting from a criminal offence. First, regarding situations of environmental damage, which are complex and diffuse, French scholars have expressed a strong preference for a system of alternative connections. This would favour victim access to compensation and better represent the international and domestic evolution towards a system of 'objective' liability. This is particularly true in the situation of massive pollution or ecological catastrophe caused by MNEs. Applying the law of the place where the defendant has his domicile may appear more appropriate. Nonetheless, French courts have been reluctant to apply alternative principles of conflict of law.⁵³ Second, when a civil claim is brought for a damage arising out of a criminal offence, *lex loci delicti commissi* continues to apply to the conditions and effects of the compensation.⁵⁴ However, some French scholars have argued that *lex fori* should apply in this context.⁵⁵

The Dutch regime of private international law distinguishes between two situations regarding the applicable law. First, in 2001, the Netherlands enacted a law specifying the rules that will apply in matters of private international law (*Wet Conflictenrecht Onrechtmatige Daad*, or WCOD).⁵⁶ One of the basic rules of WCOD is the application of the law of the State where the act occurred in matters relating to tort, *delict*, or *quasi-delict*.⁵⁷ However, when an act has an harmful impact upon a person, property, or the natural environment outside the State where the act occurred, the law applicable is that of the State where the impact occurred.⁵⁸ In cases of complex *delicts* or torts with a multiple locus, such as in transnational cases against MNEs, the applicable law is the law of the place where the damage occurred.⁵⁹ An injured party cannot choose the law of the place in which the tort occurred, even if it offers greater protection to the victim.⁶⁰ In the context of civil claims against MNEs, the applicable law

⁵³ *ibid.*

⁵⁴ Cass crim 4 June 1941, Gaz Pal 1941 II 354.

⁵⁵ Marie-Laure Niboyet and Géraud de Geouffre de la Pradelle, *Droit International Privé* (LGDJ 2007) 1430; Loussouarn (n 45) 568.

⁵⁶ For a translated version of WCOD, see Paul Vlas, 'Dutch Private International Law: The 2001 Act Regarding Conflict of Laws on Torts' (2003) 50 *Netherlands International Law Review* 221.

⁵⁷ WCOD, Article 3(1).

⁵⁸ *ibid* Article 3(2).

⁵⁹ *ibid.*

⁶⁰ Vlas (n 56) 221.

should be the law of the country where the corporate harm occurred (the host State law). It is important to note that WCOD accepts party autonomy in the field of tort, *delict*, or *quasi-delict*. Parties are entitled to agree and choose the law that shall apply between them.⁶¹ However, in civil cases against MNEs, chances are slim that parties will agree on the applicable law. Claimants may seek to apply Dutch tort law whereas corporate defendants may prefer applying the host country law.

Second, following the codification of Dutch rules of private international law, Book 10 of the Dutch Civil Code (*Burgerlijk Wetboek*)⁶² contains new domestic rules on conflict-of-law. As of 1st January 2012, this new regime applies to disputes involving non-contractual obligations that do not fall within the scope of the Rome II Regulation.⁶³ Under the new regime, the Rome II Regulation is applicable to non-contractual obligations that arise from a tort or a *delict*. This means that *lex loci damni* is applicable as a rule.⁶⁴ However, Dutch law applies to the conduct and procedure of legal proceedings in Dutch courts.⁶⁵

In *Shell*, the District Court of The Hague found that the claims fell outside the temporal scope of the Rome II Regulation, since the alleged harmful events occurred before 11 January 2009.⁶⁶ It decided that WCOD should determine the applicable law, given that the claims had been brought before January 2012. It should be noted that the plaintiffs argued for the application of Dutch law whereas the defendants argued for the application of Nigerian law. The plaintiffs contended that the application of Nigerian law would be manifestly incompatible with the Dutch public order. Nonetheless, the District Court found that the plaintiffs had insufficiently demonstrated that this exception occurred in the instance.

⁶¹ WCOD, Article 6. See also Katharina Boele-Woelki and Dorothea Van Iterson, 'The Dutch Private International Law Codification: Principles, Objectives and Opportunities' (2010) 14.3 EJCL 21 <<http://www.ejcl.org/143/abs143-3.html>> accessed 30 November 2015.

⁶² For a translated version of the Dutch Civil Code, see Hans Warendorf, Richard Thomas and Ian Curry-Sumner, *The Civil Code of the Netherlands* (2nd edn, Wolters Kluwer 2013).

⁶³ Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven 2012) 224.

⁶⁴ Dutch Civil Code, Article 10:159.

⁶⁵ *ibid* Article 10:3.

⁶⁶ DC The Hague 30 January 2013, C/09/337050/HAZA09-1580 (*Akpan*), [4.8]-[4.10]; C/09/330891/HAZA09-0579 (*Oguru*), [4.9]-[4.11]; C/09/337058/HAZA09-1581 (*Dooh*), [4.9]-[4.11].

Ultimately, it chose to assess the substance of the claims under Nigerian law, because of their connection with Nigeria:

In the event of a tort that has been committed by SPDC, this tort occurred on the territory of Nigeria. In the event that [Shell Plc] allegedly committed tort with regard to the occurrence of these two oil spills, this tort by [Shell Plc] had harmful effects in Nigeria. Therefore, the District Court is of the opinion that based on Section 3(1) and (2) of WCOD, the claims in the main action must be substantively assessed under Nigerian law, more in particular the law that applies in Akwa Ibom State, where these two oil spills occurred.⁶⁷

2.2.2 The Rome II Regulation

Lex loci damni is the cornerstone of the Rome II Regulation. The law applicable to a non-contractual obligation arising out of a tort/*delict* must be the law of the country in which the damage occurs.⁶⁸ This rule applies irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred. In the context of transnational civil claims against MNEs, this means that French and Dutch courts must apply the law of the host country. This may be problematic for plaintiffs when the law of the host country is less favourable to them in areas of corporate liability, evidence, or financial compensation.⁶⁹ During the drafting of the Rome II Regulation, the EC rejected the application of the law of the place where the harmful event occurred, which covers both the act itself and the resulting damage.⁷⁰ This would have enabled both the laws of the host and home States to apply to transnational civil claims against MNEs. Ultimately, the rule adopted under the Rome II Regulation reflects the general on-going practice of some EU Member States, including France and the Netherlands.⁷¹

⁶⁷ *Akpan* (n 66) [4.9]; *Oguru* (n 66) [4.10]; *Dooh* (n 66) [4.10].

⁶⁸ Rome II Regulation, Article 4(1).

⁶⁹ Enneking (n 63).

⁷⁰ Proposal Rome II Regulation (n 43) 11.

⁷¹ *ibid.* The Proposal Rome II Regulation states that ‘while the absence of codification in several Member States makes it impossible to give a clear answer for the more than fifteen systems, the connection to the law of the

Nonetheless, the Rome II Regulation provides for exceptions to the application of *lex loci damni*, some of which are relevant in the context of transnational civil claims against MNEs. First, Article 7 Rome II Regulation provides for an environmental exception. Accordingly, the person seeking compensation for environmental damage⁷² can choose to base his claim on the law of the country in which the event giving rise to the damage occurred. If plaintiffs can prove the involvement of the parent company and that such an event took place in France or the Netherlands, they may be able to choose the law of the home country.

Second, Article 4(3) Rome II Regulation contains a general escape clause.⁷³ It provides that, where it is clear from all the circumstances of the case that the tort/*delict* is manifestly more closely connected with another country, the law of that country shall apply. A manifestly closer connection with another country might be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/*delict* in question. Article 4(3) can potentially open the door to the application of French and Dutch law to civil cases. However, a strong connection with the home country must be manifest, a difficulty which plaintiffs face when bringing a claim against MNEs in Europe.

Third, under Article 14 Rome II Regulation, the parties are allowed to agree on the law applicable to their dispute. However, this choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case and cannot prejudice the rights of third parties. The practicality of this provision appears limited in the context of transnational civil litigation against MNEs. It is unlikely that victims and MNEs will agree on a law that will govern their relationship. Furthermore, they may have opposed interests in the choice of

place where the damage was sustained has been adopted by those Member States where the rules have recently been codified.’

⁷² For a definition of ‘environmental damage,’ see Rome II Regulation, Recital 24.

⁷³ An escape clause is ‘a provision inserted in a legal instrument to supplement or cure the defect in the main rule, especially where the main rule has little or no connection with the issue to be resolved before the court.’ It gives the court the discretion to locate the law of a country that is more or most closely connected with the subject matter. See Chukwuma Samuel Adesina Okoli and Gabriel Omoshemime Arishe, ‘The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation’ (2012) 8 *Journal of Private International Law* 489, 489.

applicable law. MNEs are usually interested in a law that limits their liability and the compensation they should pay to victims.

Fourth, Article 26 Rome II Regulation provides that the application of the law of any country specified by the Rome II Regulation may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. Therefore, Article 26 allows a court to discard the law whose effect would be to award non-compensatory, exemplary, or punitive damages of an excessive nature.⁷⁴ One consequence is that the application of this provision will depend on the legal order of the forum, which may vary from one country to another.⁷⁵

3 The prosecution of extraterritorial crimes in France and the Netherlands

Victims of business-related human rights and environmental abuse, and CSOs, have sought to hold MNEs criminally liable in their home country. However, under the principle of territoriality, which is the cornerstone of the law of criminal jurisdiction, jurisdiction is primarily granted to the courts of the State where the criminal offence took place. Therefore, the prosecution of MNEs in their home country is often limited when criminal offences are committed in host countries. Nevertheless, continental European countries put far less emphasis on the territoriality principle in criminal law than common law countries,⁷⁶ and France and the Netherlands apply alternative principles of jurisdiction. As a result, French and Dutch courts may exercise their competence over the extraterritorial offences committed by MNEs.

It is important to point out that applicable law and jurisdiction are intertwined in criminal law. For instance, a French court's exercise of jurisdiction follows from the application of French criminal law on the grounds of the 'solidarity between jurisdiction and legislative competence' principle (*principe de solidarité des compétences législative et*

⁷⁴ Angelika Fuchs, 'Article 26: Public Policy of the Forum' in Peter Huber (ed), *Rome II Regulation: Pocket Commentary* (Sellier 2011) 425.

⁷⁵ *ibid* 430.

⁷⁶ Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 101.

juridictionnelle).⁷⁷ As a result, the French and Dutch courts are competent once French and Dutch criminal law applies to a criminal offence.

3.1 General rules

The French Criminal Code (*Code pénal*) and Code of Criminal Procedure (*Code de procédure pénale*) state the general rules regarding the application of French criminal law to, and the jurisdiction of French courts over, criminal offences committed outside the territory of France. Under Article 689 French Code of Criminal Procedure, perpetrators of, or accomplices to, offences committed outside the French territory may be prosecuted and tried by French courts either when French law is applicable under the Book I of the Criminal Code, or any other statute, or when an international convention gives jurisdiction to French courts to deal with the offence. Book I of the French Criminal Code contains the specific principles regarding the territorial applicability of French criminal law to offences committed outside the territory of France. Therefore, French courts have jurisdiction over criminal offences to which French criminal law applies.

Articles 2 to 8 Dutch Criminal Code (*Wetboek van Strafrecht*) generally provide for the rules of application of Dutch criminal law to, and jurisdiction of Dutch courts over, criminal offences committed abroad. These provisions apply not only to all offences under the Dutch Criminal Code, but also to those defined in other statutes, unless the statute provides otherwise.⁷⁸ In addition, the International Crimes Act (ICA),⁷⁹ which came into force in 2003, contains specific rules concerning the violations of international humanitarian law.⁸⁰ The ICA replaced fragmented legislation on international crimes and incorporated crimes included in the Rome Statute of the International Criminal Court (Rome Statute)⁸¹ in Dutch law. Under the ICA, Dutch criminal law applies to a number of criminal offences committed outside of

⁷⁷ Francis Desportes and Francis Le Guehec, *Le Nouveau Droit Pénal. Tome 1: Droit Pénal Général* (Economica 1995) 298.

⁷⁸ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2004) 165.

⁷⁹ *Wet Internationale Misdrijven* 2003.

⁸⁰ For a translated version of the ICA, see Machteld Boot-Matthijssen and Richard Van Elst, 'Key Provisions of the International Crimes Act 2003' (2004) 35 *Netherlands Yearbook of International Law* 251.

⁸¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

the Netherlands in three situations: 1) the suspect is present in the Netherlands; 2) the crime is committed against a Dutch national; 3) the crime is committed by a Dutch national.⁸² Criminal prosecution against a Dutch national may also take place if the suspect became a Dutch national after committing the crime.⁸³

3.2 Prosecuting legal persons

Article 706-42 French Code of Criminal Procedure establishes specific rules on jurisdiction for legal persons, such as companies. When a legal person is investigated or prosecuted, the court of the place where the offence was committed, or where the legal person's head office is located, has jurisdiction. However, when a natural person is charged along with the legal person for the same, or a connected, offence, the court where the natural person is prosecuted may also hear the case against the legal person. As a result, the legal person may be brought before the court of the place where the arrest took place or where one of the natural persons charged resides. Nevertheless, this principle does not apply in reverse, and a court will not have jurisdiction over a natural person just because it has jurisdiction over a legal person.⁸⁴ Furthermore, Article 40 French Code of Criminal Procedure provides that the French prosecutor can decide whether or not to press charges against a legal person similar to those being pursued against natural persons. Moreover, he may decide to only charge one or the other suspect. Finally, if the law so provides, the prosecutor may propose an exchange similar to a plea bargain.⁸⁵

Regarding the application of Dutch provisions on criminal jurisdiction to companies, the Dutch Supreme Court does not distinguish between natural or legal persons.⁸⁶ As a result, general provisions on Dutch criminal jurisdiction also apply to legal persons. When

⁸² ICA, Article 2(1). ICA applies without prejudice to the Dutch Criminal Code and the Dutch Code of Military Law.

⁸³ ICA, Article 2(3). Article 5(2) Dutch Criminal Code also stipulates that the person who acquires Dutch nationality after having committed a crime may be prosecuted in the Netherlands for that crime. See also HR 30 June 1950, NJ 1950, 646.

⁸⁴ Katrin Deckert, 'Corporate Criminal Liability in France' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011) 174.

⁸⁵ *ibid.*

⁸⁶ HR 11 December 1990, NJ 1991, 466. See also 'Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands' (International Commission of Jurists 2010) 19.

applicable, the following rules of extraterritorial jurisdiction apply to the conduct of either Dutch or foreign companies in host countries.

3.3 Relevance of the territoriality principle

Article 113-2(1) French Criminal Code states that French criminal law is applicable to all offences committed within the French territory.⁸⁷ However, the French Criminal Code interprets this territoriality principle in an extensive manner. For instance, Article 113-2(2) French Criminal Code provides for the application of the theory of ubiquity (*théorie de l'ubiquité*). As a result, an offence is deemed to have been committed within the French territory where one of its constituent elements took place in France.⁸⁸ French courts have broadly interpreted the notion of constituent elements and have accepted that preparatory acts, or even effects, within the French territory are sufficient to apply French criminal law, even when these acts or conditions are not constituent elements of the offence.⁸⁹ It should be pointed out that the French Court of Cassation takes into account the place of the statutory seat to locate the business decisions which constitute a criminal offence.⁹⁰ As a result, French criminal law may apply when the business decisions of a company whose statutory seat is within French territory, such as the French member of an MNE, are a constituent element of the offence. It should also be noted that the French Criminal Code also applies the theory of ubiquity to accomplices. Furthermore, French courts have developed the theory of indivisibility through which they may exercise territorial jurisdiction over autonomous criminal offences committed abroad that are sometimes only remotely connected with France, such as concealment abroad of goods obtained through fraud in France.⁹¹

Under Article 113-5 French Criminal Code, French criminal law is also applicable to any person who, within the French territory, is guilty as an accomplice to a felony or misdemeanour committed abroad if 1) it is punishable both by the French and foreign law,

⁸⁷ For a translated version of the French Criminal Code, see John Rason Spencer QC, 'Penal Code' (*Legifrance*, 12 October 2005) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

⁸⁸ Ryngaert (n 76) 187.

⁸⁹ *ibid* 198.

⁹⁰ Cass crim 6 February 1996, Bull crim n° 60; Cass crim 31 January 2007, Bull crim n° 28.

⁹¹ Cass crim 9 December 1933, Bull crim n° 237.

and 2) if it was established by a final decision of a foreign court. Plaintiffs in *Rougier* and *DLH* relied upon Article 113-5 to justify the criminal prosecution in France of French companies for criminal offences occurring abroad. However, the application of Article 113-5 presents a number of challenges. First, it applies only to accomplices to a criminal offence committed abroad. Second, it requires ‘double (or dual) criminality’ (*double incrimination*), which means that both countries must punish the criminal offence. Third, a foreign court must have rendered a final judgement. In general, French courts strictly interpret these requirements, thus limiting the application of Article 113-5.⁹²

The *Rougier* case demonstrates that Article 113-5 provides limited opportunities as a basis for jurisdiction to sue parent companies and gain access to justice. Pursuant to Article 113-5, the plaintiffs alleged that French criminal law was applicable to the French company Rougier for complicity in the commission of various criminal offences by SFID, its Cameroonian subsidiary. The plaintiffs contended they had been unable to gain access to justice in Cameroon, because of corruption and lack of independence of local and judicial authorities.⁹³ However, the Paris Court of Appeal dismissed their claim on the grounds that Article 113-5 requires a final ruling from a foreign court, which was missing in this instance.⁹⁴ It found that the plaintiffs did not demonstrate that it was impossible to obtain a final ruling in Cameroon. Such requirement is an obstacle to transnational criminal claims against MNEs in France when access to justice in the host country is limited by corruption or political instability.

The principle of territoriality is the prime basis for the application of Dutch criminal law and the jurisdiction of Dutch courts in criminal matters. Article 2 Dutch Criminal Code provides that Dutch criminal law is applicable to anyone who commits any criminal offence within the Netherlands. The determining factor is *locus delicti*, meaning the place where the criminal offence was committed. Unlike the criminal codes of some other European countries, the

⁹² Nicolas Mathey, ‘La Responsabilité Sociale des Entreprises en Matière de Droits de l’Homme’ (2010) 3 Cahiers de Droit de l’Entreprise.

⁹³ ‘Press Release: 7 Cameroonian Farmers Confront the French Rougier Group and its Cameroonian Affiliate SFID Before French Tribunal’ (Les Amis de la Terre and Sherpa 2002).

⁹⁴ Chambre de l’Instruction, CA Paris 13 February 2004.

Dutch Criminal Code does not describe the place where an offence is committed.⁹⁵ Therefore, Dutch courts have had to clarify the scope of *locus delicti* under Dutch law. On several occasions, the Dutch Supreme Court ruled that a criminal offence could be committed in more than one place.⁹⁶ Furthermore, it is not necessary that all the constituent elements of the criminal offence took place on Dutch territory to establish jurisdiction of the Dutch courts. They may exercise jurisdiction over a criminal offence when one of its elements took place in the Netherlands. Therefore, a legal person who committed a criminal offence abroad may be prosecuted in the Netherlands when one element of the criminal offence took place in the Netherlands. Moreover, the Dutch Supreme Court ruled that Dutch courts could exercise jurisdiction over accomplices acting abroad in support of crimes that took place in Dutch territory.⁹⁷ However, whether Dutch courts have jurisdiction over accomplices acting in the Netherlands for an offence committed abroad is not entirely clear.⁹⁸ Nonetheless, scholars assume that the location where the complicity takes place can be considered the *locus delicti* for the crime of complicity.⁹⁹ As for joint-wrongdoing, scholars have inferred from case-law that the location where the acts of joint-wrongdoing took place could be seen as the *locus delicti*.¹⁰⁰ In addition, Dutch courts have jurisdiction over extraterritorial acts which aggravate the territorial offence, but not over extraterritorial acts that constitute separate crimes.¹⁰¹

3.4 Application of the extraterritoriality principles

The exercise of criminal jurisdiction based on principles of extraterritoriality is relevant to criminal offences committed by MNEs in host countries. The French and Dutch criminal codes provide for the exercise of criminal jurisdiction based on various principles of extraterritoriality. However, domestic courts are usually reluctant to assert extraterritorial

⁹⁵ Marius Teengs Gerritsen, 'Jurisdiction' in Bert Swart and André Klip (eds), *International Criminal Law in the Netherlands* (Max-Planck-Institut für Ausländisches und Internationales Strafrecht 1997) 52.

⁹⁶ HR 6 April 1915, NJ 1915, 475; HR 6 April 1954, NJ 1954, 368. The 1954 decision of the Dutch Supreme Court is generally interpreted as implying that the place of the offence may also be the place where the instrument used by the perpetrator has its effect. See also 'The Netherlands' (n 86) 19.

⁹⁷ HR 18 February 1997, NJ 1997, 628.

⁹⁸ André Klip and Harmen Van Der Wilt, 'Netherlands' Report for the International Association of Penal Law' (2004) 73 *Revue Internationale de Droit Pénal* 1091, 1097.

⁹⁹ *ibid.*

¹⁰⁰ HR 24 January 1995, NJ 1995, 352.

¹⁰¹ Ryngaert (n 76) 201.

jurisdiction in criminal cases, especially in the Netherlands. The extraterritorial jurisdiction of Dutch criminal law has been traditionally limited to the application of the protective principle (Article 4 Dutch Criminal Code) and the active personality principle (Article 5 Dutch Criminal Code).¹⁰² In general, the Netherlands has consistently been adverse to the principles of passive personality and universal jurisdiction, even in the context of its obligations under international conventions.¹⁰³ This attitude is partly due to the Dutch legal views on the practice of criminal justice.¹⁰⁴ Four concerns guide Dutch theory and practice in the field of criminal law: legal security, proper administration of justice, avoidance of conflicts of jurisdiction, and non-interference.¹⁰⁵ As a result, reasonable and responsible treatment of offenders, if possible within their own social environment, is an important aspect of criminal justice in the Netherlands.¹⁰⁶

3.4.1 Active personality principle

Under the active personality principle, a State has jurisdiction over criminal offences committed by its nationals. The active nationality principle appears to be the most justifiable basis for exercising jurisdiction to regulate MNEs' conduct abroad.¹⁰⁷

3.4.1.1 France

Article 113-6 French Criminal Code provides that French criminal law is applicable to criminal offences committed by French nationals outside the French territory. However, it distinguishes between felonies and misdemeanours. French criminal law is applicable to any felony without any further conditions¹⁰⁸ while it is applicable to any misdemeanour if the

¹⁰² Reydams (n 78) 165.

¹⁰³ *ibid.*

¹⁰⁴ *ibid* 164; Interview with Lawyer 1 (The Netherlands, 2013).

¹⁰⁵ Reydams (n 78) 164.

¹⁰⁶ *ibid.*

¹⁰⁷ Anna Triponel, 'Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad' in Andrew Morris and Samuel Estreicher (eds), *Global Labor and Employment Law for the Practicing Lawyer* (Kluwer Law International 2010) 103; Olivier de Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (UN OHCHR Seminar, Brussels, 3-4 November 2006) 24.

¹⁰⁸ French Criminal Code, Article 113-6(1).

conduct is also punishable under the legislation of the country in which it was committed.¹⁰⁹ Therefore, Article 113-6 requires the application of the double criminality theory to misdemeanours committed by French nationals outside of France. Another important aspect is that Article 113-6 only applies to French companies and, therefore, foreign subsidiaries are excluded. French legal experts suggest that the foreign subsidiary should be considered to be of French nationality when a number of elements, including the control of the French parent company over the foreign subsidiary, demonstrate that, in reality, the foreign subsidiary is French.¹¹⁰

Article 113-8 French Criminal Code provides that the French prosecutor has absolute discretion to decide whether to pursue prosecution of misdemeanours in the cases set out under Article 113-6. This provision is a major obstacle to transnational criminal litigation against MNEs, particularly when the French prosecutor is reluctant to sue companies. In *Rougier*, the plaintiffs used Article 113-6 as a basis for their claim. However, the prosecutor refused to initiate criminal proceedings against the French parent company. Both the Paris Court of Appeal and the French Court of Cassation respectively dismissed the plaintiffs' appeal on the grounds that, pursuant to Article 113-8, only the prosecutor can initiate criminal proceedings based on Article 113-6.¹¹¹ As a result of Article 113-8, plaintiffs cannot successfully use the active personality principle as a jurisdictional basis to regulate French companies' conduct abroad in spite of its broad adoption in France. The prosecutor's absolute discretion to refuse cases appears questionable because it places significant power in the hands of one entity.¹¹² In particular, prosecutors may be subjected to political pressure, as they lack independence from the French executive power.¹¹³ Furthermore, the attitude of prosecutors seems to be reinforced by the lack of financial resources to conduct investigations in host countries and the potential 'negative' impacts on career advancement.

¹⁰⁹ *ibid* Article 113-6(2).

¹¹⁰ Mathey (n 92).

¹¹¹ Cass crim 12 April 2005, n° 04-82318.

¹¹² TriponeL (n 107) 104.

¹¹³ The ECtHR held that the French public prosecutor does not satisfy the guarantees of independence from the executive required under Article 5(3) ECHR. *Moulin v France* App no 37104/06 (ECtHR, 23 November 2010).

3.4.1.2 The Netherlands

Article 5 Dutch Criminal Code provides that Dutch criminal law is applicable to offences committed by Dutch nationals outside the Netherlands. However, Article 5 distinguishes between two situations. First, Article 5(1)1° lists a number of criminal provisions which, when violated by Dutch nationals abroad, automatically trigger the application of Dutch criminal law.¹¹⁴ In this context, whether these acts constitute criminal offences in the foreign State is not relevant.¹¹⁵ Second, Article 5(1)2° provides that Dutch criminal law applies to the commission of all crimes under Dutch law by Dutch nationals abroad when the requirement of double criminality is satisfied.¹¹⁶ When the offender is a legal person, it is assumed that the legal person must have a link with the Netherlands, such as incorporation or registration under Dutch law.¹¹⁷ Double criminality is determined *in abstracto*, which means that it is sufficient that the act falls within the scope of a foreign criminal provision.¹¹⁸ The Dutch Supreme Court held that the Dutch Criminal Code is applicable to every Dutch legal person who commits a crime outside the Netherlands, where this act constitutes a criminal offence according to the law of the State on whose territory the crime is committed.¹¹⁹ In addition, the fact that a legal person is not recognized as such in the other country does not bar prosecution in the Netherlands.¹²⁰ Furthermore, it is not relevant whether the law of the State where the crime is committed recognizes the criminal liability of natural persons for crimes committed by legal persons.¹²¹

In the case against Trafigura, in 2008, the Dutch prosecutor declined to prosecute Trafigura BV, Puma Energy International BV (Puma) (another Dutch company), and Claude Dauphin (Trafigura's chairman) for the criminal offences related to toxic waste dumping in Ivory

¹¹⁴ These offences include crimes against State security, crimes against royal dignity, and bigamy.

¹¹⁵ Gerritsen (n 95) 61.

¹¹⁶ See also HR 21 May 2002, NJ 2003, 316 (*Asean Explorer*).

¹¹⁷ Gerritsen (n 95) 60.

¹¹⁸ *ibid* 61. An assessment of the foreign law on the issue of justifications and excuses is not necessary.

¹¹⁹ HR 11 December 1990, NJ 1991, 466. See also Berend Keulen and Erik Gritter, 'Corporate Criminal Liability in the Netherlands' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011) 190.

¹²⁰ HR 12 February 1991, NJ 1991, 528. A Dutch person found responsible for a crime committed abroad by a foreign legal person can also be prosecuted in the Netherlands.

¹²¹ HR 18 October 1988, NJ 1989, 496. See also Keulen and Gritter (n 119) 190.

Coast. The main reason was that it appeared impossible to conduct an investigation in Ivory Coast, most notably due to the lack of cooperation of the Ivorian authorities.¹²²

In 2009, Greenpeace lodged a complaint with the Court of Appeal of The Hague against the Dutch prosecutor's decision.¹²³ It claimed that the Netherlands had jurisdiction to prosecute Trafigura BV and Puma:

The *locus delicti* of the offences is (partly) in the Netherlands, precisely because two 'suspected' legal persons have their offices in the Netherlands and the offences objected to and described in this complaint were committed entirely in the Dutch 'context' of these legal persons. The Netherlands, at any rate, has jurisdiction to try Trafigura and Puma pursuant to Article 5(1)2° of the Dutch [Criminal] Code. After all the persons who committed offences which are also punishable in Côte d'Ivoire are Dutch legal persons. In this case, the fact that Dauphin does not have Dutch nationality does not affect the jurisdiction of the Netherlands. For, if the legal person has the Dutch nationality, the executive 'in fact' can be prosecuted in the Netherlands, irrespective of his nationality.¹²⁴

In 2011, the Court of Appeal rejected Greenpeace's complaint,¹²⁵ concluding that the Dutch courts did not have jurisdiction for several reasons. First, the facts did not take place in the Netherlands. Second, although Trafigura BV had its formal establishment in the Netherlands, the actual business of the company occurred in the UK and Switzerland. Therefore, Trafigura BV could not be considered a Dutch legal person under Article 5 Dutch Criminal Code. Third, none of the natural persons targeted by the complaint were of Dutch nationality or residents in the Netherlands. Fourth, the Court of Appeal questioned the feasibility of both an investigation and a prosecution and raised the impossibility to conduct a proper criminal

¹²² 'The Toxic Truth About a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Cote d'Ivoire' (Amnesty International and Greenpeace Netherlands 2012) 160.

¹²³ 'Complaint Concerning Failure to Prosecute for an Offence (Article 12 of the Dutch Code of Criminal Procedure)' (Greenpeace Nederland 16 September 2009). For a discussion of Article 12 Dutch Code of Criminal Procedure, see Section 2.2.2 of Chapter 7 of this thesis.

¹²⁴ *ibid* 19-20.

¹²⁵ CA The Hague 12 April 2011, NJFS 2011, 137.

investigation in Ivory Coast. Fifth, it held that the toxic waste dumped by Tommy Company, and not by Trafigura BV. In the court's view, Greenpeace did not demonstrate that Trafigura BV knew that Tommy Company would commit such acts.¹²⁶ Overall, there was insufficient evidence justifying an investigation into, and prosecution of, the alleged criminal offences.

The ICA also provides that Dutch criminal law applies to a Dutch national who commits any of the crimes defined in ICA outside of the Netherlands.¹²⁷ Therefore, Dutch courts have jurisdiction to apply Dutch criminal law to the commission of genocide, crimes against humanity, war crimes, and torture by a Dutch company in a host country after 2003. Importantly, it does not matter if the suspect became a Dutch national only after committing the crime.¹²⁸

In the Netherlands, no Dutch company has been tried for the commission of international crimes abroad. However, two Dutch businessmen have been prosecuted for business activities directly related to international crimes.¹²⁹ In both cases, the Dutch courts held they had jurisdiction based on the active nationality principle. In *Public Prosecutor v Van Anraat*,¹³⁰ the Dutch businessman Frans van Anraat was accused of complicity in genocide and war crimes before the Dutch criminal courts. From 1985 until 1988, van Anraat delivered large quantities of thiodiglycol, a chemical used in the production of chemical weapons, to the regime of Saddam Hussein. Later, the Iraqi regime deployed chemical weapons against Kurdish civilians in Northern Iraq, as part of a larger genocidal campaign to annihilate the Kurdish population.¹³¹ On 23 December 2005, the District Court of The Hague found van

¹²⁶ *ibid* [16].

¹²⁷ ICA, Article 2(1)(c).

¹²⁸ ICA, Article 2(3).

¹²⁹ See Wim Huisman and Elies Van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 *Journal of International Criminal Justice* 803.

¹³⁰ For a description of the case, see Harmen Van Der Wilt, 'Genocide v War Crimes in the Van Anraat Appeal' (2008) 6 *Journal of International Criminal Justice* 557; 'Public Prosecutor v Frans Cornelis Adrianus Van Anraat' (*International Crimes Database*, 2013) <<http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/>> accessed 30 November 2015.

¹³¹ Harmen Van Der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese Journal of International Law* 43, 61.

Anraat guilty for complicity in war crimes, but acquitted him of complicity in genocide.¹³² On 9 May 2007, the Court of Appeal of The Hague upheld the District Court's ruling, also acquitting van Anraat in respect of genocide, albeit for different reasons.¹³³ Ultimately, on 30 June 2009, the Dutch Supreme Court confirmed the conviction.¹³⁴

During the trial, van Anraat challenged the jurisdiction of the Dutch criminal courts. He argued that, because of the accessory character of complicity to genocide and war crimes, the District Court was not competent, as it lacked jurisdiction over the main offences. However, the District Court dismissed van Anraat's argument. First, it held that complicity in a crime, even if it concerns genocide or war crimes, is an independent indictable offence. Second, given that van Anraat was staying in the Netherlands and was a Dutch national, and that the indicted offences of complicity were considered to be criminal offences, the District Court found that van Anraat could be prosecuted in the Netherlands pursuant to Article 5 Dutch Criminal Code.

In *Public Prosecutor v Kouwenhoven*,¹³⁵ the Dutch businessman Guus Kouwenhoven was accused of complicity in war crimes and illegal supply of arms to Charles Taylor, the former President of Liberia, in violation of UN and Dutch embargos prohibiting arms trade with Liberia. On 7 June 2006, the District Court of The Hague found Kouwenhoven guilty for illegal supply of arms, but acquitted him of complicity in war crimes.¹³⁶ However, on 10 March 2008, the Court of Appeal of The Hague overturned the District Court's ruling and acquitted Kouwenhoven of all charges.¹³⁷ On 20 April 2010, the Dutch Supreme Court

¹³² DC The Hague 23 December 2005, Case No 09/751003-04.

¹³³ CA The Hague 9 May 2007, Case No 2200050906 – 2.

¹³⁴ HR 30 June 2009, Case No 07/10742.

¹³⁵ For a description of the case, see Larissa Van Den Herik, 'The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia' (2009) 9 *International Criminal Law Review* 211; 'The Public Prosecutor v Guus Kouwenhoven' (*International Crimes Database*, 2013) <<http://www.internationalcrimesdatabase.org/Case/2238/Kouwenhoven/>> accessed 30 November 2015.

¹³⁶ DC The Hague 7 June 2006, Case No AX7098.

¹³⁷ CA The Hague 10 March 2008, Case No 220043306. The Court of Appeal was particularly critical of the work of the prosecution, highlighting its 'serious failure in trying to find the truth in this case.' See 'Press Release: General Acquittal in Appeal Kouwenhoven Case' (*De Rechtspraak*, 10 March 2008) <<https://www.rechtspraak.nl/>> accessed 30 November 2015.

quashed the judgement of the Court of Appeal and referred the case to another court.¹³⁸ The case was pending at the time of writing. In this instance, the Dutch courts based their extraterritorial jurisdiction on the active nationality principle. However, scholars have suggested that the practical exercise of this jurisdictional basis presented difficulties regarding the collection of evidence abroad, mutual legal assistance, and the complexity for Dutch judges to form a judgement based on the facts.¹³⁹ Ultimately, these obstacles have prevented the Dutch courts from convicting Kouwenhoven for extraterritorial crimes.

3.4.2 Passive personality principle

Under the passive personality principle, a State has jurisdiction over criminal offences committed by foreign nationals that affect its own citizens.

Article 113-7 French Criminal Code provides that French criminal law is applicable to any felony, and any misdemeanour punished by imprisonment, committed by a French or a foreign national outside the French territory where the victim is a French national at the time the offence took place. In transnational criminal litigation against MNEs, Article 113-7 enables French courts to have jurisdiction over criminal offences committed by foreign and French companies against French nationals abroad. This provision presents various advantages, as it confers automatic and exclusive jurisdiction to French criminal courts¹⁴⁰ and does not require double criminality. However, Article 113-8 French Criminal Code also applies to Article 113-7, which means that the French prosecutor has absolute discretion to initiate criminal proceedings in cases alleging misdemeanours.

Dutch criminal law applies to anyone on foreign soil who commits certain criminal offences against a victim of Dutch nationality. Two situations should be distinguished. First, Article 5b Dutch Criminal Code provides for the application of the passive personality principle to certain criminal offences, such as human trafficking and offences relating to minors, which may be relevant in the context of MNEs' activities. However, the exercise of such

¹³⁸ HR 20 April 2010, Case No 08/01322.

¹³⁹ See Van Den Herik (n 135).

¹⁴⁰ Triponeel (n 107) 100.

jurisdiction is premised on the condition that the conduct constitutes a criminal offence in the foreign state as well (double criminality). Second, the ICA provides that Dutch domestic law shall apply to anyone who commits the crime of genocide, crimes against humanity, war crimes, and torture outside the Netherlands if the crime is committed against a Dutch national.¹⁴¹ The ICA does not require double criminality.¹⁴²

However, the application of the passive nationality principle to transnational criminal litigation against MNEs in both France and the Netherlands is limited in practice. First, victims of MNE conduct in host States are often nationals of these countries. Unless the victim has dual nationality, this aspect limits the use of legislation based on the passive nationality principle to prosecute French, Dutch, and foreign companies of MNEs. Second, the passive personality principle is the most controversial of the five accepted bases of jurisdiction in international law.¹⁴³ In France, Article 113-7 has been criticized for being an incongruous basis on which to prosecute extraterritorial crimes, as it is usually seen as intruding on the sovereignty of other nations and subjecting foreign nationals to an indeterminate threat of criminal responsibility in dealings with French nationals.¹⁴⁴ In the Netherlands, by virtue of a long-standing tradition, domestic courts are particularly reluctant to apply jurisdiction based on the passive personality principle, thus limiting its potential benefits.¹⁴⁵

3.4.3 Universality principle

Under the universality principle, a State has jurisdiction to prosecute and punish foreign nationals who commit crimes abroad against foreigners.¹⁴⁶

¹⁴¹ ICA, Article 2(1)(b).

¹⁴² Boot-Matthijssen and Van Elst (n 80) 280.

¹⁴³ Eric Cafritz and Omar Tene, 'Article 113-7 of the French Penal Code: the Passive Personality Principle' (2003) 41 *Columbia Journal of Transnational Law* 585, 586.

¹⁴⁴ *ibid* 587

¹⁴⁵ Gerritsen (n 95) 58.

¹⁴⁶ Reydams (n 78) 1.

3.4.3.1 France

France provides for the exercise of universal jurisdiction (Articles 689-1 to 689-13 French Code of Criminal Procedure). These articles are an unusual combination of a domestic enabling clause (Article 689-1) and an enumeration of international conventions providing for universal jurisdiction (Articles 689-2 to 689-13).¹⁴⁷ Article 689-1 provides that, in accordance with the international conventions quoted in Articles 689-2 to 689-13, a person guilty of committing, or attempting to commit, any of the offences listed by these provisions outside of France and who happens to be in France may be prosecuted and tried by French courts. The most relevant international conventions for transnational criminal litigation against MNEs include the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),¹⁴⁸ the Rome Statute,¹⁴⁹ and the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁵⁰ Specific requirements apply to French jurisdiction over crimes under the Rome Statute, including French residency of the offender and double criminality. Furthermore, the foreign State must be a State Party to the Rome Statute. In addition, the French prosecutor has absolute discretion to prosecute.

French courts have agreed to exercise universal jurisdiction over the commission of criminal offences by foreigners abroad in only a few cases. For instance, in July 2005, a Mauritanian army officer was sentenced to imprisonment for committing acts of torture and barbarity in Mauritania in the 1990s.¹⁵¹ Under Articles 689, 689-1, and 689-2, and Article 7(2) Convention against Torture, French courts held they had jurisdiction to try the case and apply French law. They also overrode a Mauritanian amnesty law, as application of that law would

¹⁴⁷ *ibid* 132.

¹⁴⁸ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; French Code of Criminal Procedure, Article 689-2.

¹⁴⁹ French Code of Criminal Procedure, Article 689-11.

¹⁵⁰ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3; French Code of Criminal Procedure, Article 689-13.

¹⁵¹ Cour d'assises Nîmes 1 July 2005 (*Ould Dah*).

have resulted in a breach of France's international obligations and rendered the principle of universal jurisdiction totally ineffective.¹⁵²

3.4.3.2 The Netherlands

Traditionally, the Netherlands has had strong reservations concerning the exercise of universal jurisdiction.¹⁵³ Similar to France, only crimes of international concern and crimes under international criminal law can be subject to jurisdiction based on the universality principle. First, Article 4 Dutch Criminal Code provides for the exercise of universal jurisdiction for a limited number of criminal offences.¹⁵⁴ Second, under the ICA, Dutch domestic law applies to anyone who commits genocide, torture, war crimes, or crimes against humanity outside the Netherlands if the suspect is present in the Netherlands.¹⁵⁵ Both the Dutch Criminal Code and the ICA offer a restricted application of the universality principle. The alleged offender must be present in the Netherlands. Moreover, pursuant to the scope of the ICA, the crimes must have been committed after its entry into force on 1st October 2003. Furthermore, Dutch courts will only exercise universal jurisdiction if neither the territorial courts nor the International Criminal Court (ICC) is exercising jurisdiction. Whether such rule may apply to legal persons, and under which conditions, has to be clarified. The Dutch Supreme Court demonstrated hostility to the application of the universal jurisdiction principle in the *Bouterse* case,¹⁵⁶ in which it held that Dutch courts had jurisdiction over extraterritorial acts only when a nexus could be established or the suspect could be arrested in the Netherlands.

In *Riwal*, Al-Haq accused the Riwal group of contributing to war crimes and crimes against humanity in the West Bank within the meaning of the ICA.¹⁵⁷ Following the complaint, the

¹⁵² CA Nîmes 8 July 2002; Cass crim 23 October 2002 (*Ould Dah*). For a description of the French proceedings, see *Ould Dah v France* App no 13113/03 (ECtHR, 17 March 2009).

¹⁵³ Gerritsen (n 95) 62.

¹⁵⁴ They include piracy and counterfeiting currency.

¹⁵⁵ ICA, Article 2(1)(a).

¹⁵⁶ HR 23 October 2001, NJ 2002, 77.

¹⁵⁷ 'Al Haq/Report of War Crimes and Crimes against Humanity by Riwal' (Complaint to National Public Prosecutor's Office) (Böhler Advocaten 15 March 2010).

Dutch prosecutor carried out a criminal investigation, after which he acknowledged the potential direct violations of international humanitarian law raised by the litigant:

The construction of the barrier and/or a settlement may be considered to be a violation of International Humanitarian Law, among which the Geneva Conventions of 1949, if, as in the aforementioned cases, this construction took place in occupied territory. [...] Participation in a violation of International Humanitarian Law by Dutch persons and legal entities is a crime proscribed in Article 5 of the [ICA]. When making considerations with regard to a settlement according to criminal law, the Public Prosecution Service considered in the first place that a violation of Article 5 of the [ICA] is a serious criminal offence. Persons and legal entities within the Dutch jurisdiction are required not in any way to be involved in, or contribute to, possible violations of the Geneva Conventions or other rules of International Humanitarian Law. They are also required to take decisions of authoritative international bodies and judicial institutions such as the International Court of Justice about the status, legitimacy and consequences of the barrier extremely serious.¹⁵⁸

Nevertheless, the Dutch prosecutor decided not to initiate criminal proceedings against the Riwal group or its managing directors for practical reasons.¹⁵⁹

4 Conclusions

The nature of transnational litigation against MNEs poses a number of legal challenges as to whether the home or the host State is competent to hear the claims, and whether the home or the host State law applies to the proceedings.

In civil matters, France and the Netherlands are bound by the EU regime of private international law. With regard to jurisdiction, the Brussels I Regulation provides that domestic courts of a Member State are usually competent to hear civil claims against

¹⁵⁸ Letter of Dismissal from National Public Prosecutor's Office to Mr Van Eijck (14 May 2013) 2-3.

¹⁵⁹ See Section 3.2.3 of Chapter 4 of this thesis.

defendants domiciled in that Member State. Therefore, the French and Dutch courts have jurisdiction to hear transnational civil claims against the member of an MNE which is domiciled in France and the Netherlands (usually the parent company).

At the same time, the Brussels I Regulation foresees the application of different jurisdictional rules to companies domiciled outside the EU (such as host State subsidiaries). Domestic rules will normally determine the competent court. In France and the Netherlands, domestic courts have jurisdiction to hear transnational civil claims against host State subsidiaries in limited situations. French and Dutch courts may accept to hear claims against companies domiciled outside the EU in two situations: 1) when the existence of co-defendants justifies the consolidation of claims; or 2) as a result of the application of rules based on the *forum necessitatis* doctrine. When the claims satisfy a number of requirements, the application of these rules in transnational civil litigation against MNEs has received successful reception from French and Dutch courts. Finally, the effects of the recast Brussels I Regulation on transnational civil claims against MNEs, in particular the new *lis pendens* rules, have yet to be seen.

With regard to applicable law, the Rome II Regulation provides that the law applicable to civil matters must be the law of the country in which the damage occurs. As a result, the host State law applies to transnational civil claims against MNEs in France and the Netherlands. Nonetheless, the Rome II Regulation provides for a number of exceptions. Consequently, French and Dutch law may apply in a number of situations, such as when there is an environmental damage.

In criminal matters, French and Dutch law may apply to extraterritorial criminal offences involving MNEs in specific circumstances. In France, the territoriality principle remains relevant, in particular when one of the constituent elements of the crime was committed on the French territory. Furthermore, pursuant to Article 113-5 French Criminal Code, victims have brought criminal claims against French companies for complicity in crimes committed in host countries. However, a number of requirements must be met, including double criminality and a foreign court's final judgement. Similarly, in the Netherlands, it may be

possible to prosecute Dutch companies for extraterritorial crimes when one of the constituent elements of the crime was committed on the Dutch territory. Furthermore, Dutch courts accept that a criminal offence can have different *locus delicti*. However, the application of Dutch criminal law is uncertain when a Dutch company acts as an accomplice in the Netherlands to a criminal offence committed abroad. Ultimately, territorial jurisdiction is not always adapted to criminal offences committed by French and Dutch companies in host countries.

French and Dutch laws also recognize the existence of alternative principles of jurisdiction based on the nationality of the perpetrator or of the victim, or the necessity to prosecute perpetrators of gross human rights abuses. Amongst them, the active nationality principle appears to be the most justifiable jurisdictional ground to regulate French and Dutch companies' conduct in host countries. Nevertheless, procedural requirements, such as double criminality or a foreign court's final judgement, as well as institutional obstacles, such as the reluctance of public prosecutors to initiate criminal proceedings against corporate offenders, limit the opportunities offered by the French and Dutch criminal systems to hold members of MNEs accountable for crimes in host States.

Once French and Dutch courts are competent to hear transnational claims against MNEs, and their laws apply to the proceedings, the next question relates to the existence, and the content, of rules governing the liability of corporate groups in areas directly relevant to human rights and environmental protection. This question is explored in the next chapter.

CHAPTER 6

Holding multinational enterprises liable in France and the Netherlands

1 Introduction

Corporate liability standards to punish human rights abuse and environmental damage occurring in the context of corporate group activities are crucial to the success of transnational claims against MNEs. However, the UNGPs provide that legal barriers can arise where the way in which liability is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability.¹ As a result, such legal barriers may prevent legitimate cases from being addressed, thus leading to corporate impunity.

In France and the Netherlands, a number of plaintiffs have sought to hold parent companies liable for their direct or indirect involvement in activities harmful to humans and the environment in host countries. In most instances, cause lawyers and CSOs litigating these cases have attempted to demonstrate the absence of an effective regime of liability applying to MNEs. They have also raised the inadequacy of benefits related to the corporate form, such as ‘the limited liability for its members and a legal personality separate from that of its members,’² when business-related abuse occurs in the context of corporate groups.

Chapter 6 aims to provide an overview of civil and criminal legislation, and case-law applicable to corporate liability in France and the Netherlands. In particular, it focuses on the way existing legal rules may affect the attribution of liability among members of corporate groups and, therefore, access to remedies in the context of transnational litigation against MNEs. Chapter 6 starts by presenting a brief overview of legislation related to the separate legal personality of the company as well as limited liability companies in France and the Netherlands. Particular attention will be given to the problem they pose when plaintiffs seek

¹ UNHRC, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31, Guiding Principle 26, Commentary.

² UNHRC, ‘Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special-Representative’ (23 May 2011) UN Doc A/HRC/17/31/Add.2, para 29.

to hold parent companies liable for the harm caused by their subsidiaries. Chapter 6 then provides a comparative analysis of French and Dutch legislative and case-law standards applying to corporate liability in various legal fields, including competition, tort, commercial, environmental, employment, and criminal law. This analysis aims to understand whether existing standards allow, or may allow, parent companies to be held liable for the harm caused by their subsidiaries. The final section of Chapter 6 analyses the emergence of new standards of corporate liability, in particular the reception by French and Dutch courts of corporate liability arguments based on the CSR commitments of MNEs and legislative initiative on human rights due diligence.

It should be pointed out that, as seen in Section 2.2.2 of Chapter 5, pursuant to the Rome II Regulation, the host State law generally applies to transnational civil claims against an MNE. Therefore, it is less likely that French or Dutch law will apply to these claims. Nonetheless, the Rome II Regulation also creates a number of exceptions, which allow plaintiffs to choose the home State law, meaning the French or Dutch law, as the applicable law. Consequently, the study of corporate liability standards in France and the Netherlands remains relevant.

2 The liability of MNEs

The separate legal personality of the company as well as the emergence of limited liability are two important developments of modern company law.³ However, they may pose problems in the case of corporate groups, especially where one company owns and controls another.⁴ This may be the case where the parent company is the shareholder, or one of the shareholders, of a subsidiary and, at the same time, controls or is engaged in the business activities of the subsidiary. The separate legal personality of the company and limited liability have often shielded the parent company from liability for human rights abuse and

³ Alan Dignam and John Lowry, *Company Law* (5th edn, OUP 2009) 14. See also John Birds and others, *Boyle & Birds' Company Law* (8th edn, Jordans 2011); Brenda Hannigan, *Company Law* (3rd edn, OUP 2012).

⁴ On the interplay between corporate groups, separate legal personality, and limited liability, see Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (OUP 1993); Janet Dine, *The Governance of Corporate Groups* (CUP 2005).

environmental damage it committed through its subsidiary.⁵ Nonetheless, the technique of piercing the corporate veil may provide a solution to limit unfair consequences on victims of MNE abuse.

2.1 Separate legal personality and limited liability

It should be pointed out that the EU has adopted a number of directives governing various aspects of company law, such as the formation of public limited liability companies.⁶ As a result, a number of French and Dutch legislative provisions in the field of company law reflect EU law and present some similarities.

2.1.1 Separate legal personality

In this study, ‘separate legal personality’ means that domestic legislation and/or case-law may foresee that some types of companies become autonomous legal entities once they are incorporated. As such, they exercise rights and assume certain obligations. The law ignores the artificial nature of these companies by giving them a legal personality which is separate from that of the persons who manage it (directors) or own it (shareholders when the company is limited by shares).⁷

In France, Article 1842 French Civil Code states that partnerships (*sociétés*)⁸ enjoy legal personality from the time of their registration.⁹ Furthermore, the French Commercial Code

⁵ Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 Cambridge Journal of Economics 915, 917.

⁶ On EU company law, see Thomas Papadopoulos and Niamh Moloney, ‘EU Company Law’ in David Vaughan, Aidan Robertson and Pavlos Eleftheriadis (eds), *Law of the European Union* (OUP 2012).

⁷ On the separate legal personality of the company, see Paddy Ireland, ‘Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality’ (1996) 17 *Legal History* 40.

⁸ Pursuant to Article 1832 French Civil Code, a ‘partnership is created by two or several persons who agree by a contract to appropriate property or their industry for a common venture with a view to sharing the benefit or profiting from the saving which may result therefrom.’ The partners bind themselves to contribute to the losses. For a translated version of the French Civil Code, see David Gruning, ‘Civil Code’ (*Legifrance*, 1 July 2013) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

⁹ However, partnerships which are not registered do not enjoy legal personality. See French Civil Code, Article 1871.

(*Code de commerce*)¹⁰ provides that trading companies (*sociétés commerciales*) shall have legal personality with effect from their registration in the commercial and companies register.¹¹ In the Netherlands, Article 2:3 Dutch Civil Code provides that a number of companies possess legal personality, including companies limited by shares (*naamloze vennootschappen* or NV) and private companies with limited liability (*besloten vennootschappen* or BV). Both types of companies are legal persons with an authorized capital divided into transferable shares.¹² However, BV shares must be registered shares.¹³

2.1.2 Limited liability

In this study, ‘limited liability’ means that domestic legislation and/or case-law may foresee that, for certain types of companies, the liability of investors, owners, or shareholders is limited to the amount of their investment, contribution, or shares in the company.¹⁴

In France, Article L223-1 French Commercial Code states that a limited liability company (*société à responsabilité limitée*) may be established by one or more persons who shall bear its losses only up to the amount of their contributions. In addition, Article L225-1 French Commercial Code provides that the main form of joint-stock company (*société anonyme*) is a company whose capital is divided into shares and which is formed among members who shall bear any losses only up to the amount of their contributions. In the Netherlands, in both companies limited by shares and private companies with limited liability, the shareholders shall not be personally liable for acts performed in the name of the company and shall not be

¹⁰ For a translated version of the French Commercial Code, see Martha Fillastre, Amma Kyeremeh and Miriam Watchorn, ‘Commercial Code’ (*Legifrance*, 1 July 2013) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

¹¹ French Commercial Code, Article L210-6. It should be noted that Article L210-1 French Commercial Code provides that the trading, or commercial, nature of a company is determined by its form or by its objects. Various companies are concerned, including ‘*les sociétés en nom collectif, les sociétés en commandite simple, les sociétés à responsabilité limitée et les sociétés par actions.*’

¹² Dutch Civil Code, Articles 2:64(1) and 2:175(1).

¹³ Maarteen Muller, *Corporate Law in the Netherlands* (3rd edn, Wolters Kluwer 2013) 33.

¹⁴ There is no general definition of limited liability and the application of this principle varies across jurisdictions. Furthermore, limited liability is not unique to corporations. On the subject, see Phillip Blumberg, ‘Limited Liability and Corporate Groups’ (1986) 11 *Journal of Corporate Law* 573; Frank Easterbrook and Daniel Fischel, ‘Limited Liability and the Corporation’ (1985) 52 *The University of Chicago Law Review* 89.

liable to contribute to losses of the company in excess of the amount which must be paid up on their shares.¹⁵

2.2 Corporate groups

There is no general definition of the ‘corporate group’ (also called ‘group of companies’ in this thesis).¹⁶ Vandekerckhove explains that:

the corporate group is one of the forms of concentration of companies. Such a concentration may be the result of very different evolutions. The group may have grown through new incorporations or other forms of establishment abroad. It may also have grown by way of international mergers and acquisitions or through joint ventures. Groups are further characterised by their organisational structure, the territorial distances between group members, ownership pattern, intensity of intra-group transactions, profitability, and technical circumstances. This results in the existence of very different types of groups, from highly centralised to decentralised, from very specialised to largely diversified.¹⁷

Ultimately, Vandekerckhove broadly defines the corporate group as ‘an aggregate of legally independent corporations that are related to each other through patrimonial, contractual or personal links and that come under a common centre of control.’¹⁸

As seen in Chapter 1, MNEs ‘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. One or more of these entities may be able to exercise a significant influence over the activities of others and their degree of autonomy within the enterprise may vary widely from

¹⁵ Dutch Civil Code, Articles 2:64(1) and 2:175(1).

¹⁶ On corporate groups, see Tom Hadden, *The Control of Corporate Groups* (IALS 1983); Clive Schmitthoff and Frank Wooldridge (eds), *Groups of Companies* (Sweet and Maxwell 1991); Dine (n 4); Asli Colpan, Takashi Hikino and James Lincoln (eds), *The Oxford Handbook of Business Groups* (OUP 2010).

¹⁷ Karen Vandekerckhove, *Piercing the Corporate Veil* (Kluwer Law International 2007) 17.

¹⁸ *ibid.*

one multinational enterprise to another.¹⁹ The type of business relationships that members of an MNE have with each other vary from one MNE to another. In the context of transnational litigation against MNEs, plaintiffs have repeatedly challenged the relationship between the parent company based in a home country, such as France or the Netherlands, and foreign subsidiaries under its control or ownership and operating in host countries.²⁰

In France, there is no statutory definition of the corporate group. While French courts have attempted to compensate by adopting various definitions, there is a lack of consistency amongst these definitions, as they reflect the priorities of different legal branches. For instance, the criminal chamber of the French Court of Cassation found that the corporate group exists when its companies share a common economic, social, or financial interest (*intérêt économique, social ou financier commun*), which must be appreciated with regard to the policies elaborated for the whole group.²¹ At the same time, the commercial chamber of the French Court of Cassation held that a corporate group is characterized by an economic unity and a community of indivisible interests led by one person.²² French courts have also developed various rules to govern corporate group conduct and protect creditors in specific circumstances. As a result, the French law governing corporate groups is fragmented and inconsistent.²³ Nonetheless, an important feature of the corporate group is that it does not have legal personality and, as a result, it cannot be held liable in the context of civil or criminal proceedings.²⁴ The French Court of Cassation recently reaffirmed that, in the absence of legal personality, corporate groups cannot have rights and obligations or be bound to pay damages.²⁵

¹⁹ ‘OECD Guidelines for Multinational Enterprises: 2011 Edition’ (OECD 2011) 17.

²⁰ In some claims, plaintiffs have challenged the liability of a company in the context of business relationships different from that existing between a parent company and its subsidiary. However, this chapter focuses mainly on the liability of parent companies for their involvement in the activities of their foreign subsidiaries.

²¹ Cass crim 4 February 1985, n° 84-91581 (*Rozenblum*). See also C Le Guehec, ‘Le Fait Justificatif Tiré de la Notion de Groupe de Sociétés dans le Droit Pénal Français de l’Abus de Biens Sociaux’ (1987) 58 *Revue Internationale de Droit Pénal* 117.

²² Cass com 5 February 1985, n° 82-15.119.

²³ On the subject, see Maggy Pariente, *Les Groupes de Sociétés* (Litec, 1993); Thierry Gauthier, *Les Dirigeants et les Groupes de Sociétés* (Litec 2000); Pierre-Henri Conac, ‘Le Groupe de Sociétés’ (2013) 7-8 *Revue des Sociétés* 417.

²⁴ Cass com 2 April 1996, n° 94-16380.

²⁵ Cass com 15 November 2011, n° 10-21701 (*Sté JCB Service (FD)*).

Even if there is no statutory definition of the corporate group, the French Commercial Code still defines various situations where a company may control another. First, when a company owns more than 50% of the capital of another company, the second company shall be regarded as a subsidiary (*filiale*) of the first company (Article L233-1). Second, when a company owns between 10 and 50% of another company's capital, the first company shall be regarded as having a holding (*ayant une participation*) in the second company (Article L233-2). Third, Article L233-3 defines other situations where a company is deemed to control another one: 1) the company directly or indirectly holds a fraction of the capital that gives it a majority of the voting rights at that company's general meetings; 2) the company holds a majority of the voting rights in that company by virtue of an agreement; 3) the company effectively determines the decisions taken at that company's general meetings through its voting rights; 4) the company is a partner in, or member or shareholder of, that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management or supervisory structures; 5) the company directly or indirectly holds a fraction of the voting rights above 40% and no other partner, member, or shareholder directly or indirectly holds a fraction larger than its own.²⁶ As will be seen in the analysis of the *AREVA* case later in this Chapter, the type of control that a company has over another one influences the possibility to hold a parent company liable for the actions of its foreign subsidiary.

In the Netherlands, Article 2:24b Dutch Civil Code provides that a 'group is an economic unit in which legal persons and partnerships are united in one organization. Group companies are legal persons and partnerships which are united in one group.'²⁷ Furthermore, Article 2:24a(1) Dutch Civil Code defines the subsidiary (*dochtermaatschappij*) of a legal person, such as a parent company, in two ways. First, a subsidiary is a legal person in which the parent company, or one or more of its subsidiaries, 'can exercise, solely or jointly, more than one half of the voting rights at a general meeting.'²⁸ Second, a subsidiary is a legal person of

²⁶ Translated French Commercial Code (n 8).

²⁷ For a translated version of the Dutch Civil Code, see Hans Warendorf, Richard Thomas and Ian Curry-Sumner, *The Civil Code of the Netherlands* (2nd edn, Wolters Kluwer 2013).

²⁸ Dutch Civil Code, Article 24a(1)(a) (Translated Dutch Civil Code).

which the parent company, or one or more of its subsidiaries, is ‘a member or shareholder and [...] can appoint or dismiss, solely or jointly, more than one half of the directors or officers or of the supervisory board members,²⁹ also if all persons entitled to vote were to cast their vote.’³⁰ The parent company’s rights may be derived from its majority as a shareholder or from a shareholders’ agreement and may be held either by the company alone or jointly with any of its other subsidiaries.³¹ The Dutch Civil Code also foresees situations where a legal person participates, or has a participating interest, in another legal person. This is the case ‘if it or one or more of its subsidiaries, solely or jointly and for its own account, contributes, or causes the contribution of, capital with the object of a long-lasting relationship with such legal person or the furtherance of its own activities. If one-fifth or more of the issued capital is contributed, the existence of a participation shall be presumed.’³²

In the context of MNE activities, the application of separate legal personality and limited liability generally prevents one MNE member from being held liable for the activity of another member of the same MNE, even when the former member owns and controls the latter one. For instance, a parent company is not liable for the harm caused to humans or the environment by its subsidiary, even when the parent company owns and controls the subsidiary.³³ MNEs may use complex and confusing corporate structures to distance and separate the parent company from the local operating subsidiaries, thereby protecting the MNE from legal liability.³⁴

²⁹ In the Netherlands, a separate supervisory board (two-tier system) controls the managing directors of publicly-traded companies. See Gregory Maassen and Frans Van Den Bosch, ‘On the Supposed Independence of Two-Tier Boards: Formal Structure and Reality in the Netherlands’ (1999) 7 *Corporate Governance: An International Review* 31.

³⁰ Dutch Civil Code, Article 24a(1)(b) (Translated Dutch Civil Code).

³¹ Muller (n 13) 30.

³² Dutch Civil Code, Article 24c(1) (Translated Dutch Civil Code).

³³ See Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 *Cambridge Journal of Economics* 915.

³⁴ Richard Meeran, ‘The Unveiling of Transnational Corporations: A Direct Approach’ in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 162; Charley Hannoun, ‘La Responsabilité Environnementale des Sociétés-Mères’ (2009) 6 *Environnement* 33.

Scholars have criticized the strict application of separate legal personality and limited liability where human rights abuse or environmental damage are involved.³⁵ They have also suggested that the traditional image of the company as ‘an isolated and free-standing commercial entity with a sole aim of making profit, often at any cost’ should be revised. Policy-makers should recognize that companies are integrated parts of society and that their economic persona should not be separated from their social and political persona.³⁶

2.3 Piercing the corporate veil

The expression ‘piercing the corporate veil,’ or corporate veil piercing, emerged from the lexicon of company law. It refers to the situation where a corporate shareholder is held liable for the debts of the company of which it is a shareholder notwithstanding separate legal personality and limited liability.³⁷ However, there is a lot of confusion as to the exact meaning of corporate veil piercing. For instance, courts often do not distinguish between statutory rules and corporate veil piercing theories when they hold parent companies liable. As a result, parent companies are sometimes held liable based on corporate veil piercing theories where the case could have been solved by reference to existing rules of company or civil law.³⁸ Moreover, corporate veil piercing theories are less developed outside of common law countries. Therefore, courts in France and the Netherlands have frequently relied on fraud or abuse of the purpose of the corporate form to hold parent companies liable for harm caused by other companies.³⁹ In France, there have been several attempts to introduce theories equivalent to the corporate veil piercing into legislation. For instance, a bill was presented to the French Parliament in 1973, which would have recognized the specificities of

³⁵ See Paddy Ireland, ‘Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility Limited Liability’ (2010) 34 *Cambridge Journal of Economics* 837; Ian Lee, ‘Corporate Criminal Responsibility as Team Member Responsibility’ (2011) 31 *Oxford Journal of Legal Studies* 755. For a study of transnational asbestos companies’ use of corporate law to escape liability, see also Andrea Boggio, ‘Linking Corporate Power to Corporate Structures: An Empirical Analysis’ (2012) 22 *Social and Legal Studies* 107.

³⁶ Michael Addo, ‘Human Rights and Transnational Corporations: An Introduction’ in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999) 8.

³⁷ Vandekerckhove (n 17) 11.

³⁸ *ibid.*

³⁹ William Carney, ‘Limited Liability’, *Encyclopedia of Law and Economics III: The Regulation of Contracts* (2000) 669.

corporate groups and would have created a special court to rule over all legal issues relating to them.⁴⁰ However, this bill was never adopted.

There are also instances of ‘voluntary piercing’ which occurs when the parent company, as the shareholder of its subsidiary, voluntarily abandons its right to limited liability and agrees to be held jointly liable for its subsidiary’s acts.⁴¹ Voluntary piercing is accepted under French and Dutch law. For instance, in the Netherlands, the parent company can declare that it assumes joint and several liability for any obligations arising from the legal acts of its subsidiary in order to allow the latter to obtain an exemption from the duty to publish its annual accounts (Article 2:403(f) Dutch Civil Code).⁴² In France, voluntary piercing may result from a guarantee of the parent company for liabilities of its subsidiaries to the benefit of third parties.⁴³

Some commentators have argued that corporate veil piercing should be extended to cases raising human rights abuse or environmental damage by MNEs through amendments to national company laws.⁴⁴ However, piercing the corporate veil is a problematic solution for a number of reasons. First, it involves judicial discretion,⁴⁵ and scholars have argued that criteria for corporate veil piercing are not very clear-cut. It may also be very difficult to establish the factual relation required to pierce the corporate veil.⁴⁶ Furthermore, complex corporate structures, coupled with the use of separate legal personality and limited liability, have an influence on the legal strategies used by plaintiffs to hold MNEs to account. For instance, limited liability forces plaintiffs to focus on acts or omissions of parent companies rather than seeking to pierce the corporate veil. However, an emphasis on parent companies limits the potential for holding to account corporate groups that operate under a vertically

⁴⁰ Kenneth Weissberg and Marie-Caroline Moissinac, ‘Piercing the Corporate Veil in France’ (1987) 6 *International Financial Law Review* 33, 33.

⁴¹ Vandekerckhove (n 17) 16.

⁴² *ibid* 36.

⁴³ *ibid* 45.

⁴⁴ Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation’ (2011) 22 *Business Ethics Quarterly* 145, 152.

⁴⁵ *ibid*.

⁴⁶ Nicola Jägers and Marie-José Van Der Heijden, ‘Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands’ (2008) 33 *Brooklyn Journal of International Law* 833, 842.

hierarchical management structure. In more complex management structures, it is even more difficult to match existing legal principles of negligence to the reality of control.⁴⁷

3 The civil liability of French and Dutch MNEs

In France and the Netherlands, there is substantial litigation practice of attempting to make the parent company liable for harm caused by its subsidiaries in various areas of civil law. Therefore, a comparative analysis of legislation and case-law in each area for both countries allows the reader to understand the variety of standards applicable, or potentially applicable, to MNEs and the differences existing across fields and between both countries. These standards may have implications for transnational litigation against MNEs.

3.1 Competition law

Although competition law is not an area of civil law, its treatment of parent companies' liability for their subsidiaries' acts is instructive. EU law influences French and Dutch competition rules. Over the years, EU competition law has progressively accepted the recognition of parent companies' liability for their subsidiaries' acts in specific circumstances.⁴⁸ In the landmark *Akzo Nobel NV* case,⁴⁹ the CJEU ruled that a parent company could be held jointly and severally liable for the payment of the fine imposed on its wholly-owned subsidiary. This solution was based on the grounds that the parent company exercises, either directly or indirectly, a decisive influence over the commercial policy of the subsidiary.⁵⁰ The parent company has the burden of rebutting that presumption by showing that its subsidiary acts independently on the market.⁵¹ When the parent company does not

⁴⁷ Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 *Hastings International and Comparative Law Review* 451, 470.

⁴⁸ See Clarisse Le Corre and Emmanuel Daoud, 'La Présomption d'Influence Déterminante: L'Imputabilité à la Société Mère des Pratiques Anticoncurrentielles de sa Filiale' (2012) 4334 *Revue Lamy de Droit des Affaires* 83.

⁴⁹ Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I- 8237.

⁵⁰ For a later confirmation, see Case C-508/11 *ENI SpA v Commission* [2013] OJ 225/11. See also Thibaud d'Alès and Laura Terdjman, 'L'Écran Sociétaire, Rempart Face à la Mise en Cause d'une Société Mère du Fait de sa Filiale' (2014) 47 *La Semaine Juridique Entreprise et Affaires* 1584.

⁵¹ Case C-90/09 P *General Química e.a. v Commission* [2011] ECR I- 0000; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg SA v Commission* [2011] ECR I-2239. For a discussion of these cases, see Antoine Winckler, 'Parent's Liability: New Case Extending the Presumption of Liability of a Parent Company for the Conduct of its Wholly Owned Subsidiary' (2011) 2 *Journal of European Competition Law & Practice*

wholly own the subsidiary, the CJEU must seek additional evidence of the absence of the subsidiary's autonomy and of the determining influence of the parent company on its subsidiary's behaviour on the market. Such evidence can be demonstrated by showing the parent company's influence on fixing prices or on the subsidiary's management and commercial strategy.⁵²

The reception of EU case law by domestic courts is relevant here. In France, courts have adopted an interpretation that slightly departs from the *Akzo Nobel NV* judgement,⁵³ seeking additional proof of the lack of autonomy of the wholly-owned subsidiary.⁵⁴ For example, French courts will take into account the parent company's financial participation in the capital of the subsidiary, the nomination of the managing body, or the possibility for the subsidiary's managing body to freely determine an autonomous industrial, financial, and commercial strategy.⁵⁵ In the Netherlands, Dutch courts have established that, if a parent company exercises 'decisive influence' over its subsidiary's commercial behaviour, then both form part of the same economic undertaking. As a result, the parent company and the subsidiary can be fined for infringement of competition law. It is irrelevant whether the parent company was itself involved in the infringement. However, automatic liability for a parent company is not assumed in a private enforcement action.⁵⁶

3.2 Tort law

Two main situations to hold a parent company liable in tort for harm caused by its subsidiary's activities should be distinguished. First, the parent company is liable for its own

231; Georges Decocq, 'Présomption de Responsabilité de la Société Mère des Infractions Commises par ses Filiales Détenues à 100%' (2011) 3 *Revue Contrats Concurrence Consommation* 31.

⁵² Case C-48/69 *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619; Case C-73/95 P *Viho European BV v Commission* [1996] ECR I-5457.

⁵³ Frédérique Chaput, 'L'Autonomie de la Filiale en Droit des Pratiques Anticoncurrentielles' [2010] *Contrats Concurrence Consommation* 11, 12; Le Corre and Daoud (n 48) 84.

⁵⁴ Cons Conc, Décision n°05-D-49 du 28 juillet 2005 relative à des pratiques mises en œuvre dans le secteur de la location entretien des machines d'affranchissement postal; Cons Conc, Décision n° 07-D-12 du 28 mars 2007 relative à des pratiques mises en œuvre dans le secteur du chèque-cinéma.

⁵⁵ Le Corre and Daoud (n 48) 85.

⁵⁶ Boekel de Nerée, 'Private Enforcement of Competition Law: A Dutch Perspective' (*The In-House Lawyer*, 10 June 2009) <<http://www.inhouselawyer.co.uk/index.php/the-netherlands/7363-private-enforcement-of-competition-law-a-dutch-perspective>> accessed 30 November 2015.

acts (personal liability). Second, it is liable on the basis of its subsidiary's acts (vicarious liability).⁵⁷

3.2.1 France

In France, Articles 1382 and 1383 French Civil Code govern the liability for one's own act (*la responsabilité du fait personnel*).⁵⁸ Pursuant to Article 1382, 'any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.'⁵⁹ Furthermore, Article 1383 states that 'everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.'⁶⁰ Both articles require three elements to trigger liability: damage, causation, and a fault (*faute*).⁶¹ Articles 1382 and 1383 apply to legal persons. They provide a basis for holding a parent company liable in the context of corporate group activities. However, the parent company must have committed a fault either intentionally or negligently.⁶² The liability of a parent company as a corporate shareholder on the basis of Article 1382 has been encountered in various situations. This was the case when the parent company maintained its subsidiary's operations although insolvency was clearly inevitable or when it gave harmful instructions to its subsidiary.⁶³ A parent company can also be held liable towards its subsidiary's creditors when it has interfered in the management of its subsidiary.⁶⁴ If a parent company makes decisions for its subsidiary, the latter cannot be considered an autonomous legal entity. However, French courts are reluctant to recognize such interference.⁶⁵ Corporate groups often share a common strategy, which makes it difficult to assess the degree of the parent company's interference in the management of its subsidiary.⁶⁶ Furthermore, the parent

⁵⁷ Hannoun (n 34).

⁵⁸ Cees Van Dam, *European Tort Law* (2nd edn, OUP 2013) 52.

⁵⁹ Translated French Civil Code (n 8).

⁶⁰ *ibid.*

⁶¹ Van Dam (n 58) 52.

⁶² T com Orléans 1 June 2012, n° 2010-11170. See also Alain Couret and Bruno Dondero, 'Condamnation d'un Fonds d'Investissement Étranger à Réparer le Préjudice Causé par une Opération de Restructuration' (2012) 35 *La Semaine Juridique Entreprise et Affaires* 1494.

⁶³ Vandekerckhove (n 17) 44.

⁶⁴ Cass com 4 March 1997, n° 95-10756.

⁶⁵ Cass civ (3) 25 February 2004, n° 01-11764.

⁶⁶ Sandrine Clavel, 'Conflits de Lois: Loi Applicable aux Obligations Non Contractuelles' (2012) 2 *Journal du Droit International Clunet* 684.

company is not required, by the mere fact of its participation in its subsidiary, to support its subsidiary in fulfilling its financial obligations. This applies even if the subsidiary is responsible for a public service that can pose a risk to the public interest.⁶⁷ In the *Ademe v Elf Aquitaine* case,⁶⁸ the French Court of Cassation dismissed a claim to extend the liability of a subsidiary to its parent company for the clean-up of a landfill site. In the court's view, there was no evidence that the parent company had committed a fault that would have justified making it liable under Article 1382. The simple fact of controlling another company does not suffice to demonstrate the parent company's fault. Moreover, it is difficult to provide not only the evidence of such fault, but also the evidence of causation between the parent company's fault and the damage caused by its subsidiary.

Article 1384 French Civil Code provides for vicarious liability (*responsabilité du fait d'autrui*). Accordingly, a person is liable not only for the damage he causes by his own act, but also for the damage caused by the acts of persons for whom he is responsible.⁶⁹ Article 1384 enumerates a number of situations in which vicarious liability applies, such as employer/employee relationships. However, the relationship between a parent company and its subsidiary is excluded. Although the French Civil Code provides a legal basis for vicarious liability, the absence of a specific mention of the relationship between a parent company and its subsidiary prevents holding parent companies liable for their subsidiaries' activities pursuant to Article 1384. Nonetheless, scholars have argued that French courts may apply vicarious liability beyond the employer/employee relationship to 'any relationships capable of meeting the tests of subordination or the right to give instructions.'⁷⁰ For instance, in 'a blatant example of judicial creativity,' French courts have extended Article 1384(1) to render one party (usually an institution or association) strictly liable for the torts of persons under its control or whose activities it controls.⁷¹ However, it remains uncertain whether French courts would be audacious enough to extend vicarious liability principles to the relationship between a parent company and its subsidiary.

⁶⁷ Cass com 26 March 2008, n° 07-11619.

⁶⁸ *ibid*

⁶⁹ French Civil Code, Article 1384(1).

⁷⁰ Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 101.

⁷¹ *ibid* 132.

It should be pointed out that, over the last decades, a number of official reports, which aimed to reform French tort law, have made various proposals regarding the liability of parent companies for their subsidiaries' acts. For instance, in 2005, the Catala report⁷² suggested that the category of persons under Article 1384 should be extended to natural or legal persons who organise and have an interest in the activity of professionals or businesses (not being their employees). Furthermore, it suggested that a new Article 1360 extend such liability to the relationship between parent companies and subsidiaries. Interestingly, the Catala report promoted the creation of a strict liability regime. Similarly, in 2012, the working group led by Professor Terré suggested the creation of a fault-based liability regime for corporate groups (ie Article 7).⁷³ However, both proposals have been criticized and, to date, the French government has not acted on the changes suggested.

3.2.2 The Netherlands

Under Article 6:162(1) Dutch Civil Code, a person who commits a tort against another which is attributable to him must repair the damage suffered by the other in consequence thereof. The Dutch Civil Code lays down a rule of fault liability on the basis of which both natural and legal persons can be held liable for their own intentional or negligent conduct.⁷⁴ Furthermore, Article 6:162(3) Dutch Civil Code provides that a tortfeasor is responsible for the commission of a tort if it is due to his fault or to cause for which he is accountable by law or pursuant to generally accepted principles. As a result, tortious liability is incurred not only in case of subjective fault, but also in case of objective 'answerability.' Article 6:162(2) Dutch Civil Code specifies the types of acts which are deemed tortious. There are mainly three categories: the violation of a right; an act or omission breaching a duty imposed by law; an act or omission breaching a rule of unwritten law pertaining to proper social conduct. First, there is a tort where the right of a person is infringed, such as the right to life, the right to

⁷² Pierre Catala, *Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (La Documentation Française 2006). For an English translation, see John Cartwright and Simon Whittaker, 'Proposals for Reform of the Law of Obligations and the Law of Prescription' (2007).

⁷³ François Terré, 'Groupe de Travail sur le Projet Intitulé "Pour une Réforme du Droit de la Responsabilité Civile"' (Cour de Cassation 2012).

⁷⁴ Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven 2012) 230.

physical integrity, or the right to freedom.⁷⁵ This category is directly relevant to transnational tort claims against MNEs in which plaintiffs raise human rights abuse. Second, liability arises where a wrongful act or omission violates a clear legal norm, such as Dutch laws and regulations or directly applicable norms of public international law.⁷⁶ However, few Dutch statutory norms are applicable in the context of transnational tort claims against MNEs.⁷⁷ Third, transnational claims raising the liability of a parent company for its subsidiary's activities abroad might also be built on the breach of unwritten norms pertaining to acceptable social behaviour.⁷⁸

The Dutch Civil Code also provides other potential bases for the liability of the parent company in the context of MNE activities. According to Article 6:166(1), 'if one out of a group of persons unlawfully causes damage and the risk of thus causing damage should have restrained such persons from their collective conduct, they shall be jointly and severally liable if they can be held accountable for such conduct.'⁷⁹ Furthermore, the Dutch Civil Code foresees the vicarious liability for other persons and things, such as children, subordinates, or movable things.⁸⁰ However, similar to the French Civil Code, it does not mention any relationship between a parent company and its subsidiary.

In *Shell*, the plaintiffs claimed that the Dutch parent company Shell Plc violated a duty of care by failing to properly oversee its Nigerian subsidiary SPDC.⁸¹ They alleged that Shell Plc has an obligation to act in a socially responsible manner and 'should exert its influence and control over its subsidiary [SPDC] in such a way that it is prevented as much as possible that its subsidiary [SPDC] causes damages to human beings and the environment during the

⁷⁵ 'Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands' (International Commission of Jurists 2010) 10.

⁷⁶ Enneking (n 74) 230.

⁷⁷ *ibid.*

⁷⁸ Dutch Civil Code, Articles 6:162 and 6:163.

⁷⁹ Translated Dutch Civil Code (n 27).

⁸⁰ Dutch Civil Code, Articles 6:169 to 6:184.

⁸¹ 'Writ of Summons: *Oguru, Efanga & Milieudefensie vs Shell plc and Shell Nigeria*' (Böhler Advocaten 7 November 2008) 23, 47.

oil extraction.⁸² In 2013, the District Court of The Hague dismissed all the claims against Shell Plc. It ruled that, pursuant to Nigerian law, a parent company is not obliged to prevent its '(sub-)subsidiaries' from harming third parties abroad.⁸³ It used a narrow definition of the duty of care of parent companies in the context of MNE activities. The District Court distinguished the relationship between a parent company and its subsidiary's employees when both companies operate in the same country, which was the situation in *Chandler*,⁸⁴ from the relationship between the parent company and the people living around the oil pipelines and facilities of its subsidiary operating in another country. As a result, it found that:

The duty of care of a parent company in respect of the employees of a subsidiary that operates in the same country further only comprises a relatively limited group of people, whereas a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-)subsidiaries would create a duty of care in respect of a virtually unlimited group of people in many countries. The District Court believes that in the case at issue, it is far less quickly fair, just and reasonable than it was in *Chandler v Cape* to assume that such a duty of care on the part of [Shell Plc] exists.⁸⁵

It should be pointed out that, in this instance, the District Court applied Nigerian law, and not Dutch law. However, this ruling informs the reasoning of the District Court when considering the parent company's duty of care.

3.3 Company law

In France and the Netherlands, statutory company law may provide for the liability of parent companies for their subsidiaries' acts in a limited number of situations. In general, French and Dutch courts have had to develop some theories to face the reality of corporate groups.

⁸² *ibid* 47.

⁸³ DC The Hague 30 January 2013, C/09/337050/HAZA09-1580 (*Akpan*); C/09/330891/HAZA09-0579 (*Oguru*); C/09/337058/HAZA09-1581 (*Dooh*).

⁸⁴ *Chandler v Cape* [2012] EWCA Civ 525.

⁸⁵ *Akpan* (n 83) [4.29]; *Dooh* (n 83) [4.33]; *Oguru* (n 83) [4.36].

Nonetheless, they remain reluctant to hold parent companies liable in the context of corporate group activities.

3.3.1 France

French company law offers a number of options under statutory law for holding parent companies liable for their subsidiaries.

Article L621-2(2) French Commercial Code provides that commenced safeguarding proceedings (*procédure de sauvegarde*)⁸⁶ may be extended to one or more other persons where their assets are intermingled with those of the debtor (commingling of assets – *confusion de patrimoine*), or where the legal entity is a sham (fictitious legal person – *fictivité de la personne morale*). However, the French Court of Cassation adopted a narrow interpretation of commingling of assets and fictitious legal persons in *Theetten v SA Metaleurop*.⁸⁷ First, it ruled that a cash management system, foreign exchange agreements, and important fund advances by the parent company might be justified in a corporate group. These acts do not automatically prove the existence of abnormal financial relations demonstrating the commingling of assets of the parent company with those of its subsidiary.⁸⁸ Scholars have suggested that this case-law makes it even more difficult to prove a commingling of assets in a transnational case.⁸⁹ Second, a company is fictitious when it lacks decisional autonomy, most notably its ability to make decisions with regard to the commenced safeguarding proceedings. As a result, exchange of staff does not necessarily characterize a fictitious subsidiary. Ultimately, the Court of Cassation held that the parent company, acting as *de facto* director, could be held liable if it had interfered in the management of its subsidiary.

⁸⁶ Article L620-1 French Commercial Code provides that safeguarding proceedings is a procedure ‘established at the request of the debtor [...] who can prove that although it is not faced with a cessation of payments, it has difficulties that it is unable to overcome. The purpose of this procedure is to facilitate the reorganisation of the business in order to allow the continuation of the economic activity, the maintenance of employment and the settlement of liabilities’ (Translated French Commercial Code).

⁸⁷ Cass com 19 April 2005, n° 05-10.094.

⁸⁸ *ibid.*

⁸⁹ Vandekerckhove (n 17) 439.

The second situation where a parent company may be liable for its subsidiaries' acts is in the context of liability for excess of liabilities over assets (*responsabilité pour insuffisance d'actif*). Article L651-2(1) French Commercial Code provides:

Where the judicial liquidation proceedings of a legal entity reveals an excess of liabilities over assets, the court may, in instances where management fault [*faute de gestion*] has contributed to the excess of liabilities over assets, decide that the debts of the legal entity will be borne, in whole or in part, by all or some of the *de jure* or *de facto* managers, or by some of them who have contributed to the management fault. If there are several managers, the court may [...] declare that they are liable in solidarity.⁹⁰

Importantly, the managers can be either natural or legal persons. As a result, a parent company may be required to pay the debts of its subsidiary if it contributed to the management fault while acting as the *de jure* or *de facto* manager of its subsidiary.⁹¹ French courts appear to have considerable flexibility to find parent companies liable in such cases.⁹²

French courts have also developed various theories, based on the theory of identification, to hold a parent company liable for its subsidiary's acts.⁹³ The theory of identification requires that, in the context of a corporate group, abstraction is made of the difference in the identity between two companies. As a result, these two companies are considered as one company, and acts and liabilities of one company may be attributed to the other company.⁹⁴

First, under the 'theory of false appearances' (*la théorie de l'apparence*), where a third party acted in good faith upon an appearance that the two companies were only one legal person from their behaviour, the court will treat them as one. For instance, in the context of

⁹⁰ Translated French Commercial Code (n 10).

⁹¹ CA Paris 15 January 1999, n° 1998/04408.

⁹² Michael Bode, *Le Groupe International de Sociétés: Le Système de Conflit de Lois en Droit Comparé Français et Allemand* (Peter Lang 2010) 157.

⁹³ Weissberg and Moissinac (n 40) 37.

⁹⁴ Vandekerckhove (n 17) 37.

insolvency, a parent company may be liable to its subsidiary's creditors if the creditor had a good faith reason to believe the two companies were the same entity. Generally, French courts use a 'bundle of indicators' (*faisceau d'indices*) to determine whether a parent company intervened in its subsidiary's activities (eg similar telephone numbers, email addresses, head offices or managers, or important cash flows between the companies). The French Court of Cassation recently held that a simple interference in the subsidiary's activities is not enough to hold the parent company liable. Interference must appear in a way that allows others to legitimately believe that the parent company was the cocontractor of the subsidiary.⁹⁵ More recently, the Court of Cassation ruled that a parent company was obliged to pay its subsidiary's debts in a case where the parent company had directly intervened to settle with the creditor.⁹⁶ This interference created the appearance that the parent company had substituted for the subsidiary and that the creditor had to deal with the parent company. The Court of Cassation also observed that the subsidiary was wholly-owned by the parent company and that both companies had the same email address, domicile, and director.

Second, under the 'theory of the fictitious corporation' (*la théorie de la société fictive*), a company is deemed to be fictitious where its sole purpose is to serve the interests of the natural or legal person behind it, this person engaging in high-risk activities under the cover of separate legal personality and limited liability.⁹⁷

Third, the 'theory of commingling of assets' (*la théorie de la confusion des patrimoines*) is used when it is no longer possible to distinguish between the assets of the parent company and those of its subsidiary.⁹⁸ Both the theories of the *société fictive* and of *confusion des patrimoines* involve the notion of fraud.⁹⁹

⁹⁵ Cass com 12 June 2012, n° 11-16109.

⁹⁶ Cass com 3 February 2015, n° 13-24.895.

⁹⁷ Vandekerckhove (n 17) 42.

⁹⁸ Cass com 13 February 2001, n° 98-15190.

⁹⁹ Juan Dobson, 'Lifting the Veil in Four Countries: The Law of Argentina, England, France and the United States' (1986) 35 *International and Comparative Law Quarterly* 839, 841.

Practice demonstrates that French courts often apply or mix these three theories inconsistently.¹⁰⁰ At times, similar facts in distinct cases may lead to different outcomes, as a result of arbitrary application of these theories.¹⁰¹ Scholars have criticized French courts for being more concerned with the result of corporate veil piercing rather than its legal underpinning. However, French courts are generally reluctant to hold parent companies liable for their subsidiaries' activities and the use of these theories remains exceptional.¹⁰²

The French courts have attempted to use alternative theories to hold parent companies liable. On several occasions, the Paris Court of Appeal ruled that corporate veil piercing should be allowed when the parent company and its subsidiary form an economic unity.¹⁰³ Such an economic unit exists when corporate group members are, to a large extent, intermingled from a financial and economic point of view.¹⁰⁴ However, the French Court of Cassation has consistently rejected this view.¹⁰⁵ In addition, based on the theories of 'the *de facto* corporation' and 'the apparent *de facto* corporation,' scholars have also suggested that corporate groups should be considered one corporation when they share a common corporate interest. However, these theories have had limited success to date.¹⁰⁶

3.3.2 The Netherlands

Tort is usually the principal basis for establishing the liability of parent companies for their subsidiaries' acts.¹⁰⁷ In the landmark *Osby* case of 1981,¹⁰⁸ the Dutch Supreme Court found that a parent company may commit a tort vis-à-vis its subsidiary's creditors when it has such an influence over the management of the subsidiary that, at the time of the creation of the security, the parent company knew, or should have foreseen, that new creditors would be

¹⁰⁰ D'Alès and Terdjman (n 50) 1584.

¹⁰¹ Vandekerckhove (n 17) 457.

¹⁰² D'Alès and Laura Terdjman (n 50) 1584.

¹⁰³ CA Paris 20 March 1986 (1987) Rev Soc 98 (comments Y Guyon); CA Paris 12 May 1987 (1989) Somm D 5f (comments F Derrida).

¹⁰⁴ Vandekerckhove (n 17) 443.

¹⁰⁵ Cass com 8 November 1988 (1990) Rev Soc 71; Cass com 20 October 1992 (1993) Rev Soc 449. See also Vandekerckhove (n 17) 39-45, 443.

¹⁰⁶ For a further discussion of these doctrines, see Vandekerckhove (n 17) 443-444.

¹⁰⁷ *ibid* 34.

¹⁰⁸ HR 25 September 1981, NJ 1982, 443 (*Osby-Pannan A/B v Las Verkoopmaatschappij BV*).

harmed by the lack of the subsidiary's assets but nevertheless failed to satisfy the debts of those creditors.¹⁰⁹ Since this case, Dutch courts have refined the idea that a parent company may have a legal duty of care towards its subsidiary's creditors. As such, it must prevent a subsidiary from taking on a new debt if it is clear that this debt will not be satisfied.¹¹⁰ Dutch courts usually ask two questions. First, did the parent company know, or should it have known, that its act or omission would harm the creditors of the subsidiary (duty of care)? Second, what was the degree of involvement of the parent company in the management of its subsidiary (control)? When the parent company intensively influences the subsidiary's daily management, it may be considered as a quasi-director and it may incur the same liabilities in the event of a breach of duty of care.¹¹¹ Following this reasoning, a number of cases raising corporate veil piercing issues have been solved on the basis of tort rules.¹¹² Scholars studying transnational claims against MNEs have suggested that a parent company may generally have a duty of care to prevent foreseeable damage harming stakeholders by its subsidiaries.¹¹³

A parent company acting as a director of its subsidiary may also be held liable for the subsidiary's acts and omissions. Pursuant to Article 2:11 Dutch Civil Code, any legal person, which, at the time the liability arose, was an officer or director of another company, shall be jointly and severally liable with that company for its liability. The Dutch Civil Code provides that, when a company limited by shares¹¹⁴ and a company¹¹⁵ becomes bankrupt, each director shall be held liable for the amount of liabilities that cannot be satisfied out of the liquidation of the other assets if the management has manifestly performed its duties improperly and it is plausible that the improper management was an important cause of the bankruptcy. Importantly, these provisions apply to a parent company acting as a *de jure* or a *de facto* director of its subsidiary. For instance, a parent company may be considered as a *de facto*

¹⁰⁹ In this instance, the parent company had provided credit to the subsidiary and had received all the assets of the latter, actual and future, as collateral. As a result, the subsidiary appeared as a financially sound corporation whereas, in reality, it had no assets for the satisfaction of its debts. See Vandekerckhove (n 17) 34.

¹¹⁰ HR 19 February 1988, NJ 1988, 487; HR 21 December 2001, NJ 2005, 96. See also Jägers and Van Der Heijden (n 46) 858.

¹¹¹ Vandekerckhove (n 17) 35.

¹¹² *ibid.*

¹¹³ Jägers and Van Der Heijden (n 46) 859.

¹¹⁴ Dutch Civil Code, Article 2:138(1).

¹¹⁵ Dutch Civil Code, Article 2:248.

manager when it has had a direct influence over the subsidiary's management and when, in reality, the subsidiary's formal management has been set aside.¹¹⁶ This also applies to a foreign company acting as director of a Dutch company.¹¹⁷

Dutch courts may also apply the theory of identification to hold a parent company liable for corporate group activities.¹¹⁸ Dutch courts have identified various circumstances or factors that may give rise to identification, such as dominance of one company over another, intensive involvement in the management of a company, creation of expectations vis-à-vis third parties, commingling of assets, or close intermingling.¹¹⁹ However, Dutch courts remain reluctant to apply the identification theory and require sufficient reasons to conclude to identification (eg a close commingling of assets is not enough). Also, the fact that all the shares of a company are in the hands of one shareholder, and that this shareholder forms an economic unit with this company, does not generally provide sufficient ground to hold the shareholder liable for the contractual liabilities of the company.¹²⁰

3.4 Environmental law

French and Dutch laws and courts require the existence of fault to hold the parent company liable for environmental damage caused by corporate group activities.

3.4.1 France

In 2010, France enacted the Grenelle II Law, an environmental statute which contains two important provisions on the parent company's liability for its subsidiary.¹²¹ First, Article 227 Grenelle II Law modified Article L512-17 French Environmental Code, which now provides that, when a subsidiary¹²² is in judicial liquidation, a tribunal can hold its parent company liable for cleaning up the subsidiary's operation site if the parent company committed a 'characterized fault' (*faute caractérisée*) that contributed to the insufficient assets of the

¹¹⁶ Vandekerckhove (n 17) 35.

¹¹⁷ HR 18 March 2011, RvdW 2011, 392.

¹¹⁸ Vandekerckhove (n 17) 36-37.

¹¹⁹ *ibid.*

¹²⁰ *ibid* 37-38.

¹²¹ Loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (Loi Grenelle II).

¹²² The company must be a subsidiary according to Article L233-1 French Commercial Code.

subsidiary. When the parent company is itself insolvent, the tribunal can hold the ‘grand-parent’ company, meaning the company owning the parent company, liable. This provision prevents parent companies from using insolvent subsidiaries as a way to avoid liability. However, scholars have criticized this provision on several grounds. First, commentators are uneasy with the concept of characterised fault, arguing it does not exist in bankruptcy proceedings.¹²³ As a result, the necessary criteria to prove that the parent company committed a characterized fault, which contributed to the subsidiary’s insufficient assets, are uncertain.¹²⁴ Second, only a limited number of individuals, such as the liquidator or the State, can request such procedure, thus limiting opportunities for other actors, such as environmental NGOs, to bring a claim before a tribunal.

Second, Article 227 Grenelle II Law created Article L233-5-1 French Commercial Code, which allows a company to assume liability for the environmental obligations of another company when the latter has defaulted. Accordingly, a company, which holds more than 50% of the capital of another company, or has a holding, or controls another company, may elect to bear responsibility, in the event of the affiliated company’s failure, for all or part of the obligations to prevent and restore damage caused to the environment by that company.¹²⁵ However, this provision does not create an obligation for the parent company. Moreover, it only targets a limited number of damages caused to the environment.¹²⁶

French courts recently held the parent company of an oil MNE liable for environmental pollution committed by its subsidiary in the landmark *Erika* case.¹²⁷ However, *Erika* is concerned with oil pollution on the high seas, which is an area governed by specific rules of international law. The International Convention on Civil Liability for Oil Pollution Damage

¹²³ François-Guy Trébulle, ‘Entreprise et Développement Durable (1ère Partie) Juin 2009/Juillet 2010’ (2010) 12 *Environnement*, para 25.

¹²⁴ Sabrina Dupouy, ‘La Responsabilisation Environnementale des Groupes de Sociétés par le Grenelle: Enjeux et Perspectives’ (2012) 11 *Droit des Sociétés*.

¹²⁵ The French Court of Cassation had previously accepted that a parent company could voluntarily bear responsibility for its subsidiary’s environmental obligations. See Cass com 26 March 2008, n° 07-11.619.

¹²⁶ Dupouy (n 126).

¹²⁷ See Corinne Lepage, ‘Erika: “Une Avancée Tout à Fait Considérable du Droit de l’Environnement”’ (2012) 11 *Environnement*.

(CLC Convention)¹²⁸ establishes a specific system of civil liability that deals with damage resulting from maritime casualties involving oil-carrying ships. *Erika* was a complex case raising various legal and procedural issues. However, the following summary focuses mainly on the search for civil and criminal liability of the French parent company Total SA.¹²⁹ On 12 December 1999, the 25 year-old Maltese-flagged tanker *Erika* sank off the coast of Brittany. It spilled 31,000 tons of heavy fuel oil, belonging to the Panama subsidiary of Total SA, on 400 kilometres of the French coast.¹³⁰ Following the oil spill, civil and criminal claims were brought against various actors, including the parent company Total SA, in France. The Paris Regional Court, the Paris Court of Appeal, and the French Court of Cassation successively ruled in this case.¹³¹ Eventually, Total SA was found criminally and civilly liable.

The Paris Court of Appeal found that Total SA was criminally liable for the discharge of pollutants (Article L218-12 French Environmental Code)¹³², and the French Court of Cassation later upheld this point of the ruling. Article L218-12 normally applies to the person responsible for the operation of the ship. In this instance, Total SA's subsidiary was directly in charge of the operation of the *Erika* through a charter party.¹³³ Nonetheless, the Court of Appeal deduced that the parent company had control over the management of the ship based on the provisions of the charter party. First, although it was not a party to the charter party, Total SA had to enforce a number of the obligations in the contract. For example, in the

¹²⁸ International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3.

¹²⁹ For a discussion of the liability exposure of MNEs involved in oil spills, see Robin Hansen, 'Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the *Prestige* Oil Spill' (2008) 26 Berkeley Journal of International Law 410.

¹³⁰ On the *Erika* litigation, see Vincent Foley and Christopher Nolan, 'The *Erika* Judgement – Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed' (2009) 33 Tulane Maritime Law Journal 41; Laurent Neyret, 'L'Affaire *Erika*: Moteur d'Évolution des Responsabilités Civile et Pénale' [2010] Recueil Dalloz 2238; Sophia Kopela, 'Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: The *Erika* Case' (2011) 20 RECIEL 313; Emmanuel Daoud and Clarisse Le Corre, 'Arrêt *Erika*: Marée Verte sur le Droit de la Responsabilité Civile et Pénale des Compagnies Pétrolières' (2012) 122 Bulletin Lamy Droit Pénal des Affaires.

¹³¹ TGI Paris (11) 16 January 2008, n° 9934895010; CA Paris 30 March 2010, n° 08/02278; Cass crim 25 September 2012, n° 10-82938.

¹³² *Code de l'environnement*.

¹³³ A charter party is the hire or lease contract between the owner of a vessel and the hirer or lessee (charterer) for the use of the vessel.

event of an accident, the captain of the ship had to inform Total SA immediately. Second, Total SA had retained a right to check vessel compliance under its vetting procedure. The charter party allowed Total SA to verify the care and the diligence with which the shipment was transported, as well as the ways in which the ship and the crew were managed. In *Erika*, the French courts held the real decision-maker, meaning the parent company, liable.¹³⁴ The Court of Appeal concluded that the subsidiary in Panama was ‘an empty shell,’ as it did not have any team or building in Panama where it was registered and lacked legal and financial autonomy.¹³⁵ Furthermore, the French courts found that Total SA had made an abusive use of the charter party to separate the legal and financial risks from the tanker management and, therefore, avoid liability.¹³⁶ Another important aspect of *Erika* is that the Court of Appeal assessed Total SA’s behaviour on the basis of its own internal rules of control.¹³⁷ Total SA had voluntarily set up a number of procedures for its own activities, including a specific vetting procedure to control the quality of tankers. The Court of Appeal concluded that, by ignoring this procedure and not vetting the *Erika*, Total SA had neglected its duty of care. Total SA’s voluntary commitment to control the quality of tankers became a norm to assess the faulty behaviour of the company.¹³⁸

However, the Court of Appeal rejected that Total SA could be held civilly liable for the damage caused by the pollution.¹³⁹ The Court of Appeal held that the CLC Convention places the liability for damage resulting from maritime casualties involving oil-carrying ships on the owner of the ship from which the polluting oil escaped or was discharged. This liability is strict and exonerates other potential parties from being held civilly liable, unless these parties committed gross negligence. The Court of Appeal did not find that Total SA had committed any gross negligence, as it had not expected that pollution would occur, even though it did not respect its own vetting rules. However, the Court of Cassation overturned this point of

¹³⁴ Neyret (n 130) 2239.

¹³⁵ Daoud and Le Corre, ‘Arrêt Erika’ (n 130) 5.

¹³⁶ Neyret (n 130) 2239; *ibid*.

¹³⁷ Neyret (n 130) 2239.

¹³⁸ *ibid*; Daoud and Le Corre, ‘Arrêt Erika’ (n 130) 5.

¹³⁹ The French doctrine has used the expression ‘guilty but not liable’ to highlight the lack of consistency between civil and criminal liability. See Neyret (n 130) 2239; Christine Carpentier, ‘Société Mère et Droit de l’Environnement’ (2012) 4333 *Revue Lamy Droit des Affaires* 79.

the ruling, holding that Total SA had acted recklessly (*faute de témérité*) within the meaning of the CLC Convention and that it was necessarily aware that damage would probably result from such behaviour.

The *Erika* case demonstrates that French judges can creatively hold parent companies liable in the context of corporate group activities. However, if the Court of Cassation's ruling was innovative, it was, at the same time, quite unusual. Commentators have argued that the French Court of Cassation's ruling was probably influenced by the 'symbolic nature' of *Erika* and the public attention the case received in France. Therefore, it is uncertain whether the French Court of Cassation could reach similar conclusions in a transnational case against an MNE.

3.4.2 The Netherlands

Dutch courts have been hesitant to find to 'an appropriate delineation of the rules on tort and the identification theory' in cases where companies attempt to evade environmental liability through the abusive use of the corporate group structure.¹⁴⁰

In the *Roco BV v De Staat der Nederlanden* case, Rouwenhorst was the owner of premises that were heavily polluted. In order to escape liability, he transferred the business to a newly incorporated limited liability company, Roco BV, which continued to operate at another location. Rouwenhorst's spouse and Hoekstra BV (a holding controlled by Rouwenhorst and his spouse and of which Rouwenhorst was the sole director) held the shares of Roco BV. The Dutch State claimed reimbursement for costs related to the environmental clean-up. In first instance, the District Court dismissed the State's claim because Roco BV had been incorporated after the pollution had been caused and it had not accepted liability for the pollution upon the business transfer.¹⁴¹ However, the Court of Appeal held Roco BV liable since the sole purpose of the transfer was to evade potential claims by the State, as Roco BV

¹⁴⁰ Vandekerckhove (n 17) 423.

¹⁴¹ DC Zutphen 1 August 1991, Vermande D-8-85.

continued the business of its predecessor.¹⁴² Eventually, the Dutch Supreme Court upheld that Roco BV was liable for the environmental clean-up.¹⁴³ However, it rejected the use of the theory of identification as a basis for liability since ‘the case did not concern an identification of two legal or natural persons but rather an identification of an “enterprise” with the company.’¹⁴⁴ Furthermore, Roco BV could not be held liable on the basis of a successor liability theory, as it did not exist under Dutch law. Ultimately, the Dutch Supreme Court held Roco BV liable in tort for having continued the business with the clear intent of frustrating the State’s claim for damages.¹⁴⁵

In the *Bato’s Erf BV v De Staat der Nerderlanden* case,¹⁴⁶ which concerned soil and groundwater pollution, the parent company had modified its charter and name, and had transferred its operations to a newly incorporated wholly-owned subsidiary in order to escape liability. The Court of Appeal decided that the parent company and the subsidiary must be identified because both companies were closely intermingled. In doing so, it took into account the following factors: the parent company had incorporated the subsidiary; it had transferred most assets and liabilities; the subsidiary was the true operating company conducting the business of the parent company, which controlled the subsidiary’s activities; both companies had the same directors; the subsidiary was wholly-owned; and the financial statement of both companies were consolidated.¹⁴⁷ However, the Dutch Supreme Court overturned the ruling, holding that the mere fact that a parent company determines the business policy of a subsidiary, and directs or influences its implementation, either by having its managing directors also acting as managing directors of the subsidiary or in its capacity as managing director and/or sole shareholder, does not mean that these activities become the activities of the parent company. As a result, the parent company cannot automatically be held liable for the tortious activities of the subsidiary.¹⁴⁸

¹⁴² CA Arnhem 10 May 1994, TMA 94-6, 155 et seq.

¹⁴³ HR 3 November 1995, NJ 1996, 215.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ HR 16 June 1995, NJ 1996, 214.

¹⁴⁷ Vandekerckhove (n 17) 424.

¹⁴⁸ Lucas Bergkamp and Wan-Q Pak, ‘Piercing the Corporate Veil: Shareholder Liability for Corporate Torts’ (2011) 8 Maastricht Journal of European and Comparative Law 167, 169.

3.5 Employment law

French and Dutch courts have ingeniously used the theory of ‘co-employment’ (*co-emploi*) to find parent companies liable towards their subsidiaries’ employees. Nonetheless, recent transnational litigation in France has demonstrated that this theory may have limited success protecting employees in the context of MNE activities.

3.5.1 France

The theory of co-employment has prompted renewed interest in France over the last few years.¹⁴⁹ This judicial creation challenges not only the separate legal personality and the limited liability of companies, but also the contractual foundation of the employment relationship.¹⁵⁰ Co-employment is generally raised by the employees of a company, often a subsidiary belonging to a corporate group, when the company is ceasing its activities and the employees’ labour rights are at risk of being violated. In general, the contractual employer has specific obligations towards its employees, such as providing termination compensation, which it may not be able to respect if it becomes insolvent. To get around this situation, employees have sought to hold the parent company liable for such obligations, claiming that it was actually their real employer and, therefore, had obligations towards them. French courts have applied the theory of co-employment not only to protect employees, but also to sanction abnormal practices within corporate groups, especially when parent companies are also holding companies that benefit from an advantageous tax regime.¹⁵¹

Originally, French courts required plaintiffs to demonstrate a relationship of subordination between the parent company and the subsidiary’s employees, for instance, by the parent company’s interference in the management of the subsidiary’s employees.¹⁵² However, the

¹⁴⁹ See Laure Calice and Marie-Charlotte Diriar, ‘Les Nouveaux Fronts Contentieux du Licenciement Économique: L’Impossible Équation entre l’Existence du Groupe et l’Autonomie Juridique de la Société’ (2012) 5 Cahiers de Droit de l’Entreprise; Patrick Morvan, ‘L’Identification du Co-Employeur’ (2013) 46 La Semaine Juridique Social 1438.

¹⁵⁰ Jacques Perotto and Nicolas Mathey, ‘La Mise en Jeu de la Responsabilité de la Société Mère est-elle une Fatalité? Regards Croisés sur les Groupes de Sociétés et le Risque de Coemploi’ (2014) 25 La Semaine Juridique Social 1262, 1262.

¹⁵¹ *ibid.*

¹⁵² Cass soc 19 June 2007, n° 05-42.570.

French Court of Cassation progressively accepted that a ‘commingling of interests, activities, and control’ (*confusion d’intérêts, d’activité et de direction*) between the two companies was sufficient to qualify these companies as ‘co-employers.’¹⁵³ Generally, French courts look at various indicators, such as the parent company’s economic control of the subsidiary, the absence of the subsidiary’s independence to define its own strategy, etc.¹⁵⁴ For example, French courts have found commingling between a parent company and its subsidiary when ‘a subsidiary is totally dependent on a corporate group that absorbs 80% of its production and determines its prices, when the parent company of this group owns almost all its capital, manages its staff, dictates its strategy, and constantly intervenes in its economic and social management while the subsidiary is ceasing its activities, while leading the operational direction and the administrative management of the subsidiary.’¹⁵⁵ The co-employment theory applies to MNEs, as the French Court of Cassation accepted that a German parent company was the co-employer of its French subsidiary’s employees.¹⁵⁶

Scholars have criticized the French courts for lacking consistency or clarity in their application of co-employment. This led the French Court of Cassation to clarify which requirements are necessary to demonstrate the existence of co-employment. It recently found that two companies belonging to the same group is not enough to justify co-employment.¹⁵⁷ Furthermore, it found that ‘a company belonging to a corporate group cannot be considered the co-employer of the employees of another company, outside the existence of a relationship of subordination, unless there is between them, beyond the necessary coordination of economic actions between companies belonging to a same group and the state of economic domination that belonging to the same group may produce, a commingling of interests, activities, and control demonstrated by the interference in the economic and social management of the latter.’¹⁵⁸ French courts seem to require strict criteria to prove such

¹⁵³ Cass soc 28 September 2011, n° 10-12.278; Cass soc 18 January 2011, n° 09-69.199; Cass soc 30 November 2011, n° 10-22.964 to 10-22.985 and 10-22.994.

¹⁵⁴ Marie Hautefort, ‘Co-Employeur: Le Vritable Employeur Est Celui qui Détient les Pouvoirs’ (2012) 314 *Jurisprudence Sociale Lamy*.

¹⁵⁵ Cass soc 18 January 2011 (n 153) (author’s translation).

¹⁵⁶ Cass soc 30 November 2011 (n 153).

¹⁵⁷ Cass soc 25 September 2013, n° 11-25.733.

¹⁵⁸ Cass com 2 July 2014, n° 13-15.208 (*Molex*) (author’s translation).

interference.¹⁵⁹ Moreover, the mere fact that the parent company wholly owns its subsidiary's capital and exercises decisive influence over its subsidiary (the capital presumption) is not enough to justify co-employment.¹⁶⁰

The *AREVA* case showed the limits of the co-employment theory as a basis for parent company liability. Pursuant to Article L454-1 Code of Social Security (*Code de la sécurité sociale*), the plaintiffs brought a compensation claim for occupational disease against AREVA Nc for 'inexcusable fault' or gross negligence (*faute inexcusable*)¹⁶¹ towards Venel, an employee of its Nigerien subsidiary COMINAK.

In 2012, the TASS held that AREVA Nc, as the co-employer of Venel, was liable for gross negligence. First, it found that AREVA Nc was the co-employer of Venel, since COMINAK and AREVA Nc 'pursued, in collaboration, simultaneously, indivisibly, and permanently, a common activity in a common interest, under a single authority.'¹⁶² Indicators included COMINAK's charter, the identity of its main shareholder, and interconnections between COMINAK and AREVA Nc (same address, same activities, same involvement in the exploitation of the same mining site). Moreover, AREVA Nc appeared to assume technical, economic, social, and financial liability for the potential impact on the health and safety of individuals working in its uranium mines by setting up 'health observatories' and signing a memorandum of understanding on occupational disease caused by ionizing radiation with Sherpa in 2009.¹⁶³ AREVA NC's voluntary commitment demonstrated that, while COMINAK acted as the contractual employer of Venel, AREVA Nc acted as the employer with the authority and power to control and organize working conditions, especially with

¹⁵⁹ *ibid.* See also D'Alès and Terdjman (n 50) 1584.

¹⁶⁰ Cass soc 25 September 2013 (n 157).

¹⁶¹ The TASS described the gross negligence of the employer as follows: '[P]ursuant to the employment contract with its employee, the employer has towards [the employee] an obligation of result to ensure his safety, most notably for the occupational disease developed by this employee as a result of the products manufactured or used by the company, and the breach of that obligation constitutes gross negligence within the meaning of Article L452-1 Code of Social Security where the employer knew or ought to have known the danger to which the employee was exposed and did not take the necessary measures to protect the employee.' TASS Melun 11 May 2012, n°10-00924/MN (author's translation).

¹⁶² *ibid.* (author's translation).

¹⁶³ AREVA Nc agreed to monitor the impacts of its activities on its employees and to compensate them in case of occupational disease.

regard to occupational risk management. Therefore, a subordinate relationship existed between AREVA Nc and the employee. Second, the TASS found that AREVA NC had committed gross negligence by not setting up safety measures to protect workers in its mines, which caused the development of the disease.

However, in 2013, the Paris Court of Appeal overturned the TASS' judgement, rejecting that AREVA Nc was the co-employer of Venel.¹⁶⁴ It found that there was no subordinate relationship between AREVA Nc and Venel, as it could not be proved that AREVA Nc had exerted any power of direction, control, or discipline over Venel. Furthermore, it held that there was no commingling of activities, interests, and control between COMINAK and AREVA Nc. First, COMINAK could not be considered AREVA Nc's subsidiary pursuant to Article L233-1 French Commercial Code, which requires that a company owns more than 50% of the capital of another company in order for the second company to be regarded as a subsidiary. However, AREVA Nc only owned 34% of COMINAK's shares while the Nigerien State and other foreign companies owned the rest. Second, there was no evidence demonstrating that COMINAK had lost the autonomy to manage its own activities. The fact that both companies shared a common interest, as a result of AREVA Nc being COMINAK's shareholder, did not constitute a commingling of management or activities. Third, even though AREVA Nc owned COMINAK's mining concession, the Court of Appeal rejected there were interconnections between COMINAK and AREVA Nc demonstrating dependence. Fourth, the Court of Appeal rejected that AREVA Nc's voluntary commitment made it the co-employer of Venel. The French Court of Cassation upheld this ruling in 2015.¹⁶⁵

The position of the Court of Appeal of the Court of Cassation in *AREVA* appears to be in line with the approach recently adopted by the French Court of Cassation, which requires the demonstration of strict criteria showing the existence of co-employment. However, a lack of consistency, clarity, and certainty remains as to the exact criteria required. Furthermore, this approach restricts the situations that may qualify for co-employment. For instance, it appears

¹⁶⁴ CA Paris 20 June 2013, n° 08/07365.

¹⁶⁵ Cass civ 22 January 2015, n° 13-28.414.

that the parent company must own 50% of the subsidiary's capital within the meaning of French Commercial Code in order for the relationship between the parent company and the subsidiary to qualify for co-employment. This criterion does not allow a parent company to be held liable for its subsidiary's abuse in the context of a joint venture, such as in *AREVA*. Ultimately, such a position reduces the possibilities the co-employment theory could potentially provide to victims of labour rights abuse by MNEs in host countries.

3.5.2 The Netherlands

The Dutch courts have accepted the application of co-employment in cases involving MNEs.¹⁶⁶ For instance, a Dutch company was held to be the co-employer of an employee of its Cypriot subsidiary in Saudi Arabia.¹⁶⁷ The two companies were closely intermingled and the court had doubts about the true existence of the subsidiary.¹⁶⁸

4 The criminal liability of French and Dutch MNEs

Plaintiffs have sought to hold parent companies of MNEs, or their directors, criminally liable in France and the Netherlands for human rights abuse and environmental damage taking place in host countries. Aspects, such as the existence of corporate criminal liability, especially for criminal offences committed in the context of corporate group activities, and the conditions required to engage it, play a crucial role in the success of transnational criminal claims against MNEs.

4.1 Corporate criminal liability and corporate groups

The criminal liability of legal persons is relatively new in France and the Netherlands. Both countries were amongst the first European countries of civil law tradition to adopt a comprehensive regime of corporate criminal liability.¹⁶⁹

¹⁶⁶ Vandekerckhove (n 17) 410.

¹⁶⁷ Central Appeal Council 11 November 1980, WW 1980/79 (*Centrale Raad Van Beroep*).

¹⁶⁸ Vandekerckhove (n 17) 410.

¹⁶⁹ Sara Sun Beale and Adam Safwat, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 109.

In France, discussions over the use of criminal sanctions to regulate corporate misconduct emerged in the 1980s after the country was confronted with the increase in MNEs' power and their ability to evade local regulatory requirements.¹⁷⁰ The new French Criminal Code introduced corporate criminal liability in 1994. At that time, companies could be held criminally liable only when statutory law explicitly stated that legal persons could be liable as such. This legal restriction had a direct impact on transnational claims against MNEs. In *Total*, the plaintiffs targeted Total's executives, and not the company, as the French Criminal Code did not provide for corporate criminal liability for the alleged offences.¹⁷¹ It was not until 2004 that the criminal liability of legal persons was extended to all criminal offences.¹⁷² Article 121-2 French Criminal Code now provides that legal persons are criminally liable for the offences committed on their account by their organs or representatives.

Can corporate groups be held criminally liable in France? Pursuant to Article 121-2 French Criminal Code, only business entities that have legal personality can be held criminally liable. Since corporate groups do not enjoy legal personality, they cannot be criminally liable.¹⁷³ Furthermore, Article 121-1 French Criminal Code states that no one is criminally liable except for his own conduct.¹⁷⁴ Therefore, this principle of personal liability prevents the emergence of criminal vicarious liability in the context of corporate group activities.¹⁷⁵ This is reinforced by the fact that it may be difficult to determine which company of the group committed the offence.¹⁷⁶ However, French courts have occasionally taken into account the economic reality of the corporate group to hold the parent company criminally liable. In *Erika*, for instance, the parent company was held criminally liable, as it had an effective

¹⁷⁰ *ibid.*

¹⁷¹ Benoît Frydman and Ludovic Hennebel, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' in Manoj Kumar Sinha (ed), *Business and Human Rights* (SAGE 2013).

¹⁷² Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.

¹⁷³ See Frédéric Desportes, 'La Responsabilité Pénale des Personnes Morales' [2002] *JurisClasseur Sociétés Traité*, Fasc. 28-70; Katrin Deckert, 'Corporate Criminal Liability in France' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011) 156.

¹⁷⁴ For a translated version of the French Criminal Code, see John Rason Spencer, 'Penal Code' (*Legifrance* 12 October 2005) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

¹⁷⁵ Emmanuel Daoud and Clarisse le Corre, 'À la Recherche d'une Présomption de Responsabilité des Sociétés Mères en Droit Français' (2012) 4330 *Revue Lamy Droit des Affaires* 63, 63.

¹⁷⁶ Maggy Pariente, 'Les Groupes de Sociétés et la Responsabilité Pénale des Personnes Morales' (1993) 2 *Revue des Sociétés* 247; Marc Segonds, 'Frauder l'Article 121-2 du Code Pénal' (2009) 9 *Droit Pénal* 19, 19.

power of control over the tanker.¹⁷⁷ Furthermore, in theory, a parent company may be held criminally liable as an accomplice to a criminal offence committed by its subsidiary abroad pursuant to Article 113-5 French Criminal Code (*Rougier*).

In the Netherlands, in 1951, the Economic Offences Act (*Wet Economische Delicten*) recognized that legal persons, including companies, could be criminally liable for a number of economic crimes. However, in 1976, a major criminal reform introduced general corporate criminal liability. Since then, Article 51 Dutch Criminal Code provides that both natural and legal persons can commit criminal offences.

Similar to France, only business entities with legal personality can be criminally liable. Nonetheless, Article 51(3) Dutch Criminal Code states that criminal offences may also be committed by certain entities without legal personality, such as unincorporated companies or partnerships. The Dutch Criminal Code also provides potential grounds to engage the criminal liability of the parent company in the context of corporate group activities. For instance, Article 51(2) Dutch Criminal Code states that, when a legal person commits a criminal offence, criminal proceedings may be instituted, and punishments may be imposed not only on the legal person but also on persons who ordered the commission of the criminal offence or directed the unlawful acts. Moreover, pursuant to Article 48 Dutch Criminal Code, in theory, a parent company may be held criminally liable as an accomplice to a criminal offence committed by its subsidiary.

4.2 The elements of criminal offences committed by companies

Corporate criminal liability will be established when the objective (*actus reus*) and the subjective (*mens rea*) elements of the criminal offence are gathered.

¹⁷⁷ Emmanuel Daoud and Annaëlle André, 'La Responsabilité Pénale des Entreprises Transnationales Françaises: Fiction ou Réalité Juridique?' [2012] AJ Pénal 15, 19.

4.2.1 *Actus reus*

Article 121-2 French Criminal Code states that legal persons are criminally liable for the offences committed on their account by their organs or representatives. Two conditions are therefore required. First, the criminal offence must have been committed on behalf of the company.¹⁷⁸ This means that the criminal offence must have been committed for the benefit of the company and not just for the individual benefit of the organ or the representative. It is not required that the company gained a financial benefit from the criminal offence.¹⁷⁹ Second, an organ or a representative of the company must have committed the criminal offence. An organ may be defined as the person, either an individual or a group, who has the power of direction or organization within the company, such as a director, a board of directors, or a general assembly.¹⁸⁰ A company can also be liable when the criminal offence was committed by a *de facto* director.¹⁸¹

The situation is more complex when a representative commits the criminal offence. Previously, a representative was an individual possessing the power, either general or special, to represent the company. Nonetheless, French courts recently extended the concept to individuals, whether employees or not, which intervene on behalf of the company.¹⁸² Historically, the French Court of Cassation also rejected that a company could be liable if the perpetrator of the criminal offence could not be identified or was not its representative.¹⁸³ However, it now accepts that a company is liable, even though it is not possible to identify the perpetrator.¹⁸⁴ In addition, a company used to be criminally liable only when its representative committed fault.¹⁸⁵ But, on several occasions, the French Court of Cassation

¹⁷⁸ See also Cass crim 1 April 2008, n° 07-84839; Cass crim 22 January 2013, n° 12-80022.

¹⁷⁹ Emmanuel Mercinier, 'La Dégénérescence de l'Article 121-2 du Code Pénal' (2011) 3681 Revue Lamy Droit des Affaires 91, 91.

¹⁸⁰ *ibid* 91.

¹⁸¹ Cass crim 13 April 2010, n° 09-86429.

¹⁸² Deckert (n 173) 161; Mercinier (n 179) 93.

¹⁸³ Cass crim 18 January 2000, n° 99-80318.

¹⁸⁴ Cass crim 20 June 2006, n° 05-85255; Cass crim 25 June 2008, n° 07-80261. For a critique of this case-law, see Alexandre Gallois, 'La Responsabilité Pénale des Personnes Morales: Une Responsabilité à Repenser' [2011] Bulletin Lamy Droit Pénal des Affaires 1.

¹⁸⁵ Mercinier (n 179) 91.

has held companies liable, even though their representatives did not commit fault.¹⁸⁶ Scholars suggest that French courts assume that a company automatically committed fault when it was responsible for respecting certain rules and regulations, such as health and safety regulation. If human intervention is still required, the condition is automatically satisfied due to the nature of the offence.¹⁸⁷ Ultimately, recent case-law demonstrates that French courts are progressively broadening the situations where they accept corporate criminal liability.

In France, the delegation of authority within a company may play an important role in determining corporate criminal liability. French courts accept that the person who holds a delegation of authority is a representative of the legal person acting on behalf thereof. As a result, a legal person can be held criminally liable for any offences a delegatee committed on its behalf. However, when there is delegation of authority within a group of companies, the French Court of Cassation has consistently held that, in health and safety matters, the criminal offence committed by a delegatee only engages the criminal liability of the company which is the employer of the victim.¹⁸⁸ This position has been criticized for presuming that the delegatee, although not an employee of the company that employed the victim, was a representative of this company.¹⁸⁹ In the context of transnational litigation against MNEs, this means that only the company that has employed the victim, usually the subsidiary, can be held liable. As a result, the parent company cannot be held liable, even when it benefits from the delegation.

In the Netherlands, the criteria required to establish the criminal liability of legal persons were inconsistent until 2003 when the Dutch Supreme Court ruled that a legal person could be held criminally liable only if there was an illegal act or omission that could be reasonably imputed to the legal person.¹⁹⁰ It provided a guiding principle to assess this ‘reasonable

¹⁸⁶ Cass crim 27 October 2009, n° 09-80490. See also *ibid* 94.

¹⁸⁷ Deckert (n 173) 161.

¹⁸⁸ Cass crim 13 October 2009, n° 09-80857; Cass crim 14 December 1999, n° 99-80.101.

¹⁸⁹ Marie Desplanques, ‘Les Délégations de Pouvoirs : Principes et Actualités’ (2011) 3682 *Revue Lamy Droit des Affaires* 96, 100.

¹⁹⁰ HR 21 October 2003, NJ 2006, 328. See also Berend Keulen and Erik Gritter, ‘Corporate Criminality in the Netherlands’ in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011) 177, 183

attribution’: ‘the attribution of certain (illegal) conduct to the corporation may under certain circumstances be reasonable if the (illegal) conduct took place within the ‘scope’ of the corporation.’¹⁹¹ There are four situations in which conduct will, in principle, be carried out ‘within the scope of a corporation.’ First, the act or omission was allegedly committed by someone who works for the legal person, whether or not under a formal contract of employment. Second, the conduct was part of the everyday ‘normal business’ of the legal person. Third, the legal person profited from the relevant conduct. Fourth, the alleged course of conduct was at the ‘disposal’ of the legal person which ‘accepted’ the conduct. In the latter situation, the failure to take reasonable care to prevent the conduct from being carried out may establish acceptance.¹⁹² Furthermore, any employee can cause its employer to commit an offence as long as the facts can be construed to show that the corporation ultimately ‘committed’ the offence. Dutch scholars suggest that the Dutch Supreme Court’s approach towards corporate criminal liability can be characterized as ‘open,’ as there is no rigorous theory to turn to for guidance. In particular,

The Dutch approach may put some pressure on legal certainty but it has several advantages. [...] The open approach leaves room for “tailor-made” jurisprudence, in which the courts are free to weigh relevant circumstances and factors. It acknowledges that the possible variation in cases is, in fact, endless.¹⁹³

This approach may leave room for relevant jurisprudential developments in the context of transnational litigation against MNEs.

4.2.2 *Mens rea*

Specific categories of criminal offences, such as crimes, require proof of a subjective element (intent).¹⁹⁴ As a result, there can be no liability without the intent of committing a crime. This

¹⁹¹ Keulen and Gritter (n 190) 183.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ It should be noted that Dutch criminal law requires proof of the subjective element only for crimes (*misdrifven*) and excludes it for misdemeanours and contraventions (*overtredingen*), while French criminal law requires proof of the subjective element for both crimes and misdemeanours.

rule creates difficulties in the context of corporate criminal liability, as legal persons are incapable of possessing intent to commit a crime. Therefore, courts may adopt various approaches to establish the *mens rea* of a company.

Under French law, corporate criminal liability is not dependent on the commission of fault by the legal person. Usually, the fault of the natural person, whether an organ or a representative of the legal person, will be sufficient. Nonetheless, some French courts also require fault of the legal person.¹⁹⁵ Proof of fault may be found in the commercial or social policy of the legal person or its ‘defective’ organization. However, the French Court of Cassation explicitly rejected this line of reasoning.¹⁹⁶

Dutch case-law demonstrates two main approaches to prove corporate intent and negligence in the Netherlands.¹⁹⁷ First, the *mens rea* of a natural person is attributed to the company.¹⁹⁸ Second, corporate *mens rea* can be derived from circumstances closely related to the company itself, such as its policies and decisions. A company may confess by means of its agents,¹⁹⁹ for example, stating in court that management did not act whereas it knew that fraudulent acts were taking place within the company.²⁰⁰ The latter approach is particularly suited to cases of gross negligence, which can be derived ‘objectively’ from the failure to act according to standards of conduct. For instance, manslaughter by gross negligence may be established if the failure to meet the standards caused death.²⁰¹ It should also be pointed out that intent is not required for misdemeanours under Dutch criminal law. The absence of intent is significant in the context of criminal claims brought against MNEs, as plaintiffs have raised commission of misdemeanours in past claims.

¹⁹⁵ T corr Versailles 18 December 1995, Dr Pénal (1996) 71 obs Robert.

¹⁹⁶ Cass crim 26 June 2001, Bull Crim (2001) 161 (*Sté Carrefour*). See also Deckert (n 173) 164.

¹⁹⁷ Keulen and Gritter (n 190) 183.

¹⁹⁸ HR 15 October 1996, NJ 1997, 109.

¹⁹⁹ HR 14 March 1950, NJ 1952, 656.

²⁰⁰ Keulen and Gritter (n 190) 184.

²⁰¹ *ibid* 184.

5 The emergence of new corporate liability standards

Plaintiffs in transnational litigation against MNEs have used the CSR commitments of MNEs to allege liability for human rights abuse and environmental damage. However, their arguments have been met with a mixed reception from French and Dutch courts. Ultimately, legislative intervention seems necessary to ensure corporate liability. Recent developments in France seem to go in this direction.

5.1 Corporate social responsibility: source of liability?

The proliferation of CSR instruments and the trend towards corporate self-regulation may inadvertently contribute to the development of liability regimes.²⁰² Some NGOs and scholars argue that CSR instruments create, to some extent, obligations on MNEs to abide by them, and the breach of which may trigger corporate liability before a court.²⁰³ In practice, CSR instruments are useful to courts in assessing specific situations.

5.1.1 France

In some cases, French labour courts have used ethical codes to demonstrate the employer's management power or to assess the gravity of the employee's failure to comply with a professional duty.²⁰⁴ In some transnational cases against MNEs, judges have creatively used CSR instruments to assess MNEs' breach of their duty of care. In *Erika*, the parent company Total SA had voluntarily set up a specific vetting procedure to control the quality of its tankers. The French courts found that, by ignoring this procedure, Total SA had neglected its duty of care. Total SA's voluntary commitment to control the quality of tankers became a norm upon which to base the faulty conduct of the company.²⁰⁵ Similarly, in *AREVA*, the TASS held that, by setting up health observatories and signing a memorandum of

²⁰² Emmanuel Daoud and Clarisse Le Corre, 'La Responsabilité Pénale des Personnes Morales en Droit de l'Environnement' (2013) 44 Bulletin du Droit de l'Environnement Industriel 53, 55.

²⁰³ Interview with Lawyer 2 (France 2013). For a discussion of the legal effects of company voluntary commitments, see Stéphane Béal and others, 'Les Risques Juridiques Liés à la Mise en Place d'une Démarche Éthique dans l'Entreprise' (2012) 4 Cahiers de Droit de l'Entreprise; Laurence Pinte, 'La Responsabilité Sociale des Entreprises: un Nouvel Enjeu Fiscal' (2012) 9 Revue de Droit Fiscal; Julie Ferrari, 'La Société Mère Peut-Elle Voir sa Responsabilité Engagée dans le Cadre de la RSE?' (2012) 4332 Revue Lamy Droit des Affaires 72.

²⁰⁴ Béal and others (n 203).

²⁰⁵ Neyret (n 130) 2239; Daoud and Le Corre, 'Arrêt Erika' (n 130) 5.

understanding on occupational disease caused by ionizing radiation with Sherpa, AREVA Nc appeared to assume liability for potential impacts on the health and safety of individuals working in its uranium mines. The TASS found, on the basis of the company's CSR commitments, that AREVA Nc acted as the employer of Venel with the authority and the power to control and organize his working conditions.

At the same time, arguments based on CSR commitments have produced limited results. In the same *AREVA* case, the Court of Appeal rejected that AREVA Nc's voluntary commitments led either directly, or through its subsidiaries, to a situation where AREVA Nc automatically becomes the employer, or co-employer, of Venel. In *Alstom*, the plaintiffs argued that the companies failed to fulfil their commitments to observe relevant rules of public international law enshrined in their code of ethics and the UN Global Compact they signed.²⁰⁶ In 2013, the Versailles Court of Appeal rejected that the companies had violated international law with regard to commitments resulting from their adhesion to CSR instruments. First, it held that the UN Global Compact's application is 'based solely on the goodwill of the corporations. It has no binding effect [...]. The Global Compact being no more than a point of reference, non-compliance with its principles cannot be invoked to justify a claim for violation of international rights.'²⁰⁷ Second, the Court of Appeal found that the companies' codes of ethics stated that they are of a 'strictly voluntary' and non-binding character. As these codes stem from a personal initiative and provide no sanction, they cannot be considered binding or relied upon by third parties. Ultimately, the Court of Appeal concluded:

The Global Compact, as well as the codes of ethics, express values that the corporations wish their staff to apply in the exercise of their activities for the company. They are "framework" documents which contain only recommendations and rules of conduct, without creating obligations or commitments for the benefit of

²⁰⁶ The UN Global Compact is a voluntary initiative by which businesses commit to implement a principle-based framework in areas such as human rights, labour rights, the environment, or corruption. See 'UN Global Compact' (*UN*) <<https://www.unglobalcompact.org/about>> accessed 30 November 2015.

²⁰⁷ See Noah Rubins and Gisèle Stephens-Chu, 'Introductory Note to AFPS and PLO v Alstom and Veolia (Versailles Ct App.)' (2013) 52 *International Legal Materials* 1157, 1181.

third parties who may seek compliance [with such documents]. Thus, the appellant cannot rely on a breach of the Global Compact or of the standards of conduct provided for in the codes of ethics to claim that Alstom, Alstom Transport and Veolia Transport have committed a breach of international law.²⁰⁸

Interestingly, the plaintiffs insisted upon the binding nature of the norms contained in the CSR instruments the companies had committed to respect. However, the French courts focused instead on the nature of the soft-law instruments to reject their direct applicability.

5.1.2 The Netherlands

In the Netherlands, the OECD Guidelines were famously applied in the *BATCO* case.²⁰⁹ The Court of Appeal of Amsterdam annulled the decision to close down the Dutch subsidiary of an English parent company in order to concentrate production at the Belgian company of the group. It held that the lack of appropriate consultation with the trade unions by the Dutch subsidiary amounted to mismanagement in breach of the OECD Guidelines, to which the English parent had committed. For some authors, *BATCO* demonstrated that Dutch courts are prepared to consider the OECD Guidelines when determining the duty of care of companies under Dutch tort law.²¹⁰

In *Shell*, the plaintiffs argued that the parent company Shell Plc had a duty of care to influence and control its subsidiary SPDC to prevent damage to humans and the environment in Nigeria.²¹¹ This obligation was reinforced by the fact that the MNE had committed to implement various CSR instruments, such as the OECD Guidelines, the UN Global Compact, and Global Reporting Initiative, which prescribe an active duty of care for parent companies.²¹² For instance, pursuant to the OECD Guidelines, Shell Plc should have set up and maintained a suitable environmental management system making emergency plans as

²⁰⁸ *ibid* 1182.

²⁰⁹ CA Amsterdam 21 June 1979, NJ 1980, 217.

²¹⁰ Jägers and Van Der Heijden (n 46) 857-858.

²¹¹ ‘Writ of Summons’ (n 81) [195].

²¹² *ibid* [199]-[211].

well as best practices procedures and technologies available in case of oil spills.²¹³ Furthermore, the plaintiffs alleged that Shell Plc failed to respect precautionary measures set in the UN Global Compact²¹⁴ and to report the oil spills in accordance with the Global Reporting Initiative.²¹⁵ In 2013, the District Court of The Hague dismissed the argument of the plaintiffs and concluded that:

In the circumstances of this case, it cannot be assumed on other grounds, either, that [Shell Plc] in The Hague as parent company assumed the obligation to intervene in SPDC's policy regarding the prevention of and response to sabotage of oil pipelines and oil facilities in Nigeria. The District Court is of the opinion that the general fact that [Shell Plc] made the prevention of environmental damage caused by operations of its (sub-) subsidiaries the main focus of its policy and that to some extent, [Shell Plc] is involved in SPDC's policy constitutes insufficient reason to rule that under Nigerian law, [Shell Plc] assumed a duty of care in respect of the people living in the vicinity of the oil pipelines and oil facilities of SPDC.²¹⁶

The District Court rejected that CSR instruments may create legal obligations upon companies or may determine a duty of care in the context of corporate group activities, discontinuing the progressive interpretation adopted in *BATCO*.

5.2 Towards human rights due diligence in France?

In November 2013, several French deputies introduced a bill to create a duty of care of parent and controlling companies towards their subsidiaries, subcontractors, and suppliers.²¹⁷ The French Bill on duty of care sought to hold MNEs accountable 'to prevent the occurrence of tragedies in France and abroad and to obtain reparations for victims of damage detrimental

²¹³ *ibid* [216].

²¹⁴ *ibid* [220].

²¹⁵ *ibid* [221]-[223].

²¹⁶ *Akpan* (n 83) [4.33]; *Dooh* (n 83) [4.38]; *Oguru* (n 83) [4.40].

²¹⁷ Proposition de loi n°1524 & Proposition de loi n°1519 du 6 novembre 2013 relatives au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

to human rights and the environment.²¹⁸ However, it stirred a lot of opposition, most notably from businesses, and the French government was at unease with the initiative. In January 2015, the French deputies voted for the content of the bill to be reviewed and, in February 2015, a group of socialist deputies introduced a new French Bill on duty of care (new Bill).²¹⁹

On 30 March 2015, the National Assembly adopted the new Bill. It provided that parent companies registered in France must draft and effectively implement a ‘vigilance plan’ (*plan de vigilance*). This document must contain measures to identify and prevent the occurrence of human rights abuses, and environmental and other health damage in both their activities and the activities of the subsidiaries, subcontractors, and suppliers that they control. A company may be held civilly liable if it does not respect its obligation to draft and implement a vigilance map, and NGOs are allowed to bring a civil claim. The content of the new Bill was trimmed of controversial points, such as the existence of a duty of care *per se*, the criminal liability of parent companies, and the burden of proof on parent companies. However, on 18 November 2015, the Senate rejected the new Bill.²²⁰ As a result, its future remains uncertain. Nonetheless, if it were to be enacted, it would be one of the first legislative initiatives to translate the human rights due diligence provided by the UNGPs into a legally binding mechanism.

6 Conclusions

French and Dutch laws recognize the separate legal personality of specific companies and the existence of limited liability companies. In the context of MNE activities, the application of these legal standards generally prevents holding the parent company liable for its subsidiary, even when the parent company owns and controls the subsidiary. Plaintiffs in transnational claims against MNEs have challenged the strict application of these standards. However, French and Dutch courts have generally remained reluctant to hold parent companies liable.

²¹⁸ (Author’s translation).

²¹⁹ Proposition de loi n° 2578 du 11 février 2015 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.

²²⁰ ‘Le Sénat n’a pas Adopté la Proposition de Loi Relative au Devoir de Vigilance des Sociétés Mères’ (*Sénat*, 19 November 2015) <http://www.senat.fr/les_actus_en_detail/article/vigilance-des-societes-meres.html> accessed 30 November 2015.

Nonetheless, French courts may occasionally hold parent companies liable for their subsidiaries based either on statutory rules or jurisprudential theories. For instance, they are willing to punish abusive arrangements where the parent company sought to avoid liability by moving an activity abroad (*Erika*). However, the solutions adopted across legal fields lack consistency. In general, French courts do not accept the parent company's liability where there was no misconduct of the parent company. As a result, the legal regime of corporate group liability is fragmented.

In the Netherlands, Dutch courts are reluctant to use the theory of identification to hold parent companies liable for harm caused by their subsidiaries. The Dutch Supreme Court clearly indicated that identification should be allowed only when companies are closely intermingled or control exists within the corporate group. There must be additional elements, such as abuse, fraudulent intent, or wrongful creation of false appearances.²²¹ In addition, in the absence of statutory rules, Dutch courts have preferred to use tort as a way to hold parent companies liable in the context of corporate group activities. Less stringent fault requirements may be an advantage for plaintiffs bringing claims against MNEs. Nonetheless, in *Shell*, Dutch courts have narrowly interpreted the duty of care in a transnational context.

Both France and the Netherlands recognize the criminal liability of companies with legal personality. France does not generally accept that corporate groups can be held criminally liable. However, it may be possible to engage the criminal liability of a parent company for criminal offences committed in the context of corporate group activities, based either on the economic reality of the corporate group or on acts of complicity. In general, the criminal liability of a company is engaged when its organs or representatives have committed the criminal offence on its account. Similarly, even if the Netherlands remains silent as to the criminal liability of corporate groups, it may be possible to engage the criminal liability of a parent company in the context of corporate group activities when it ordered or directed the unlawful act or based on its complicity. Dutch courts have developed a flexible theory of corporate criminal liability. There is corporate criminal liability if there was an illegal act or

²²¹ Vandekerckhove (n 17) 433.

omission that could be reasonably imputed to the corporation. The absence of a rigorous definition of ‘reasonableness’ leaves the door ajar for ‘tailor-made’ jurisprudence where judges can assess corporate liability against the facts and circumstances of the case.

At times, French and Dutch courts have taken into account the voluntary commitments of MNEs to assess the faulty conduct of the parent company. In *Erika* and *AREVA*, French courts assessed the behaviour of the parent company against its voluntary commitments. Similarly, Dutch courts considered the OECD Guidelines when determining the duty of care of a parent company in *BATCO*. Given the current predominance of soft norms and CSR policies to regulate business activities, this approach is an important step towards further corporate accountability. Nonetheless, French and Dutch courts make careful and sporadic use of voluntary norms to hold companies liable. Ultimately, legislative intervention may be necessary to create a specific regime governing the liability of parent companies in the context of group activities. In France, deputies are currently discussing a bill which would create mandatory human rights due diligence for large companies.

The next chapter focuses on the procedural opportunities and barriers which affect access to effective remedy against MNEs in France and the Netherlands.

CHAPTER 7

Procedural opportunities and barriers to accessing effective remedy against multinational enterprises in France and the Netherlands

1 Introduction

The UNGPs reaffirm that access to effective remedy is not only of substantive but also of procedural nature.¹ In the context of transnational litigation against MNEs, various procedural aspects will affect the progress and the outcome of the proceedings. Standing has an impact on the ability of crucial actors, such as victims and CSOs, to participate in civil proceedings. Similarly, criminal procedures may allow some type of ‘private prosecution’ in the context of corporate criminal offences. Furthermore, the availability of collective redress mechanisms improves the opportunities for poor communities to hold MNEs liable or obtain remedy where victims may not have the resources to bring individual claims. The existence of strict rules restricting the access to information held by MNEs may also complicate the victims’ duty to produce sufficient evidence to establish corporate liability. Finally, litigation costs and limited availability of financial support may also influence victims’ decision to bring, or continue, a claim against an MNE.

The aim of Chapter 7 is to provide an analysis of procedural opportunities and obstacles to accessing effective remedy in France and the Netherlands and assess how they impact feasibility of transnational claims against MNEs. Chapter 7 starts by exploring participation of victims and CSOs in civil and criminal proceedings and the opportunities to obtain collective redress. It also provides a summary of rules concerning the production of evidence. Chapter 7 looks then at costs and funding of transnational litigation against MNEs. Finally, it ends with a description of the various remedies available in courts.

¹ UNHRC, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31, Guiding Principle 25, Commentary.

2 The participation of plaintiffs in the proceedings

To ensure access to remedy, procedural rules should facilitate the plaintiffs' ability to bring a claim against an MNE in France and the Netherlands. Various aspects are important in this regard, including a right of action for victims of business-related abuse and NGOs in civil proceedings, the role plaintiffs may play in launching, or continuing, criminal proceedings, and the availability of collective redress.

2.1 Initiating civil proceedings

The way in which the law authorizes natural and legal persons to bring civil claims before domestic courts has a direct effect on the ability of these persons to gain access to remedy or to hold MNEs to account. Various types of plaintiffs may bring a civil claim against an MNE, including an individual who suffered direct damage from the business-related abuse, a representative of a particular group, such as an affected village, or an organization defending a collective interest related to the claim.² If victims of corporate abuse may usually be allowed to bring civil claims without particular problems, however, NGOs may face considerable obstacles to bring claims.³

2.1.1 The right of action

In France, 'the action is the right of the plaintiff of a claim to bring an action to be heard on the merits of his claim so that the judge may declare it founded or unfounded.'⁴ Pursuant to Article 31 French Code of Civil Procedure, 'the right of action is available to all those who have a legitimate interest in the success or dismissal of a claim without prejudice to those cases where the law confers the right of action solely upon persons whom it authorises to

² Stephen Tully, "Never Say Never Jurisprudence": Comparative Approaches to Corporate Responsibility under the Law of Torts' in Stephen Tully (ed), *Research Handbook on Corporate Legal Personality* (Edward Elgar Publishing 2005) 125.

³ Other organizations, such as trade unions, have brought claims against MNEs (eg *COMILOG*). However, given the constraints of this thesis, this study focuses on NGOs.

⁴ French Code of Civil Procedure, Article 30. For a translated version of the French Code of Civil Procedure, see Yves-Antoine Tsegaye, 'Code of Civil Procedure' (*Legifrance*, 30 September 2005) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

raise or oppose a claim, or to defend a particular interest.⁵ As a result, the law imposes three main requirements: a legitimate interest; standing; and legal capacity.

First, plaintiffs must demonstrate that they have a ‘legitimate interest’ to bring a civil claim (*intérêt légitime*) against an MNE, meaning that the claim may provide an advantage or a benefit to the plaintiff. Such interest must already exist when the plaintiff brings the claim.⁶ Importantly, French courts have progressively accepted that the interest to bring a civil claim is not subordinated to the legitimacy, or well-foundedness, of the claim.⁷

Second, Article 31 implies that plaintiffs must have standing to bring a civil claim (*qualité à agir*) against an MNE. However, the distinction between interest and standing to bring a claim is not always clear in French case-law.⁸ To have standing, plaintiffs must usually demonstrate a direct and personal interest, which may be problematic for NGOs when they seek to sue an MNE in defence of a collective or public interest.⁹ Nevertheless, the law may directly confer standing on NGOs in specific circumstances.¹⁰

Third, legal capacity is a prerequisite for the right of action.¹¹ However, there is no requirement as to the plaintiff’s nationality and, as a result, foreign victims may be entitled to the right of action.

Article 122 French Code of Civil Procedure enumerates the situations where a claim might be declared inadmissible for lack of a right of action, including lack of interest, lack of standing, statute of limitations, fixed time limit, or *res judicata*. One disadvantage of the French Code of Civil Procedure is that it emphasizes that any claim raised by, or against, a person deprived of the right of action is inadmissible, and a person bringing a claim deemed

⁵ Translated French Code of Civil Procedure (n 4).

⁶ Serge Guinchard, Cécile Chainais and Frédérique Ferrand, *Procédure Civile: Droit Interne et Droit de l’Union Européenne* (32nd edn, Dalloz 2014) para 131-136.

⁷ *ibid* para 137. See also Cass civ (2) 13 January 2005, n° 03-13.531.

⁸ Guinchard, Chainais and Ferrand (n 6) para 122.

⁹ French law differentiates between individual, collective, and general interests. See *ibid* para 145.

¹⁰ *ibid* para 138-165.

¹¹ *ibid* para 124-124.

abusive may be condemned to a fine.¹² In several cases, MNEs have used this as an argument against NGOs and victims seeking civil redress for human rights or environmental abuse.

In the Netherlands, pursuant to Article 3:303 Dutch Civil Code, a person has no right of action where he lacks sufficient interest. However, the existence of sufficient interest is generally presumed and there is no requirement to address questions of substance before ‘standing’ can be granted.¹³ Plaintiffs can be natural or legal persons, irrespective of whether they are Dutch nationals. However, legal personality is a prerequisite and, as a result, only companies, NGOs, and other foundations or associations that have legal personality may bring a civil claim.

2.1.2 Standing of NGOs

NGOs defending a collective or public interest often face obstacles in obtaining standing. For the purpose of this study, the words ‘association’ and ‘NGO’ are used interchangeably, as French and Dutch laws usually refer to NGOs as ‘associations.’

Article 1 French Act of 1st July 1901¹⁴ defines ‘association’ (*association*) as the agreement between two or several persons who put together, permanently, their knowledge or their activity with a goal other than sharing profits.¹⁵ Article 6 French Act of 1st July 1901 states that a lawfully registered association can, without specific authorisation, be a party to legal proceedings.¹⁶ Therefore, an association has standing to bring a claim to protect its individual interest, such as its property. French law traditionally distinguished between the ‘individual interest’ of the association as a legal person and the ‘collective interest’ defended by the association.¹⁷ In 1923, the French Court of Cassation rejected that an association had standing

¹² French Code of Civil Procedure, Articles 32 and 32-1.

¹³ Cornelis Hendrik Van Rhee, ‘Locus Standi in Dutch Civil Litigation in Comparative Perspective’ (2014) Maastricht Faculty of Law Working Paper 2014/03, 6 <<http://ssrn.com/abstract=2376162>> accessed 30 November 2015.

¹⁴ Loi du 1er juillet 1901 relative au contrat d’association.

¹⁵ (Author’s translation).

¹⁶ It is important to stress that an association which has not been lawfully registered does not have standing. Cass civ (2) 20 March 1989, n° 88-11585.

¹⁷ For a description of the concept of ‘collective interest’, see Jacques Héron and Thierry Le Bars, *Droit Judiciaire Privé* (5th edn, Domat 2012) 80.

to defend the collective interest it aims to protect in its statutes.¹⁸ However, it recently reversed its position and held that an association may bring a civil claim on behalf of the collective interest it protects in its statutes.¹⁹

The French legislator has also progressively authorized associations to have standing in order to protect their collective interest.²⁰ For example, Article L421-1 French Consumer Code (*Code de la consommation*) allows consumers associations to bring a civil claim to defend the collective interest of consumers. However, a number of criteria must be met. In some cases, the association must have been lawfully registered for at least five years. In other situations, the association must prove that it obtained the written consent of the victim after bringing specific information, such as the nature and purpose of the proposed action, to the attention of the victim.

Finally, the French Court of Cassation has recognized that an association may bring a claim to protect its members' individual interests.²¹ For instance, this is the case for associations defending the interests of victims of a specific harmful activity.²² However, a number of conditions are required. First, associations can only act for their members and cannot bring a claim for third parties. Second, an association's statutes must clearly provide that it can bring a claim to protect its members' interests.²³

The *Alstom* case demonstrates that the complexity and the formalism of the rules governing NGO standing in French civil procedure affect the ability for plaintiffs to gain access to a court in transnational litigation against MNEs. The corporate defendants challenged the right of action of AFPS and PLO. In first instance, the Nanterre Regional Court dismissed PLO's claim on the grounds that it lacked standing under the power of attorney granted to PLO. At

¹⁸ Cass ch réunies 15 June 1923, DP 1924 1 153, S 1924 1 49, note Chavegrin (*Cardinal Luçon*).

¹⁹ Cass civ (3) 26 September 2007, n° 04-20636.

²⁰ Benoît Grimonprez, 'L'Infraction Environnementale et le Préjudice Moral des Associations' (2011) 8-9 *Environnement et Développement Durable* 22; François Terré and Dominique Fenouillet, *Droit Civil: Les Personnes (Personnalité, Incapacité, Protection)* (8th edn, Dalloz 2012) 263.

²¹ Cass civ 23 July 1918, DP 1918, 1, 52; Cass civ (1) 27 May 1975, D 1976, 318, obs Viney.

²² Héron and Le Bars (n 17) 98.

²³ *ibid.* See Cass civ (3) 17 July 1997, n° 95-18100.

the same time, it accepted AFPS' claim on the grounds that it had the interest and standing to act in accordance with its statutes. Moreover, an infringement of a moral harm was sufficient. However, on appeal, both points of the ruling were overturned. The Versailles Court of Appeal declared PLO's claim admissible, as PLO had been granted new power of attorney and could be considered as having the interest and standing to intervene. Nonetheless, it rejected that AFPS could bring a civil claim, holding that an association could not act for the general interest. The Court of Appeal²⁴ held that, without a statutory basis, AFPS has the right to take legal actions only on behalf of the collective interest protected in its statutes.²⁵ However, the Court of Appeal found that, by seeking to annul international contracts performed on the Palestinian territory on the grounds that they violated rules of public international law, AFPS was not defending the collective interest of its members under its statutes. Instead, it sought to defend the collective interest of Palestinians, which it did not have authority to defend either in its statutes or on a statutory basis.

This ruling seems to conform to the restrictive position adopted by French courts on the standing of NGOs. French civil procedure limits the opportunities for NGOs to gain access to a court, especially when they seek to defend interests broader than their own or that of their members. Ultimately, it prevents public interest litigation to challenge impunity and human rights abuse. An intervention of the legislator appears desirable to create a consistent and clear set of rules providing NGOs with standing, so they can play a more active role in defending societal interests.

In *Alstom*, the Court of Appeal gave its own interpretation of the interplay between the right of action of NGOs and the right of access to a court.²⁶ It held that a declaration that AFPS' claim is inadmissible does not conflict with Article 6 ECHR and Article 47 EU Charter as:

²⁴ CA Versailles 22 March 2013, n° 11/05331.

²⁵ For an English version of the ruling, see Noah Rubins and Gisèle Stephens-Chu, 'Introductory Note to AFPS and PLO v Alstom and Veolia (Versailles Ct App.)' (2013) 52 International Legal Materials 1173.

²⁶ Article 6 ECHR embodies the right of access to a court, which is the right to institute proceedings before civil courts. See *Golder v the UK* (1975) Series A no 18, para 36.

the association has been able to bring its suit, it has thus had access to a court. But this right is not unlimited. If the formal and substantive conditions for bringing a lawsuit are lacking, it must be dismissed. On the facts, the AFPS fails to demonstrate that it fulfills the conditions allowing a charitable organization to bring a suit in defence of collective interests; thus, its suit must be declared inadmissible, without this prejudicing its right since it has had access to a court and a trial has taken place.²⁷

The position of the Court of Appeal on the right of access to a court is criticisable here. Although such a right is not absolute, limitations should not impair its very essence.²⁸ The Court of Appeal's view that AFPS had access to a court because it was able to bring its suit is erroneous in the light of the various interpretations given by the ECtHR of Article 6 ECHR. This ruling limits the right of access to a court to the practical possibility to file a claim. However, the scope of this right is much broader, and must be practical and effective.²⁹ As such, the right of access to a court may be impaired by the existence of procedural rules barring certain subjects of law from bringing court proceedings³⁰ or by excessive formalism.³¹ Ultimately, French civil procedure currently impedes NGOs' right of access to a court.

In the Netherlands, traditionally, NGOs were barred from civil courts until the Dutch Supreme Court allowed them to bring an action to protect a public interest in a case related to environmental pollution.³² A number of requirements must be fulfilled: 1) the NGO must be a legal person, 2) its statutes must include the protection of the public interest on which the action is based, and 3) the action must aim to protect such an interest.³³ Since 1994, Article 3:305a Dutch Civil Code provides the possibility for an NGO to bring a representative action to protect interests similar to those it promotes. A foundation or an association with full legal

²⁷ Rubins and Stephens-Chu (n 25) 1173.

²⁸ *Philis v Greece* (1991) Series A no 209, para 59.

²⁹ *Bellet v France* (1995) Series A no 333-B, para 38.

³⁰ *Philis v Greece* (n 28) para 65; *The Holy Monasteries v Greece* (1995) Series A no 301-A, para 83; *Lupsa and v Romania* ECHR 2006-VII, paras 64-67.

³¹ *Pérez de Rada Cavanilles v Spain* (1998) 29 EHRR 109, para 49.

³² HR 17 June 1986, NJ 1987, 743.

³³ Hanna Tolsma, Kars de Graaf and Jan Jans, 'The Rise and Fall of Access to Justice in the Netherlands' (2009) 21 *Journal of Environmental Law* 309, 311-312.

capacity can institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests.³⁴ Three basic requirements must be met: 1) the NGO must be a foundation or an association with legal personality, 2) the NGO's statutes and activities must promote the interests it seeks to further through the action, and 3) the interests defended must be analogous to be suitable for protection through the representative action.³⁵ Importantly, the NGO can be established after the dispute has arisen.³⁶ Other conditions shape this representative action. Through the action, the NGO must seek to protect interests others than its own and it must adequately promote the interests of those it represents. Furthermore, an NGO shall have no *locus standi* if it has not made a sufficient attempt to achieve the objective of the action through consultations with the defendant.³⁷ Therefore, Dutch civil procedure emphasizes the role of NGOs as conciliators and litigation should take place when consultations are not possible.

In *Shell*, the corporate defendants challenged Milieudefensie's standing pursuant to Article 3:305a.³⁸ They held that the NGO's claim was inadmissible, as the case at issue involved a 'purely individual representation of interests.'³⁹ Furthermore, the claim was not justified as it did not offer any advantages 'whatsoever over litigating in the name of the interested parties themselves.'⁴⁰ Finally, Article 3:305a was not intended to enable a Dutch NGO to seek protection for 'a very limited, purely local foreign interest,' meaning the interests of the Nigerian victims of the oil spills.⁴¹

³⁴ Dutch Civil Code, Article 3:305a(1).

³⁵ Berthy Van Den Broek and Liesbeth Enneking, 'Public Interest Litigation in the Netherlands: A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts' (2014) 10 Utrecht Law Review 77, 84.

³⁶ Marieke Van Hooijdonk and Peter Eijssvoogel, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation* (Kluwer Law International 2013) 105.

³⁷ Van Den Broek and Enneking (35) 84.

³⁸ 'Motion for the Court to Decline Jurisdiction and Transfer the Case, Also Conditional Statement of Defense in the Main Action' (De Brauw Blackstone Westbroek 13 May 2009) paras 85-98.

³⁹ *ibid* paras 94-95.

⁴⁰ *ibid* paras 96-97.

⁴¹ *ibid* para 98.

These arguments were however rejected by the District Court of The Hague.⁴² It held that the plaintiffs' claims rose above the individual interests of the parties, as the decontamination of the soil and the clean-up of the fishponds would benefit not only the plaintiffs but also the rest of the community and the environment. Furthermore, the District Court found that:

the conducting of campaigns aimed at halting pollution of the Nigerian environment as an actual activity that Milieudefensie has engaged in to support the interests of the environment in Nigeria. Finally, the protection of the environment globally is an objective set down in Milieudefensie's charter. There is no reason to assume that this objective is not sufficiently specific, nor is there any reason to assume that localised damage to the environment abroad falls outside that objective or outside the application of Article 3:305a [...]. All of the foregoing brings the court to the (provisional) opinion that Milieudefensie's claims are admissible.⁴³

2.2 Initiating criminal proceedings

The French and Dutch criminal systems recognize the principle of opportunity, under which the public prosecutor retains a right of discretion whether to initiate criminal proceedings. For example, the prosecutor may decide not to initiate criminal proceedings if there is a lack of evidence. This principle applies to all criminal offences.

However, in some countries, victims of crimes and NGOs have the opportunity to initiate criminal proceedings. This form of action is an important way of getting around unwilling prosecutors and has increased in some countries, such as France, in recent years.⁴⁴

⁴² DC The Hague 14 September 2011, Judgment in the Ancillary Actions Concerning the Production of Exhibits and in the Main Actions, 337050/HAZA09-1580 (*Akpan*); 330891/HAZA09-0579 (*Oguru*); 337058/HAZA09-1581 (*Dooh*).

⁴³ *Akpan* (n 42) [4.5]; *Oguru* (n 42) [4.5]; *Dooh* (n 42) [4.5].

⁴⁴ Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing 2005) 31.

2.2.1 France

Article 1 French Code of Criminal Procedure provides that judges and prosecutors have the power to initiate and exercise public prosecution for the imposition of penalties. However, this power is not exclusive, as ‘this prosecution may also be initiated by the injured party under the conditions determined by [the Code of Criminal Procedure].’⁴⁵ As a result, victims of corporate abuse and NGOs have been able to directly initiate criminal proceedings against MNEs. Generally, they have two options.

First, they can file a criminal complaint with the prosecutor. In this situation, the prosecutor is obligated to open a preliminary enquiry to decide whether prosecution is possible. However, the victims’ ability to initiate criminal proceedings is limited to this stage of investigation. Moreover, the prosecutor can still choose to terminate the criminal proceedings following the preliminary enquiry. In the context of transnational litigation against MNEs, French prosecutors have been particularly hostile to prosecute MNEs. As a result, this option has so far been unsuccessful.

Second, victims and NGOs may initiate criminal proceedings by bringing a civil action (*plainte avec constitution de partie civile*) directly before the examining magistrate (*juge d’instruction*). Pursuant to Article 2 French Code of Criminal Procedure, a civil action aims at the reparation of the damage suffered because of a felony, a misdemeanour, or a petty offence. It is open to all those who have personally and directly suffered damage resulting from a criminal offence. The second option presents a number of advantages. It allows initiating not only criminal proceedings but also civil proceedings against MNEs. Plaintiffs sometimes prefer this option, as they can participate in the proceedings and can claim financial compensation. Furthermore, examining magistrates have typically been more receptive to plaintiffs’ claims.⁴⁶

⁴⁵ For a translated version of the French Criminal Code, see John Rason Spencer, ‘Penal Code’ (*Legifrance* 12 October 2005) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015.

⁴⁶ In the DLH case, Sherpa and the other plaintiffs considered the second option after the first option was unsuccessful. In the Auchan case, Sherpa and the other plaintiffs adopted this strategy. See ‘Sherpa: Rapport d’Activités 2013’ (Sherpa 2014) 7.

French law allows some NGOs to bring a civil action on behalf of victims of specific criminal offences. Articles 2-1 to 2-23 French Code of Criminal Procedure list the types of associations that can exercise the rights granted to a civil party, including associations fighting against racism or discrimination (Article 2-1), sexual violence and harassment (Article 2-2), violence committed against children (Article 2-3), war crimes and crimes against humanity (Article 2-4), sexual discrimination (Article 2-6), discrimination of persons with disabilities (Article 2-8), social exclusion and poverty (Article 2-10), occupational disease (Article 2-18), human trafficking and slavery (Article 2-22),⁴⁷ and corruption (Article 2-23).⁴⁸ Similarly, associations must have been lawfully registered for at least five years. Moreover, Article L142-2 French Environmental Code provides that environmental NGOs can exercise the rights granted to a civil party in respect of facts creating direct or indirect damage to the collective interests they defend and constituting a criminal offence according to environmental legislation. However, the standing of environmental NGOs is limited by two requirements: the existence of damage to the collective interests the NGO defends and the commission of a criminal offence. Nonetheless, the French Court of Cassation has recognized that the commission of a criminal offence is not a *sine qua non* condition of the right of action of environmental NGOs.⁴⁹ Thus, environmental associations face fewer restrictions to bring a claim when environmental damage occurs.

2.2.2 The Netherlands

In the Netherlands, victims cannot initiate criminal proceedings. Contrary to the French system, the Dutch public prosecutor holds a monopoly on prosecution and is not obliged to prosecute. For instance, he may decline to prosecute when the suspect pays a sum of money in the form of a fine in order to settle the case (*transactie*). Likewise, the prosecutor may decide not to prosecute under the expediency principle, as laid down in Article 167 Dutch Code of Criminal Procedure. Accordingly, the prosecutor may waive prosecution for reasons

⁴⁷ Article 2-22 was created by Loi n° 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France.

⁴⁸ Article 2-23 was created by Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière.

⁴⁹ Grimonprez (n 20) 22.

of public interest.⁵⁰ The Dutch prosecutor tends to deal with some criminal offences, such as environmental offences, through transaction, settlement, or dismissal.⁵¹ The Dutch Code of Criminal Procedure does not provide the criteria for the exercise of this power, and no other authority will check whether discretion by the prosecutor was properly used. Nonetheless, the prosecution service is still bound by its own policies.⁵²

Nevertheless, Article 12 Dutch Code of Criminal Procedure gives victims and NGOs a right to appeal the prosecutor's decision not to initiate criminal proceedings. Accordingly, parties with a direct interest in the prosecution of criminal offences can apply to the Court of Appeal against the prosecutor's decision. Article 12 is 'the only way in which a private person (natural or otherwise) can formally influence the decision on prosecution.'⁵³ However, the Court of Appeal has the last word. If it considers the complaint to be reasonable, it will order the prosecutor to launch the prosecution. To date, this has been done only in exceptional cases.⁵⁴ Otherwise, it will turn down the complaint.⁵⁵

NGOs used this procedure in the case against Trafigura, but it produced limited results. In 2009, Greenpeace appealed the prosecutor's decision not to prosecute Trafigura BV, as well as the chairman and various employees of the Trafigura group. On 13 April 2011, the Court of Appeal of The Hague rejected Greenpeace's complaint, finding that Greenpeace had an insufficient direct interest to request prosecution of Trafigura BV, and that the criminal acts in question were beyond the scope of Greenpeace's purpose as an organization. Therefore, the NGO lacked legal standing. In addition, the Court of Appeal held that the prosecutor had

⁵⁰ Sanne Taekema (ed), *Understanding Dutch Law* (Boom Juridische Uitgevers 2004) 152.

⁵¹ Jonathan Verschuuren, 'The Netherlands' in Louis Kotzé and Alexander Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Wolters Kluwer 2009) 67.

⁵² Berend Keulen and Erik Gritter, 'Corporate Criminal Liability in the Netherlands' (2010) 14.3 EJCL, 3 <<http://www.ejcl.org/143/abs143-9.html>> accessed 30 November 2015.

⁵³ Chrisje Brants-Langeraar, 'Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure' (2007) 11.1 EJCL, 10 <<http://www.ejcl.org/111/abs111-6.html>> accessed 30 November 2015.

⁵⁴ JF Nijboer, 'The Criminal Justice System' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius, *Introduction to Dutch Law* (4th edn, Kluwer Law International 2006) 411.

⁵⁵ Verschuuren (n 51) 67.

a margin of discretion in deciding which offences are in the public interest to investigate and prosecute, and that he had sole authority to decide which cases to pursue.⁵⁶

2.2.3 European Union

The EU recently enacted the Directive on the rights of victims of crimes, which aims ‘to ensure that victims of crimes receive appropriate information, support and protection and are able to participate in criminal proceedings.’⁵⁷ This directive is applicable to transnational criminal litigation against MNEs. It does not require victims of crime to reside in, or to be a national of, EU Member States. Furthermore, the directive applies not only to criminal offences committed in the EU but also to criminal proceedings taking place in the EU, thus conferring rights on foreign victims of extraterritorial offences who are involved in criminal proceedings in EU Member States.

Article 11 of the directive provides victims with specific rights in the event of a decision not to prosecute. In particular, Member States must ensure that victims have the right to a review of a decision not to prosecute.⁵⁸ The EC clearly distinguished between the possibility for victims to pursue the prosecution as ‘a private or subsidiary prosecutor’ and the right to a review set out in Article 11. In supplementary guidance, it invited Member States to develop a clear and transparent procedure in their own criminal procedures to entitle victims to ask for a review.⁵⁹

2.3 Collective redress

The UNGPs state that practical and procedural barriers to accessing judicial remedy can arise where there are inadequate options for aggregating claims or enabling representative

⁵⁶ ‘The Toxic Truth About a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Cote d’Ivoire’ (Amnesty International and Greenpeace Netherlands 2012) 160-161.

⁵⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57, Article 1(1).

⁵⁸ Directive on the rights of victims of crimes, Article 11(1).

⁵⁹ Commission, ‘DG Justice guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA’ (2013) 30-31 (Guidance document).

proceedings, such as class actions and other collective action procedures.⁶⁰ Collective redress mechanisms⁶¹ can help a large number of victims, especially those with limited financial resources, have effective access to remedy. In EU Member States, their existence is very limited, however. When such mechanisms exist, domestic legislation strictly narrows their scope of application. Furthermore, collective redress mechanisms focus excessively on areas of law linked to economic life, such as consumer or competition law. Nonetheless, faced with rising demands for collective redress mechanisms, more EU Member States are considering adopting such mechanisms.

2.3.1 France

France has traditionally been reticent to allow collective redress mechanisms such as those in common law countries.⁶² As a result, there is no mechanism of collective redress *per se*, and only a small number of ‘representative action’ mechanisms have been adopted in consumer⁶³ and investment⁶⁴ law. However, these mechanisms are of no use to plaintiffs in transnational litigation against MNEs. Over the last decades, the creation of a general collective redress mechanism, inspired by the American system of class action, has been much debated. Nevertheless, France remains reluctant to introduce such a mechanism.⁶⁵

⁶⁰ UNGPs (n 1), Guiding Principle 26, Commentary.

⁶¹ The EC defines ‘collective redress’ as either a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress) or a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress). Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60, para 3(a) (Recommendation on collective redress).

⁶² On the subject of collective redress in France, see Guillaume Cerutti and Marc Guillaume, ‘Rapport sur l’Action de Groupe’ (La Documentation Française 2005); Véronique Magnier and Ralf Alleweldt, ‘Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union: Country Report France’ (Civic Consulting 2008); Angélique Legendre (ed), *L’Action Collective ou Action de Groupe: Se Préparer à son Introduction en Droit Français et en Droit Belge* (Larcier 2010).

⁶³ Articles L421-1 and L422-1 French Consumer Code provide respectively an action for the financial reparation of the consumer collective interest and a joint representative action for consumers.

⁶⁴ Article L452-2 French Monetary and Financial Code (*Code monétaire et financier*) provides for a joint representative action for investors.

⁶⁵ Cerutti and Guillaume (n 62) 36.

A small step was nonetheless recently made towards the creation of a group action ‘à la française.’ In 2014, the French Parliament passed a new law on consumption, which introduced a group action in the field of consumer law.⁶⁶ The new Article L423-1 French Consumer Code provides that, under specific circumstances, a nationally representative consumer protection association may be entitled to bring a group action before a civil court to obtain compensation for individual losses sustained by a group of consumers ‘placed in a similar or identical situation and having for common cause the failure by one or several similar professionals of their legal or contractual obligations.’⁶⁷ It has yet to be seen whether such a group action could be extended to other legal fields. However, French fears of perceived excesses of the US system of compensation and a French business lobby strongly opposed to the creation of collective redress mechanisms remain major obstacles to the creation of a general group action.⁶⁸

2.3.2 The Netherlands

Similarly, the Dutch legislator has traditionally been suspicious of collective redress mechanisms. As a result, although collective redress mechanisms exist in the Netherlands, they are very different from US class action or UK group action, aiming to prevent transforming the Dutch legal system into a ‘perceived aggressive American litigating society.’⁶⁹ They instead focus on limited representative action and settlement. One striking aspect of the Dutch practice of collective redress is the emphasis on mediation, which is highly relevant to transnational litigation against MNEs.

Article 3:305a Dutch Civil Code provides the possibility for an NGO to bring a representative action to protect similar interests to those it promotes.⁷⁰ One characteristic of this action is that only an NGO, not the individuals who suffered harm, may claim damages for the entire group. Furthermore, the NGO must adequately consult with the defendant

⁶⁶ Loi n° 2014-344 du 17 mars 2014 relative à la consommation.

⁶⁷ (Author’s translation).

⁶⁸ See Thomas Clay, ‘Class Actions or Not Class Actions?’ [2010] *Recueil Dalloz* 1776.

⁶⁹ Marie-José Van Der Heijden, ‘Class Actions/Les Actions Collectives’ (2010) 14.3 *EJCL*, 3 <<http://www.ejcl.org/143/abs143-18.html>> accessed 30 November 2015.

⁷⁰ For further details, see Section 2.1.2 of this Chapter.

before initiating the action. Moreover, the ruling resulting from the action cannot affect a person whose interest the action intends to protect when this person opposes the ruling's producing effect as regards himself, unless the nature of the ruling is such that its operation cannot be excluded as regards only that person.⁷¹ As was previously mentioned under Section 2.1.2 of this Chapter, this action was used by Milieudefensie in *Shell*.

The 2005 Dutch Act on Collective Settlements of Mass Claims (*Wet Collectieve Afhandeling Massaschade* or WCAM) provides for a settlement-only collective action.⁷² The idea behind the WCAM is to settle cases of mass damages in a smooth manner by enabling liable and injured parties to reach a collective settlement.⁷³ There are two main stages. First, an association, or a foundation, representing victims of a mass harm reaches a collective settlement with the tortfeasor. Second, the Court of Appeal of Amsterdam approves the settlement. One advantage is that WCAM is not restricted to a particular area of law or to certain sectors, such as competition or consumer law.⁷⁴ One disadvantage from a victim's perspective is that all injured parties, including those who have not participated in the negotiations of the settlement, are bound by the court decision approving the settlement, unless they have opted out. Although it aims to ensure legal certainty and to prevent additional claims, this rule is problematic for injured parties who disapprove of the settlement or ignore the proceedings. Another disadvantage is that WCAM does not deal with the stage of reaching a settlement. It only provides that the settlement is a prerequisite that must be reached out-of-court.⁷⁵ In 2013, the WCAM was amended and a pre-trial hearing was introduced. To date, the Netherlands is the only European country to offer a procedure to declare a collective settlement binding on all class members on an 'opt-out' basis. The WCAM procedure may provide a cheaper and faster alternative than transnational litigation against MNEs to gain access to remedy.

⁷¹ Dutch Civil Code, Article 3:305a(5).

⁷² Stefaan Voet, 'European Collective Redress Developments: A Status Quaestionis' (2014) 4 *International Journal of Procedural Law* 97, 107.

⁷³ Marco Loos, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union: Country Report The Netherlands' (Civil Consulting 2008) 2.

⁷⁴ Van Der Heijden (n 69) 3.

⁷⁵ Loos (n 73) 2.

2.3.3 European Union

Collective redress mechanisms have been much debated at EU level over the last decade, especially in consumer and competition law. On 2 February 2012, the European Parliament (EP) adopted a resolution in which it called for a legally binding horizontal framework including a common set of principles that would provide uniform access to justice via collective redress within the EU.⁷⁶ Amongst the areas listed where collective redress is ‘of value’ are not only consumer protection and competition, but also environmental protection, protection of personal data, financial services legislation, and investor protection. However, on 11 June 2013, the EC adopted a recommendation containing a series of non-binding principles for collective redress mechanisms ‘to ensure a coherent horizontal approach to collective redress in the EU without harmonising Member States’ systems.’⁷⁷ Pursuant to this document, within two years, EU Member States should adopt collective redress mechanisms that allow multiple claimants to obtain compensation or injunctive relief on a collective basis or through a representative claimant. Such mechanisms should be available in different areas where EU law grants rights to citizens and companies, including in consumer protection, competition, and environmental protection. It remains to be seen whether and how EU Member States will implement this recommendation and the benefits produced for plaintiffs in transnational litigation against MNEs.

3 Production of evidence

The UNGPs provide that unbalanced access to information and to expertise between parties in business-related human rights claims create barriers to accessing judicial remedy.⁷⁸ NGOs and scholars have also described how the lack of transparency and access to information, and formalistic rules on evidence are significant obstacles for victims of corporate abuse seeking remediation.⁷⁹ Access to, and production of, evidence in transnational litigation against

⁷⁶ European Parliament Resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)).

⁷⁷ Recommendation on collective redress (n 61).

⁷⁸ UNGPs (n 1), Guiding Principle 26, Commentary.

⁷⁹ See Gwynne Skinner and others, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ (ICAR, ECCJ & CORE 2013); Liesbeth Enneking, ‘Multinationals and Transparency in Foreign Direct Liability Cases: the Prospects for Obtaining Evidence under the Dutch Civil Procedural Regime on the Production of Exhibits’ (2013) 3 *The Dovenschmidt Quarterly* 134.

MNEs is problematic for several reasons. First, collecting evidence in transnational cases is costly for plaintiffs, as it is usually located in both host and home countries. In cases raising complex issues, such as environmental pollution, the intervention of experts may be required, necessitating additional financial resources to obtain sufficient evidence. Second, plaintiffs must usually prove corporate involvement in the production of the harm. Frequently, MNEs are in possession of such evidence and refuse to share compromising information with plaintiffs. Third, the rules governing the collection and admissibility of evidence may place an excessive burden on plaintiffs or fail to provide effective disclosure procedures to reduce potential inequality of arms between the parties. Ultimately, difficulties arising from the production of evidence reveal the asymmetric positions of both plaintiffs and corporate defendants in transnational litigation against MNEs.

3.1 Civil proceedings

Both French and Dutch codes of civil procedure provide rules governing burden of proof, admissibility of evidence, and disclosure procedures relevant to transnational litigation against MNEs.

3.1.1 Burden of proof

In France, as a general principle of civil procedure, each party must prove the facts necessary for the success of his claim.⁸⁰ Similarly, the Netherlands follows the same principle that ‘whoever asserts a fact must prove it.’⁸¹ Therefore, plaintiffs initiating a civil liability claim against an MNE must prove the facts and circumstances to substantiate that claim.

However, in the Netherlands, there are a number of exceptions to this rule, such as when the law specifically provides otherwise, or when the application of such requirement would be contrary to the principles of reasonableness and fairness. Furthermore, under specific

⁸⁰ French Code of Civil Procedure, Article 9.

⁸¹ Dutch Code of Civil Procedure, Article 150.

circumstances, a reversal of burden of proof is possible during the proceedings or an aggravated burden of proof may be placed on the defendant to motivate his defence.⁸²

3.1.2 Admissibility

In France, civil procedure is based almost exclusively on written evidence. The judge may invite the parties to provide factual explanations deemed necessary for the resolution of the dispute. He can also appoint an independent expert to further investigate technical matters or admit evidence from third parties by affidavit or oral testimony. However, this last option is less common.

In the Netherlands, there is no restriction on the admissibility of evidence, which may be presented in any form, unless the law provides otherwise.⁸³ In some cases, evidence unlawfully obtained may be admissible.⁸⁴ Dutch courts usually have discretion to assess evidence.⁸⁵ The absence of restrictions on the admissibility of evidence presents a benefit for victims bringing civil claims against MNEs. The flexibility of Dutch rules allows victims to present a large range of documents to substantiate their arguments. It also reduces the inequality of arms between the parties. However, the benefit of these rules appears to be limited in the absence of adequate disclosure procedures. To date, plaintiffs have had limited access to evidence proving the involvement of the parent company or the subsidiary in producing the harm, as the information to substantiate their arguments is often in the MNE's possession. Furthermore, Dutch courts sometimes reject evidence that has been lawfully obtained when, for instance, it would violate the other party's right to a private life.⁸⁶

3.1.3 Disclosure

In France, parties must respect an obligation to cooperate in proceedings.⁸⁷ Pursuant to the adversarial principle, French civil procedure requires parties to disclose in due time and

⁸² Enneking (n 79) 138.

⁸³ Dutch Code of Civil Procedure, Article 152(1).

⁸⁴ Van Hooijdonk and Eijssvoogel (n 36) 22.

⁸⁵ Dutch Code of Civil Procedure, Article 152(2).

⁸⁶ Van Hooijdonk and Eijssvoogel (n 36) 22.

⁸⁷ French Civil Code, Article 10.

spontaneously to one another the evidence they produce or rely upon.⁸⁸ The judge may also request the disclosure of such means of evidence.⁸⁹ The French code of civil procedure also considers the situation where a party holds evidence material. In transnational litigation against MNEs, corporate defendants may hold evidence that they possess when such evidence can substantiate the plaintiffs' arguments. In such a situation, plaintiffs can request the judge to order corporate defendants to disclose material evidence.⁹⁰ The judge enjoys broad powers in this regard. He can impose penalties on the party holding the evidence, if necessary, or may order third parties, such as other members of MNEs, to disclose documents. However, the plaintiff's request must be specific and identify existing documents that the corporate defendant possesses. Any general requests are otherwise considered inadmissible.⁹¹ Furthermore, the judge has the discretion to appreciate the opportunity of such requests and controls tightly the procedure.⁹²

In *COMILOG*, the plaintiffs requested the disclosure of specific documents, including corporate bylaws and minutes of meetings, in order to establish the situation of co-employment.⁹³ The corporate defendants challenged such request. In 2013, the Paris Court of Appeal ordered the companies to disclose such documents and the French Court of Cassation later upheld this decision.⁹⁴ This case demonstrates that plaintiffs can benefit from French disclosure procedures in transnational litigation against MNEs.

In the Netherlands, parties are free to submit or withhold evidence to a large extent. There is no obligation on a party to disclose documents that are damaging to its own case. Furthermore, a party has limited options to request documents from the other party, as 'fishing expeditions' are not allowed.⁹⁵ However, pursuant to Article 843a Dutch Code of Civil Procedure, anyone who has records at his disposal or in his custody must allow a

⁸⁸ French Code of Civil Procedure, Articles 15 and 132.

⁸⁹ French Code of Civil Procedure, Article 133.

⁹⁰ French Code of Civil Procedure, Article 11.

⁹¹ Héron and Le Bars (n 17) 825.

⁹² Cass civ (1) 6 November 2002, n° 00-15.220. See also Héron and Le Bars (n 17) 825.

⁹³ Conclusions, 17 June 2010, n° 09/10495 56.

⁹⁴ Cass soc 28 January 2015, n° 13-22.994 to 13-23.006.

⁹⁵ Van Hooijdonk and Eijssvoogel (n 36) 4.

person with a legitimate interest to inspect, have a copy of, or obtain an extract from, those records pertaining to a legal relationship to which he or his legal predecessors are party. If necessary, the court may determine how an inspection must be conducted or how a copy or extract must be produced. However, there are a number of limits to the application of Article 843a. As a result, obtaining evidence from MNEs remains problematic when they are unwilling to disclose them.⁹⁶

Disclosure was, and continued to be, a major obstacle for plaintiffs in *Shell*. They requested documents demonstrating insufficient maintenance of oil pipelines and the control that Shell Plc had over SPDC's environmental policy, including management reports and internal emails. However, the corporate defendants refused to provide access to the documents in their possession. As a result, plaintiffs requested disclosure based on Article 843a, but the District Court rejected the plaintiffs' request. It held that Article 843a covers an exceptional obligation to produce evidence, and 'there is no general obligation for the parties to proceedings to produce exhibits in the sense that they can be obliged as a rule to provide each other with all manner of information and documents.'⁹⁷ Therefore, and to avoid 'so-called fishing expeditions,' the application of Article 843a is restricted by several conditions:

Firstly, the party claiming the production of an exhibit must demonstrate a genuine legitimate interest, which *legitimate interest* can be explained as *an interest in evidence*. An interest in evidence exists when an item of evidence may contribute to the substantiation and/or demonstration of a concretely substantiated and disputed argument that is relevant to and possibly decisive for the claims being assessed. Secondly, the claims must concern "*certain documents*" which, thirdly, are at *the actual disposal of the respondent*, or can be put at its disposal. Fourthly, *the party claiming the production of an exhibit* must be *party to the legal relationship* covered by the claimed documents specifically. This includes legal relationship as a result of unlawful act. If all of these conditions are met, there nevertheless exists no obligation

⁹⁶ *ibid* 30.

⁹⁷ *Akpan* (n 42) [4.5]; *Oguru* (n 42) [4.6]; *Dooh* (n 42) [4.6].

to submit if, fifthly, there are *no serious causes* or if, sixthly, it can reasonably be assumed that *due administration of justice* is also guaranteed without such provision of information.⁹⁸

The District Court held that the demonstration of a concretely substantiated and disputed argument appears as a *sine qua non* condition to justify a legitimate interest. However, it found that the plaintiffs had insufficiently substantiated their argument and, as a result, had no legitimate interest in obtaining the items of evidence they requested. The plaintiffs also invoked their right to disclosure on the grounds of the principle of equality of arms laid down by Article 6 ECHR. Nonetheless, the District Court rejected such argument and held that the conditions under Article 843a were compatible with Article 6 ECHR and the principle of equality of arms.⁹⁹

The plaintiffs appealed this judgment. In September 2013, they also filed a new claim to produce documents pursuant to Article 843a.¹⁰⁰ They argued that they had a legitimate interest in accessing specific documents following the 2013 ruling of the District Court. Furthermore, they raised that new factual information, which became available as a result of disclosure in *Bodo*, the tort suit against SPDC in England, demonstrated the negligence of Shell Plc and SPDC in preventing the oil spills at stake in the Dutch court case.¹⁰¹ The case was pending at the time of writing.

A legislative review of Article 843a is currently on-going. The Dutch legislator is considering various changes, such as allowing simple requests of documents or requests from third parties, or imposing a duty of confidentiality on the requesting party. Scholars and legal practitioners have expressed concern that changes would make ‘fishing expeditions’ easier. However, it seems that the Dutch courts would maintain the power to deny requests on

⁹⁸ *ibid* (emphasis in the text).

⁹⁹ *Akpan* (n 42) [4.16]; *Oguru* (n 42) [4.16]; *Dooh* (n 42) [4.16].

¹⁰⁰ ‘Motion to Produce Documents’ (Prakken d’Oliveira 10 September 2013) 200.126.843 (*Dooh*); 200.126.849 (*Milieudefensie*); 200.126.834 (*Oguru*).

¹⁰¹ ‘Statement of Appeal Regarding the Dismissal of the Motion to Produce Documents by Virtue of Section 834A DCCP (Interlocutory Judgement District Court of The Hague 14-09-2011)’ (Prakken d’Oliveira 2014) para 8.

various grounds, including legal privilege and data protection.¹⁰² Dutch scholars have suggested that this review provides an opportunity to remove barriers to the disclosure of documents in the context of transnational litigation against MNEs, in accordance with the UNGPs.¹⁰³

3.1.4 Discovery

Civil law countries are traditionally reluctant to discovery, which is mainly found in common law countries.¹⁰⁴ Nonetheless, the French Code of Civil Procedure allows a form of discovery.¹⁰⁵ Pursuant to Article 145, ‘if there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.’ As a result, a plaintiff can obtain any items of evidence from the corporate defendants if there is a legitimate reason to establish, before the proceedings start, the proof of the facts on which the ruling will be based. In the Netherlands, if discovery does not exist, it may be possible to order pre-trial hearings of parties as witnesses if a Dutch court is competent to hear the claim.

3.2 Criminal proceedings

The public prosecutor has the primary role in gathering evidence during criminal investigations and proceedings against MNEs. This can work to the plaintiffs’ advantage, especially when they cannot access evidence in the possession of the MNE or have limited financial resources to conduct an extensive investigation. At the same time, however, prosecutors often decline to prosecute MNEs based the lack of evidence or the difficulty in accessing information in a foreign country. For example, in *Rival*, the Dutch prosecutor decided not to prosecute the corporate defendants on the grounds that the case was too complex and investigation would have required a significant amount of resources. Moreover,

¹⁰² Van Hooijdonk and Eijssvoegel (n 36) 32-33.

¹⁰³ Enneking (n 79) 145.

¹⁰⁴ Diana Lloyd Muse, ‘Discovery in France and The Hague Convention: The Search for a French Connection’ (1989) 64 *New York University Law Review* 1073, 1075.

¹⁰⁵ Anne-Marie Batut, ‘Les Mesures d’Instruction “In Futurum”’ (Cour de Cassation 1999) <https://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/anne_marie_5790.html> accessed 30 November 2015.

investigation in Israel would have probably been impossible, given the lack of cooperation from the Israeli authorities.¹⁰⁶

4 Costs and funding of litigation against MNEs

Transnational litigation against MNEs in France and the Netherlands is generally costly, even though litigation costs in those countries are perceived to be moderate compared to common law countries.¹⁰⁷ For instance, Milieudefensie needs €180,000 per year to pursue its legal case against Shell in the Netherlands. The NGO has sought funding for the case through external donations on its website,¹⁰⁸ but this has only partially covered its costs to date.

Various reasons explain such high litigation costs. First, MNEs will forcefully fight against transnational claims against them to prevent the establishment of unfavourable precedent.¹⁰⁹ As a result, litigation is often lengthy, lasting at least several years, with limited chances of success for plaintiffs. Second, essential evidence, including documents and witnesses, is often located in the host country and bringing it to the home country where proceedings take place increases litigation costs.¹¹⁰ Third, transnational litigation against MNEs is usually complex and requires specific legal and scientific expertise, adding to the costs.

According to the UNGPs, barriers to accessing judicial remedy arise where ‘the costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means.’¹¹¹ A lack of resources may also make finding legal representation difficult for claimants.¹¹² Furthermore, rules of civil procedure, such as the loser pays principle, limited legal aid

¹⁰⁶ Letter of Dismissal from National Public Prosecutor’s Office to Mr Van Eijck (14 May 2013).

¹⁰⁷ ‘Collective Redress in the Netherlands’ (US Chamber Institute for Legal Reform 2012) 17.

¹⁰⁸ ‘Support the Nigerian People. Join the 500 Club’ (*Milieudefensie*)

<<https://milieudefensie.nl/english/shell/courtcase/support-the-courtcase/the-500-club-1>> accessed 30 November 2015.

¹⁰⁹ 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) 257.

¹¹⁰ *ibid.*

¹¹¹ UNGPs (n 1), Guiding Principle 26, Commentary.

¹¹² *ibid.*

schemes, and absence of funding arrangement options between plaintiffs and their lawyers may prevent victims and NGOs from accessing courts.

4.1 Loser pays principle

France applies the loser pays principle, whereby the losing party bears the costs pertaining to the legal proceedings.¹¹³ However, the judge may decide to impose whole or part of the legal costs on the other party. Furthermore, Article 700 French Code of Civil Procedure provides that the judge can order the losing party, or the party obliged to pay the legal costs, to pay an amount, which he determines, to the other party to cover the sums not included in the legal costs. Nonetheless, the judge must consider rules of equity and the financial condition of the party ordered to pay. On such grounds, he may free the losing party from paying other sums in addition to the legal costs.¹¹⁴ In *Alstom*, the plaintiffs lost and the Versailles Court of Appeal ordered them to pay the entire costs of the legal proceedings. In addition, the plaintiffs were ordered to pay €30,000 to each of the corporate defendants pursuant to Article 700.¹¹⁵ Following the ruling, AFPS stated that those sums were substantial financial penalties for an NGO.¹¹⁶

Similarly, the Netherlands applies the loser pays principle.¹¹⁷ Dutch courts will also order the losing party to bear the legal costs and the costs of the prevailing party, including registry fees, compensation of witness and experts, and lawyer fees.¹¹⁸ However, the losing party is not required to pay the full lawyer fees incurred by the prevailing party. As a rule, lawyer fees are calculated on the basis of a scale of costs set out in non-binding, but generally applied, court guidelines. In practice, this scale leads to a remuneration that does not cover the complete costs of legal representation and, as a result, the prevailing party will usually

¹¹³ French Code of Civil Procedure, Article 696. Furthermore, Article 695 French Code of Civil Procedure lists the various costs.

¹¹⁴ French Code of Civil Procedure, Article 700.

¹¹⁵ *Alstom* (n 24).

¹¹⁶ ‘Tramway Colonial: Un Jugement Incompréhensible de la Cour d’Appel’ (AFPS 25 March 2013) <<http://www.france-palestine.org/Tramway-colonial-un-jugement>> accessed 30 November 2015.

¹¹⁷ Dutch Code of Civil Procedure, Article 237.

¹¹⁸ Van Hooijdonk and Eijssvoogel (n 36) 51.

recover only a small percentage of its actual costs.¹¹⁹ An important feature of Dutch civil procedure is that a claimant may request the court to order the defendant to pay the costs. The defendant can make the same request in his statement of defence.¹²⁰

In *Shell*, the District Court of The Hague ordered the plaintiffs to pay the defendants' costs concerning the production of evidence during the legal proceedings following the dismissal of the plaintiffs' request to obtain access to evidence. For each of the claims, the plaintiffs were ordered to pay jointly and severally the sum of €2,712 to the defendants within 14 days of the judgement.¹²¹ Furthermore, in 2013, the District Court ordered Milieudefensie and the plaintiffs who had lost in the first instance to pay the defendants' costs, including their court fees and a fixed lawyer fee. However, the cost of the lawyer fees was relatively low due to the application of the abovementioned scale.¹²²

The application of the loser pays principle is particularly problematic when one considers that victims and NGOs often have limited financial resources, if any, to pursue legal proceedings compared to the large sums spent by MNEs. Ultimately, the loser pays principle reinforces the inequality of arms between plaintiffs and MNEs. It deters victims and NGOs from initiating legal proceedings to gain access to remedy and to hold companies to account.

4.2 Legal aid

A number of EU legislative instruments are relevant to plaintiffs in transnational litigation against MNEs with regard to access to legal aid in France and the Netherlands.

4.2.1 European Union

Article 47(3) EU Charter, on the right to an effective remedy and to a fair trial, provides that legal aid must be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

¹¹⁹ *ibid.*

¹²⁰ *ibid.* 52.

¹²¹ *Akpan* (n 42) [6.2]; *Oguru* (n 42) [6.2]; *Dooh* (n 42) [6.2].

¹²² DC The Hague 30 January 2013, C/09/330891/HAZA09-0579 (*Oguru*) [5.2] [5.5]; C/09/337058/HAZA09-1581 (*Dooh*) [4.64] [5.2].

The EU also enacted Council Directive 2002/8/EC (Directive on legal aid)¹²³ to promote access to legal aid in civil and commercial cross-border disputes for persons who lack sufficient resources, particularly where aid is necessary to secure effective access to justice. However, the Directive on legal aid applies only to cross-border disputes where the party applying for legal aid is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.¹²⁴ As a result, the Directive on legal aid does not confer rights to individuals domiciled or residing in countries outside the EU, such as victims of abuse committed by EU MNEs in host countries. This situation creates discrimination against foreign victims and limits their opportunities to obtain effective access to civil remedy in the EU.

Furthermore, the abovementioned Directive on the rights of victims of crimes requires Member States to provide legal aid to victims where they are a party in criminal proceedings.¹²⁵ As a result, foreign victims should have access to legal aid in transnational criminal litigation against MNEs. Legal aid should at least cover legal advice and legal representation free of charge.¹²⁶

4.2.2 France

In France, there are three main legal aid schemes: 1) legal aid (*aide juridictionnelle*); 2) aid to access the law (*aide à l'accès au droit*); 3) and aid to obtain a lawyer's advice in non-judicial proceedings (*aide à l'intervention de l'avocat dans les procédures non juridictionnelles*).¹²⁷ Legal aid is the most relevant scheme in the context of transnational litigation against MNEs. It is available to natural persons who lack sufficient resources in order to secure their effective access to justice.¹²⁸ The French State will cover the costs of legal assistance, including lawyer fees, and the costs of proceedings, including the fees to persons mandated by the court to perform acts during the proceedings, of the legal aid

¹²³ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41.

¹²⁴ Directive on legal aid, Article 2(1).

¹²⁵ Directive on the rights of victims of crimes, Article 13.

¹²⁶ Guidance document (n 59) 34.

¹²⁷ Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique (Loi sur l'aide juridique), Article 1(2).

¹²⁸ Loi sur l'aide juridique, Article 2(1).

recipient. One advantage for plaintiffs is that legal aid can be obtained for any type of legal proceedings, including civil and criminal.

However, various restrictions apply to legal aid in France. First, the legal aid recipient may obtain either full or partial legal aid depending on his resources. Second, legal aid does not cover the costs that may be imposed if the plaintiff loses the case (eg the defendant's legal costs, damages). Third, only a natural person, who is a French national, an EU national, or a foreign national legally and habitually residing in France, may receive legal aid.¹²⁹ Moreover, legal persons are excluded from receiving legal aid. In the context of transnational litigation against MNEs, these conditions limit access to legal aid by foreign victims and NGOs. Only in exceptional cases could nationals of non-EU countries residing outside of France receive legal aid, for instance where their situation appears particularly noteworthy regarding the subject matter or the costs of the proceedings.¹³⁰ Furthermore, only non-profit legal persons, which have their seat in France and lack sufficient resources, may exceptionally receive legal aid.¹³¹

4.2.3 The Netherlands

The Netherlands has one of the most elaborate legal aid systems in Europe.¹³² Article 18(2) Dutch Constitution provides for the granting of legal aid to persons of limited means.¹³³ In general, the Dutch State will cover a certain amount of the court fees and the lawyer fees paid by the legal aid recipient. Under the Dutch scheme, legal aid may be granted to both natural and legal persons with inadequate financial resources in relation to legal interests within the Dutch legal sphere of influence.¹³⁴ Furthermore, depending on the recipient's income, legal

¹²⁹ *ibid* Articles 3(1) and 3(2).

¹³⁰ *ibid* Article 3(3).

¹³¹ *ibid* Article 2(2).

¹³² Erhard Blankenburg, 'The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany' (1994) 28 *Law & Society Review* 789, 789.

¹³³ 'The Constitution of the Kingdom of the Netherlands 2008' (*Ministry of the Interior and Kingdom Relations* 2012) <<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>> accessed 30 November 2015.

¹³⁴ Legal Aid Act 1994, Article 12. See also 'Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands' (International Commission of Jurists 2010) 33.

aid may allow for a reduction in the court fees.¹³⁵ Moreover, there is no restriction of nationality or residence to obtain legal aid, as long as legal interests within the Dutch legal sphere of influence are involved though. In *Shell*, the Nigerian plaintiffs were able to receive legal aid. However, due to high litigation costs, legal aid has been insufficient to fund the whole case and other sources of funding have been necessary to engage and continue the lawsuit.¹³⁶ Another limit of the Dutch system is that legal aid recipients must always cover part of their litigation costs according to their financial resources.¹³⁷ Moreover, legal aid will not be granted if the party's chance of winning is considered to be close to zero or if the costs incurred with the proceedings are not reasonable compared to the interest of the case.¹³⁸

4.3 Market-based mechanisms

The UNGPs explicitly mention 'market-based' mechanisms, such as litigation insurance and legal fee structures, to fund legitimate cases involving business-related abuse. In contrast with common law countries, market-based mechanisms (eg contingent fees in the US or conditional fees in the UK) are less widespread in civil law countries.

In France, the 'no win, no fee' agreement (*pacte de quota litis*) is generally considered to be 'shocking' and 'inappropriate',¹³⁹ and French law prohibits it.¹⁴⁰ As a result, parties, and not their lawyers, must bear the costs of legal proceedings. Nonetheless, a party and his lawyer may agree a contingency fee or a success fee in addition to the remuneration for the service.

In the Netherlands, parties and their lawyers are free to agree on how lawyers are to be paid. However, the Code of Conduct of the Dutch Bar Association imposes certain limitations.¹⁴¹ As a general rule, a lawyer must take into account all the circumstances of the case when

¹³⁵ 'The Netherlands' (n 134) 33.

¹³⁶ Interview with Lawyer 1 (The Netherlands, 2013).

¹³⁷ 'The Netherlands' (n 134) 33.

¹³⁸ Legal Aid Act 1994, Article 12; *ibid* 35.

¹³⁹ Doris Marie Provine, 'Courts in the Political Process in France' in Herbert Jacob and others, *Courts, Law, and Politics in Comparative Perspective* (Yale University Press 1996) 237.

¹⁴⁰ Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires (Loi sur les professions judiciaires), Article 10.

¹⁴¹ 'Collective Redress in the Netherlands' (n 107) 17.

determining his fee and he must charge a reasonable fee.¹⁴² Furthermore, US-style contingent fees are not permitted. A lawyer should not agree to charge a proportionate part of the value of the result obtained.¹⁴³ Success fees are not allowed either. A lawyer should not agree that he would only charge for his services upon obtaining a specific result.¹⁴⁴ However, the Disciplinary Appeals Tribunal has accepted certain forms of success fees, such as charging fees at a higher hourly rate if the case is successful.¹⁴⁵ Finally, WCAM settlements can be used by plaintiffs to pay their lawyers fees, which can be substantial.¹⁴⁶

5 Remedies

The UNGPs provide that remedies may take various forms, including apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, and injunctions or guarantees of non-repetition.¹⁴⁷ In accordance with the UNGPs, France and the Netherlands offer various remedies, including damages and injunctions. However, in the context of transnational litigation against MNEs, French and Dutch domestic courts have rarely found companies liable for human rights abuse or environmental damage in host countries. Often, courts dismiss claims before they decide on their merits, or claimants and MNEs settle through an out-of-court agreement. Therefore, victims have had limited access to judicial remedy in France and the Netherlands to date.

Moreover, the application of the Rome II Regulation in EU Member States directly affects remedies in transnational litigation against MNEs. The general rule is that the type of remedy, including the character and amount, must be determined according to the law of the host State.¹⁴⁸ NGOs and scholars have criticized the effect of the Rome II Regulation on remedies available to plaintiffs.¹⁴⁹ They suggest that available remedies in host States might not be

¹⁴² ‘English Version of the Code of Conduct of the Netherlands Bar Association: The Rules of Conduct of Advocates 1992’ (CCBE 3 December 2008), Rule 25 (Clause 1) (Dutch Bar Association’s Code of Conduct).

¹⁴³ Dutch Bar Association’s Code of Conduct, Rule 25 (Clause 3).

¹⁴⁴ Dutch Bar Association’s Code of Conduct, Rule 25 (Clause 2) .

¹⁴⁵ ‘Collective Redress in the Netherlands’ (n 107) 18.

¹⁴⁶ *ibid.*

¹⁴⁷ UNGPs (n 1), Guiding Principle 25.

¹⁴⁸ Skinner and others (n 79) 65.

¹⁴⁹ *ibid.*

always appropriate to remediate corporate abuse of human rights or environmental pollution and that the maximum amount of compensation might be too low to cover the real costs of litigation in the home country.¹⁵⁰

Nonetheless, an overview of the available types of remedy in France and the Netherlands is noteworthy in the context of this study in order to understand the opportunities of redress for victims. Furthermore, the Rome II Regulation provides for a number of situations where the home State law may apply.¹⁵¹

5.1 Damages

Under French and Dutch law, the principle behind awarding damages is generally aimed at repairing the harm suffered by the victim rather than punishing the tortfeasor.¹⁵² In France, victims of corporate abuse can obtain damages¹⁵³ before civil and criminal courts in order to repair and compensate the harm they suffered. French courts use a case-by-case approach to calculate damages and there is generally no maximum limit to damages. Courts assess damages at the time of the ruling on the basis of the injury suffered by the plaintiff. French courts can order the defendant to compensate the plaintiff the entire injury, which may comprise pecuniary loss (*dommage patrimonial*) and non-pecuniary loss (*dommage moral*), such as pain, suffering, or loss of amenities.¹⁵⁴ Compensation for non-pecuniary loss may be granted for personal injury, for death or serious injuries to a loved one, or even for harm to feelings.¹⁵⁵ French courts tend to award generous sums to compensate non-pecuniary loss.¹⁵⁶ Furthermore, an extensive list of relatives is eligible to claim damages for the loss of a close relative or a loved one.¹⁵⁷ However, the benefits made by the defendant as a result of the harm are not taken into account in the assessment of the damages. In addition to reparation and

¹⁵⁰ *ibid.*

¹⁵¹ On the subject, see Section 2.2.2 of Chapter 5 of this thesis.

¹⁵² Enneking, *Foreign Direct Liability and Beyond* (n 109) 255; Cees Van Dam, *European Tort Law* (2nd edn, OUP 2013) 352.

¹⁵³ See Van Dam (n 152) 348.

¹⁵⁴ *ibid* 346, 354.

¹⁵⁵ *ibid* 354.

¹⁵⁶ *ibid* 352.

¹⁵⁷ *ibid* 371.

compensation, French courts may award a *euro symbolique* to recognize that the victim has suffered a wrong or that his right has been infringed.¹⁵⁸

In the Netherlands, damage to be repaired may cover loss to property, rights, and interests, such as loss incurred and the profit deprived, as well as any other damage.¹⁵⁹ In personal injury cases, victims may claim damages for their recovery and for other pecuniary and non-pecuniary damage, such as pain and injury.¹⁶⁰ As a general rule, damages shall be paid in monetary form, although Dutch courts have discretion to award them in other forms.¹⁶¹ They also enjoy discretion to assess the amount of financial compensation and are not bound by rules of evidence in this regard. Nonetheless, the injured party should be placed, as far as possible, in the situation which he would have been in if the event that caused the damage had never occurred.¹⁶² Unlike France, the Netherlands allows the injured party to request that the damages be assessed according to the amount of the profit (or a part thereof) that the tortfeasor derived from committing the tort.¹⁶³ This provision could potentially be useful for plaintiffs in the context of transnational claims against MNEs. For instance, MNEs may derive a profit from the sale of goods produced by employees who did not receive the minimum wage in violation with labour law requirements.

Punitive damage awards do not exist under French and Dutch law. In France, courts continue to show distrust towards punitive damages, even though the French Court of Cassation recently held that they were not contrary to public policy.¹⁶⁴ Nonetheless, foreign awards of punitive damage can be enforced in France when the amount awarded is not disproportionate with regard to the damage sustained.

¹⁵⁸ *ibid* 349.

¹⁵⁹ Dutch Civil Code, Articles 6:95 and 6:96(1).

¹⁶⁰ Enneking, *Foreign Direct Liability and Beyond* (n 109) 255.

¹⁶¹ Dutch Civil Code, Article 6:103. See also Van Hooijdonk and Eijssvoogel (n 36) 61.

¹⁶² Van Hooijdonk and Eijssvoogel (n 36) 61.

¹⁶³ Dutch Civil Code, Article 6:104 .

¹⁶⁴ See Benjamin West Janke and François-Xavier Licari, ‘Enforcing Punitive Damage Awards in France after *Fountain Pajot*’ (2012) 3 *American Journal of Comparative Law* 775.

5.2 Other types of remedy

France provides for various types of injunctions, most notably to prevent or halt on-going infringement of the plaintiff's rights, or to order the defendant to take positive action to further limit harm that has already occurred.¹⁶⁵ Similarly, Dutch courts can issue injunctions to order the defendant to perform certain acts after the tort took place, or to abstain from certain acts before the tort takes place.¹⁶⁶ As a result, plaintiffs in transnational litigation against MNEs may ask courts to order MNEs to honour any legally enforceable obligations or to grant interim injunctions or orders.¹⁶⁷ However, it remains to be seen whether such remedies are applicable or effective, particularly as the harm usually takes place in host countries where there are limited means of enforcement.¹⁶⁸

To date, courts have tended to focus on the award of damages to injured individuals. In *Shell*, the plaintiffs requested the Dutch courts to order the corporate defendants to clean-up the oil spills in Nigeria. However, the District Court only ordered the subsidiary to compensate the plaintiff for the damage he suffered. There was no order to clean-up the pollution. Scholars and activists have generally called for home country courts to take into account other types of remedy than financial compensation, such as injunctions or clean-up operations. They have pointed out that excessive focus on financial compensation to injured individuals does not remedy long-standing social and environmental problems.¹⁶⁹

6 Conclusions

Chapter 7 explored the French and Dutch procedural rules that affect the opportunities of plaintiffs to gain effective access to remedy in the context of transnational litigation against MNEs.

¹⁶⁵ Van Dam (n 152) 347-348.

¹⁶⁶ Enneking, *Foreign Direct Liability and Beyond* (n 109) 255.

¹⁶⁷ *ibid.*

¹⁶⁸ Similarly, scholars have raised potential difficulties in enforcing judgements resulting from ATS litigation overseas. See Ugo Mattei and Jeffrey Lena, 'United States Jurisdiction Over Conflicts Arising Outside of the US: Some Hegemonic Implications' (2001) 24 *Hastings International and Comparative Law Review* 381.

¹⁶⁹ Peter Newell, 'Access to Environmental Justice? Litigating against TNCs in the South' (2001) 32 *IDS Bulletin* 83, 86; Jędrzej Frynas, 'Social and Environmental Litigation against Transnational Firms in Africa' (2004) 42 *Journal of Modern African Studies* 363, 381.

In civil proceedings, while foreign victims of corporate abuse can generally bring a claim against an MNE, NGOs face significant obstacles to bring similar claims. In France, NGOs can initiate a civil claim on behalf of the collective interests they seek to protect in their statutes, or when French legislation explicitly allows it. In the Netherlands, only NGOs which have legal personality and protect the public interest on which the action is based in their statutes may bring a civil claim against an MNE. While French courts take a restrictive approach to NGO standing in the context of transnational litigation against MNEs, Dutch courts accept more easily that NGOs can bring claims.

In criminal proceedings, the public prosecutor enjoys a wide discretion to initiate prosecution, as a result of the application of the principle of opportunity in France and the Netherlands. This is problematic, as French and Dutch prosecutors are usually reluctant to sue MNEs for human rights abuse or environmental pollution taking place in host countries. However, French law allows victims and NGOs to initiate criminal proceedings, even when the prosecutor declines. One advantage of this procedure is that it allows, at the same time, for criminal punishment of the MNE and for victims to claim financial compensation. Nonetheless, the prosecutor does not have any obligation to continue the criminal proceedings after the preliminary enquiry stage. At EU level, the Directive on the rights of victims of crime recently created an obligation for Member States to ensure that victims have the right to a review in the event of a decision not to prosecute. Victims and NGOs may enjoy the benefit of this provision in the context of transnational criminal litigation against MNEs.

France and the Netherlands have traditionally been reticent to allow collective redress mechanisms similar to those found in common law countries. As a result, collective redress is generally not available to plaintiffs in French and Dutch proceedings. Nonetheless, the Netherlands provides for a representative action where NGOs can bring a claim to defend the interests of a group of individuals. This action was directly relevant in the *Shell* case. Furthermore, the Dutch legislator recently created an action that allows courts to recognize group settlements. This action may provide a viable alternative to transnational litigation against MNEs for victims who want effective access to financial compensation. In the EU,

action on the issue of collective redress mechanism has to date been limited to consumer issues and, as a result, it provides no opportunities for victims of corporate abuse.

French and Dutch rules on the production of evidence also affect how victims and NGOs effectively gain access to remedy. In civil proceedings, plaintiffs initiating a liability claim against an MNE usually bear the burden of proof. Furthermore, while French courts allow disclosure for the benefit of plaintiffs, Dutch courts are much more reluctant to require corporate defendants to produce evidence and have been wary of ‘fishing expeditions,’ such as in *Shell*. As a result, plaintiffs face significant obstacles to demonstrate the validity of their claims, especially since they often have limited access to crucial evidence possessed by MNEs. In criminal proceedings, even though the prosecutor has the main role in gathering and requesting evidence, the benefit for victims is limited because prosecutors are generally reluctant to prosecute MNEs.

Transnational litigation against MNEs is also generally expensive. The application of the loser pays principle is problematic when plaintiffs with limited financial resources have to pay the MNE’s litigation costs. Legal aid may be available for foreign plaintiffs, but it is often not enough to cover the entire costs of litigation. Other types of funding, such as market-based mechanisms, are usually not available. French and Dutch civil procedure relating to remedy is more flexible than in common law countries.¹⁷⁰ However, the Rome II Regulation generally imposes the application of the host country law to govern the choice of remedies. While various forms of remedy, whether damages or injunction, are available, punitive damages do not exist in France and the Netherlands, thus limiting the benefit of using litigation to deter MNEs from committing human rights or environmental abuse. In general, under French and Dutch law, damages aim to repair the harm and compensate the victim rather than punish the tortfeasor.

The next chapter looks at the socio-legal context in which transnational litigation against MNEs is embedded. It describes the emergence of the corporate accountability movement

¹⁷⁰ Van Hooijdonk and Eijssvoegel (n 36) 5.

and its characteristics in Europe. It also explores the role of the European corporate accountability movement, including CSOs and cause lawyers, in the emergence and the shaping of transnational litigation against MNEs.

CHAPTER 8

Social movements and legal mobilization for corporate accountability in Europe

1 Introduction

Transnational litigation against MNEs has direct links to the broader civil society agenda on globalization and corporate accountability.¹ It supports general claims for improved regulation of business activities at both international and national levels. CSOs, including lawyers and legal NGOs, have also played an instrumental role in the emergence of transnational claims against MNEs before domestic courts. They not only seek effective remedy for victims of corporate abuse in host countries but also call MNEs to account for human rights and environmental abuse occurring in the context of their international activities. In the latter situation, litigation is a tool to raise awareness amongst the judiciary and policy-makers and to demand reform for improved corporate accountability.

The aim of Chapter 8 is twofold. First, it seeks to trace the emergence and identify the characteristics of the corporate accountability movement in Europe. Particular attention is paid to the existence and the role of cause lawyers and their interactions with activist CSOs. Second, Chapter 8 aims to understand the interplay between transnational litigation against MNEs and the corporate accountability movement. It explores the strategic nature of this type of legal mobilization and questions its effectiveness to achieve conflicting objectives and to satisfy the demands of the various actors involved in claims against MNEs.

The scope of Chapter 8 is not limited to France and the Netherlands and generally includes other European countries, such as the UK and Germany. Various reasons explain this scope. First, transnational litigation against MNEs has been undertaken in various countries throughout Europe over the last years. In most cases, lawyers and CSOs active in the corporate accountability movement were behind these claims. Second, national networks of organizations working on various corporate accountability issues are well established in

¹ Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 *Hastings International and Comparative Law Review* 451, 465.

those countries. They regularly collaborate with each other on common campaigns at European level and, at times, on claims targeting specific MNEs in different countries (eg litigation against Trafigura or Shell). They may also face similar legal frameworks (eg EU private international law), and legal and procedural obstacles (access to evidence, litigation costs). Third, there is a need for further research on the interplay between transnational litigation against MNEs and social movements in Europe.

Chapter 8 starts by providing an overview of the corporate accountability movement in Europe. It then describes the strategic nature of transnational litigation against MNEs and how this type of legal mobilization succeeds, or fails, in achieving the various aims it pursues, namely access to remedies for victims and corporate accountability reform. Finally, Chapter 8 explores the use of lawsuits by MNEs to discourage plaintiffs, cause lawyers, and CSOs from raising corporate human rights or environmental abuse in courts.

2 The corporate accountability movement in Europe

This section explores the emergence and the characteristics of the corporate accountability movement in Europe. First, it describes the emergence of the corporate accountability movement at the end of the 1990s. Second, it explains the general features of the corporate accountability movement. Third, it provides an overview of the corporate accountability movement in Europe.

2.1 The rise of the corporate accountability movement

The corporate accountability movement at issue in this study is historically recent. Influenced by previous social movements concerned with human rights and environmental protection and the recent global justice movement, it emerged at the beginning of the 21st century.²

² Jem Bendell, 'Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement' (2004) UNRISD Technology, Business and Society Programme Paper 13, 16 <[http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/504AF359BB33967FC1256EA9003CE20A?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/504AF359BB33967FC1256EA9003CE20A?OpenDocument)> accessed 30 November 2015; Peter Utting, 'The Struggle for Corporate Accountability' (2008) 39 *Development and Change* 959, 960.

Traditionally, human rights and environmental CSOs were concerned with State violations of human rights abuse, and State territorial and extraterritorial environmental pollution. However, with the liberalization of the global economy and the increase in the number of MNEs operating across borders, they started to observe the negative impacts of corporate activities on humans and the environment, especially in developing countries.³ In particular, disasters caused by corporate activities, such as the 1984 Bhopal tragedy or the 1989 Exxon Valdez oil spill, triggered CSO campaigns against corporations.⁴

Since its emergence, activism concerned with corporate impacts on humans and the environment has evolved considerably.⁵ These changes are directly linked to the evolution of the relationship between CSOs and businesses. In the 1980s, CSOs focused their activities on governmental commitments to regulate companies. However, they started to be critical of what they perceived as failed attempts by governments and international organizations, such as the UN or the OECD, to regulate MNEs.⁶ This led CSOs to direct their attention to private regulation by businesses themselves. During the 1990s, there was an evolution of the CSO strategy from ‘barricades’ to ‘boardrooms.’⁷ CSOs increased engagement with companies to solve social, human rights, and environmental issues. As a result, the concepts of CSR and private, or voluntary, regulation became prevalent in CSO discourse. However, towards the end of the 1990s, some CSOs and other activists began to question the effectiveness of CSR initiatives and private regulation. In particular, these actors were concerned about corporate control over the way the CSR agenda was framed, how some crucial issues related to global injustice remained largely out of bounds, and the general failure of CSR initiatives at

³ Bendell (n 2) 14. See also Robin Broad and John Cavanagh, ‘The Corporate Accountability Movement: Lessons and Opportunities’ (1999) 23 *The Fletcher Forum of World Affairs* 151; Oliver Balch, ‘Activist NGOs Briefing Part 1: History of Campaigning – Manning the Barricades’ (*Ethical Corporation*, 7 March 2013) <<http://www.ethicalcorp.com/print/36583>> accessed 30 November 2015.

⁴ Utting (n 2) 960.

⁵ *ibid* 959.

⁶ Peter Utting, ‘Corporate Responsibility and the Movement of Business’ (2005) 15 *Development in Practice* 375, 376.

⁷ Bendell (n 2) 14.

restricting the growth of corporate power.⁸ As a result, some CSOs shifted to a new type of activism and started to mobilize around the banner of ‘corporate accountability.’⁹

It should be noted that the evolution of CSO demands for MNE regulation echoes the various phases through which the UN has engaged with corporate impacts on humans and the environment. As will be seen in Chapter 9, the recent decision of the UNHRC to create a working group to draft a legally binding instrument on MNEs and human rights demonstrates the growing international attention to the question of corporate accountability under international human rights law.¹⁰

2.2 The characteristics of the corporate accountability movement

The agenda of the corporate accountability movement is based on a distinction between corporate responsibility and corporate accountability.¹¹ While corporate responsibility refers to any attempts to encourage companies to behave responsibly towards humans and the environment on a voluntary basis, corporate accountability refers to requiring companies to comply with legal norms or face consequences.¹² Utting suggests that the corporate accountability movement seeks to redirect ‘attention to the question of corporate obligations, the role of public policy and law, the imposition of penalties in cases of non-compliance, the right of victims to seek redress, and imbalances in power relations.’¹³

⁸ *ibid* 16-18. On the trend for businesses to lead the discourse on CSR, and business and human rights, see Christian Scheper, ‘From Naming and Shaming to Knowing and Showing: Human Rights and the Power of Corporate Practice’ (2015) 19 *International Journal of Human Rights* 737.

⁹ Jennifer Clapp, ‘Global Environmental Governance for Corporate Responsibility and Accountability’ (2005) 5 *Global Environmental Politics* 23, 25; Utting, ‘The Struggle for Corporate Accountability’ (n 2) 965.

¹⁰ UNHRC Res 26/9 (2014) UN doc A/HRC/26/L.22/Rev.1.

¹¹ Craig Bennett and Helen Burley, ‘Corporate Accountability: An NGO Perspective’ in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing 2005) 372; Linda Siegele and Halina Ward, ‘Corporate Social Responsibility: A Step Towards Stronger Involvement of Business in MEA Implementation?’ (2007) 16 *RECIEL* 135, 136.

¹² Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 195.

¹³ Utting, ‘The Struggle for Corporate Accountability’ (n 2) 965. See also Anita Ramasastry, ‘Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability’ (2015) 14 *Journal of Human Rights* 237.

The tactics of the corporate accountability movement have focused on social contestation, critical research, and campaigns pushing for legal reforms.¹⁴ Amongst its portfolio of actions, organising public campaigns, and lobbying for legal and policy reforms, and testing and using soft and hard law to seek redress have developed.¹⁵ As a result, it has contributed to several regulatory developments.¹⁶ The corporate accountability movement also emphasizes the role of traditional regulatory organizations and institutions, including policy-makers, courts, and State enforcement bodies, in improving corporate behaviour.¹⁷ Importantly, it pays strong attention to the role of courts to punish companies when they do not comply with legally binding obligations and to provide victims with remedies.

The corporate accountability movement does not adhere to the view that voluntary initiatives should be a preferred substitute for legally binding regulation. Instead, it reasserts the role of the law in social, human rights, and environmental domains. It also expands the terrain for hybrid regulation where voluntary and mandatory regulations merge.¹⁸ Moreover, the corporate accountability movement has drawn attention to the need for an expanding body of hard and soft-law that target companies, especially in international law.¹⁹

Ultimately, Utting suggests that ‘the corporate accountability agenda attempts to strengthen an arena of law that is sometimes referred to as “subaltern legality” or “counter-hegemonic legality”’.²⁰ He explains as follows:

This involves efforts on the part of social groups, individuals and communities whose livelihoods, identity, rights and quality of life are negatively affected by states and corporations, to use the existing legal apparatus to seek redress for injustice and participate in struggles and processes associated with accountability. A key feature of such struggles is transnational activism that connects actors at local, national, regional

¹⁴ Utting (n 2) 966.

¹⁵ *ibid* 968.

¹⁶ *ibid* 969.

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ *ibid*.

²⁰ *ibid* 970.

and global levels. Prominent examples of subaltern legality include [PIL] in India and the approximately thirty cases that have been brought against corporations under the [ATS] in the [US].²¹

The corporate accountability movement involves a more representative cross-section of civil society actors and international, regional, and national coalitions, connecting actors and organizations that were previously disconnected or wary of each other's agendas. Utting argues that the coalitions of the modern corporate accountability movement are overcoming the fragmentation and tensions that have divided CSOs concerned with MNEs.²² In particular, the movement has brought together CSOs from Northern and Southern countries in national, regional, and international networks. Such relations are visible in transnational campaigns and legal actions, such as transnational litigation against MNEs.²³ Furthermore, the corporate accountability movement has used networking to enhance resource mobilization, political opportunities, and collective identity formation. However, a number of issues exist with regard to the potential of networks, including significant imbalances in power relations favouring CSOs from the North.²⁴ Scholars have argued that CSOs from developed countries can marginalise the interests and the role of local CSOs from developing countries.²⁵ Furthermore, campaigns for corporate accountability have been criticized for the marginalisation of victims of business-related abuse from developing countries. Transnational solidarity is often produced through socially thin relations and raises questions about the durability and potential of its agency for social change, and the practices of human rights and democracy that are locally routinizing within civil society.²⁶

²¹ *ibid.*

²² *ibid.* 971.

²³ *ibid.*

²⁴ *ibid.*

²⁵ Jem Bendell, 'In Whose Name? The Accountability of Corporate Social Responsibility' (2005) 15 *Development in Practice* 362, 363; John Dale, *Free Burma: Transnational Legal Action and Corporate Accountability* (University of Minnesota Press 2011) 207.

²⁶ Dale (n 25) 207. See also Linda Waldman, 'When Social Movements Bypass the Poor: Asbestos Pollution, International Litigation and Griqua Cultural Identity' (2007) 33 *Journal of Southern African Studies* 577.

2.3 Overview of the corporate accountability movement in Europe

The European corporate accountability movement is composed of various actors, including NGOs and cause lawyers, who regularly collaborate on transnational claims against MNEs.

2.3.1 Characteristics

Since its creation, the corporate accountability movement has grown across Europe. It is composed of a broad range of CSOs, including NGOs traditionally concerned with environmental and human rights (eg Friends of the Earth; Amnesty International), trade unions (eg TUC), scholars and universities (eg the Essex Business and Human Rights Project at the University of Essex), and lawyers and law firms (eg William Bourdon; Leigh Day). While some organizations focus on specific business sectors (eg extractive or garment industries), others target companies in general. The European corporate accountability movement is characterized by the existence of networks operating at national²⁷ and regional²⁸ levels. There are close linkages between these various networks, which regularly collaborate on common issues, initiatives, and campaigns (eg global supply chains or oil activity in Nigeria). They take advantage of opportunities offered by transnational interactions, through the Internet, social media, and regional and international institutions, to achieve common aims. For instance, the annual UN Forum on Business and Human Rights in Geneva gives CSOs the opportunity to work together in order to raise awareness about specific issues and influence policy-makers.²⁹

Importantly, the presence of regional institutions contributes to the elaboration of common strategies around the topic of corporate accountability in Europe. In particular, the EU institutions have been the object of intense campaigning, as they have a major influence on the drafting of national policies and legislation governing business activities and access to justice. Furthermore, the excessive focus of the EU on CSR policies has contributed to renew

²⁷ For instance, there are the Corporate Responsibility Coalition (CORE Coalition) in the UK, CorA – Network for Corporate Accountability in Germany, the Forum citoyen pour la responsabilité sociale des entreprises in France, the MVO Platform in the Netherlands.

²⁸ For instance, there is the European Coalition for Corporate Justice (ECCJ).

²⁹ ‘UN Forum on Business and Human Rights’ (*OHCHR*)

<<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>> accessed 30 November 2015.

demands for corporate accountability from CSOs over the last decade.³⁰ Finally, the EU is generally a major source of funding for NGOs in the region. As such, it may contribute to resources to corporate accountability NGOs, helping them fund, directly or indirectly, campaigns or projects related to corporate accountability and access to justice.

2.3.2 Cause lawyers

Within the European corporate accountability movement, lawyers, law firms, and legal NGOs have given the main impetus to transnational litigation against MNEs. For instance, the British law firm Leigh Day was one of the first law firms to bring human rights claims against MNEs in England at the end of the 1990s. Leigh Day is generally identified with the British corporate accountability movement, as a result of its litigation work against companies and its involvement in the CORE Coalition.³¹ In France, the legal NGO Sherpa was created in 2001 by William Bourdon, a French lawyer involved in human rights NGOs,³² to prevent and fight ‘economic crimes.’³³ Sherpa campaigns actively for the adoption of binding norms to govern MNE activities, and has been involved in most of the claims brought against MNEs before the French courts. In Germany, a group of human rights lawyers created the legal NGO European Center for Constitutional and Human Rights (ECCHR) in 2007. Since its creation, the ECCHR has been involved in most cases against MNEs in Germany and Switzerland.³⁴ In the Netherlands, Prakken d’Oliveira (formerly Böhler Advocaten) is a law firm specialized in international law and human rights.³⁵ The law

³⁰ See Jonathan Doh and Terrence Guay, ‘Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective’ (2006) 43 *Journal of Management Studies* 47; Olivier De Schutter, ‘Corporate Social Responsibility European Style’ (2008) 14 *European Law Journal* 203.

³¹ John Vidal, ‘Lawyers Leigh Day: Troublemakers Who Are a Thorn in the Side of Multinationals’ *The Guardian* (London, 2 August 2015) <<http://www.theguardian.com/global-development/2015/aug/02/leigh-day-troublemaker-fight-dispossessed-lawyers>> accessed 30 November 2015.

³² Bourdon was the Secretary General of FIDH from 1995 to 2000. See Olivier Petitjean, ‘Comment Mettre les Entreprises Multinationales Face à Leurs Responsabilités? L’Action de Sherpa’ (*Observatoire des Multinationales*, 24 March 2014) <<http://multinationales.org/Comment-mettre-les-entreprises>> accessed 30 November 2015.

³³ ‘Association Sherpa Statuts’ (Sherpa 20 Mai 2009) Article 3.

³⁴ ‘Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries. The KiK, Lahmeyer, Danzer and Nestlé Cases’ (ECCHR 2015).

³⁵ ‘Our History’ (*Prakken d’Oliveira*) <<http://www.prakkendoliveira.nl/en/about-us/>> accessed 30 November 2015.

firm's name has been associated to a number of famous human rights and international criminal law cases.

These actors are cause lawyers, meaning activist lawyers who seek to use the courts as a vehicle to achieve social change or social justice beyond the individual claim at stake.³⁶ They are usually specialised in human rights and environmental law issues, and they regularly work with disadvantaged groups. They are often the only litigators to offer legal assistance or representation to foreign victims of corporate abuse. In general, law firms and lawyers are reluctant to take on transnational cases against MNEs, not only because of the costs and complexity of this type of litigation but also to avoid potential conflicts with other corporate clients.³⁷

Ward distinguishes between two main categories of cause lawyers involved in transnational litigation against MNEs.³⁸ The first category is composed of legal NGOs that work on strengthening MNE accountability. They receive support for their work from major foundations and see litigation as part of their broader work. In France, Sherpa was created to hold parent companies of corporate groups legally and financially liable for the activities of their foreign companies, and to support foreign victims in accessing courts.³⁹ It engages in litigation as well as awareness-raising and lobbying. The second category is composed of profit-making law firms which take on cases that have strong public interest elements either on the basis of 'no win no fee' or legal aid. They work to obtain remedies for victims who would otherwise not be compensated for their injuries.⁴⁰ In the Netherlands, Prakken d'Oliveira represents individuals and groups which are oppressed or have difficulties gaining

³⁶ Thelton Henderson, 'Social Change, Judicial Activism, and the Public Interest Lawyer' (2003) 33 Washington University Journal of Law and Policy 33, 37.

³⁷ For a discussion of conflicts of interests for law firms in general, see Stephen Daniels and Joanne Martin, 'Legal Services for the Poor: Access, Self-Interest, and Pro Bono' in Rebecca Sandefur (ed), *Access to Justice* (Emerald Jai Press 2009).

³⁸ Ward (n 1) 464.

³⁹ 'Une Interview de William Bourdon: L'Arrogance des Multinationales Devient Leur Pire Ennemi' *Le Nouvel Observateur* (Paris, 14 March 2013).

⁴⁰ Ward (n 1) 464.

access to law.⁴¹ Its lawyers are currently representing the plaintiffs in the *Shell* case on the basis of legal aid.

2.3.3 Collaboration

One can observe a constructive tactical alliance between CSOs and cause lawyers relative to the challenges and opportunities confronted at various stages of transnational litigation against MNEs.⁴² In general, the existence of networks facilitates collaboration between CSOs and cause lawyers in building, pursuing, and raising the visibility of claims.

Cause lawyers benefit from their collaboration with CSOs regarding access to evidence, funding, and visibility. For example, Leigh Day built its legal case against the mining MNE Monterrico thanks to information provided by various American and Peruvian NGOs.⁴³ Similarly, Prakken d'Oliveira used various documents produced by other NGOs, such as Amnesty International and Platform London, to build its claims against Shell in the Netherlands.⁴⁴ Milieudefensie has also played a decisive role in funding, collecting evidence, and raising the visibility of the case. In France, Sherpa strategically mobilizes a network of various actors, including lawyers, law professors, and NGOs, to work on specific cases or develop legal arguments on corporate liability or access to justice. Furthermore, the presence of international NGOs, such as Friends of the Earth, within the European corporate accountability movement is advantageous for lawyers, as these NGOs usually have a presence in host countries that allows them to have an easier access to information and to victims of human rights and environmental abuse. For instance, Milieudefensie collaborated with the Nigerian section of Friends of the Earth to collect evidence for *Shell*.

⁴¹ 'Our History' (n 35).

⁴² Cheryl Holzmeyer, 'Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe v. Unocal*' (2009) 43 *Law & Society Review* 271, 300.

⁴³ 'Peruvian Torture Claimants Compensated by UK Mining Company' (*Leigh Day*, 20 July 2011) <<http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>> accessed 30 November 2015.

⁴⁴ See the list of productions in 'Writ of Summons: *Oguru, Efangana & Milieudefensie vs Shell plc and Shell Nigeria*' (Böhler Advocaten 7 November 2008).

CSOs also benefit from collaboration with cause lawyers. They may lack the legal expertise to put together a legal strategy or bring a claim directly before a court. Therefore, cause lawyers are precious collaborators, as they are more willing to work on complex claims raising human rights abuse and environmental damage.

At the same time, collaboration between CSOs and cause lawyers presents some challenges. Lawyers may perceive that such collaboration interferes with their relationship with their client. Furthermore, lawyers are bound by confidentiality vis-à-vis their clients, which complicates the possibility to disclose certain information to CSOs, and by their clients' decisions during the proceedings. In this regard, settlement agreements may create tensions between CSOs and cause lawyers when their interests diverge.

3 Legal mobilization for corporate accountability in Europe

Transnational litigation against MNEs is indissociable from the corporate accountability movement. Legal mobilization is one of the strategies used by activist organizations and lawyers to achieve political and legal reform of MNE conduct in host countries. This section explores the strategic nature of transnational litigation against MNEs and questions its effectiveness to achieve conflicting objectives and to satisfy the demands of the various actors involved in claims against MNEs.

3.1 Strategic litigation against MNEs

The nature of transnational litigation against MNEs is twofold. First, it is a traditional form of litigation in the sense that it seeks to hold specific companies liable for the harm they caused while providing an opportunity for victims to obtain a judicial remedy for the damage they suffered. At the same time, it is a strategic form of litigation, as it also seeks to achieve broader goals beyond the success of a specific case. Scholars have argued that transnational litigation against MNEs is similar to public law litigation.⁴⁵ Often, plaintiffs are not simply acting on their own behalf, but also serve as representatives of the larger community affected

⁴⁵ Benjamin Fishman, 'Binding Corporations to Human Rights Norms through Public Law Settlement' (2006) 81 New York University Law Review 1433, 1436.

by the company.⁴⁶ More importantly, litigators use transnational claims against MNEs to encourage legal reform to strengthen corporate accountability and improve access to justice.

On multiple occasions, European litigators have asserted the twofold nature of these claims. For instance, Sherpa insists that ‘the law can be a tool for rights advocacy, at the same time fighting against the impunity of economic (public and private) actors and providing a remedy for the damage suffered by the victims.’⁴⁷ In Germany, the ECCHR claims to use strategic litigation to hold non-State actors accountable for human rights violations in selected ‘pilot cases’ which highlight structural problems, raise legal questions that have until now gone unanswered, and may provide a precedent for enforcing human rights in the future.⁴⁸ Such litigation has for goal ‘to effect change above and beyond the individual case at hand.’⁴⁹

3.1.1 Goals

As a strategic form of litigation, transnational claims against MNEs aim to achieve various goals. First, they invite home country courts to clarify specific legal concepts, such as the boundaries of corporate liability.⁵⁰ For instance, the ECCHR has used litigation to ensure that clear guidelines exist on the extent of the parent company’s liability.⁵¹

Second, transnational claims against MNEs raise the visibility of existing regulatory gaps and encourage legal and policy reforms at both national and European levels. This approach is particularly observable in France where Sherpa has brought transnational claims against MNEs to ‘concretely show decision-makers and legislators the difficulties which exist to hold companies liable for the harm they commit.’⁵² After several years of litigation and lobbying, in 2013, Sherpa and other corporate accountability activists achieved enough support in the French Parliament for the introduction of a legislative bill creating a duty of

⁴⁶ *ibid* 1431.

⁴⁷ Petitjean (n 32) (author’s translation).

⁴⁸ ‘Criminal Complaint against Senior Manager of Danzer: Accountability for Human Rights Violations in the Democratic Republic of Congo’ (ECCHR 25 April 2013) 12.

⁴⁹ *ibid*.

⁵⁰ Ward (n 1) 468.

⁵¹ ‘Human Rights Violations Committed Overseas’ (n 34).

⁵² Petitjean (n 32) (author’s translation).

care of parent and controlling companies.⁵³ In Germany, the ECCHR has used litigation to point out loopholes in national criminal law and encourage the German legislator to introduce a regime of corporate criminal liability.⁵⁴ Litigation against MNEs is also a test to evaluate the extent of legal and policy reform needed. A campaigner said that ‘[the XX case] was also a test case to check if it is possible to [bring a claim against an MNE] and if it would not be possible, then [NGO] would have to lobby to change the law.’⁵⁵

Third, transnational litigation against MNEs breathes new life into, or raises the visibility of, campaigns deemed unsuccessful. In the Netherlands, the *Shell* case was the result of a strategic decision by corporate accountability activists to make more effective a public campaign seeking Shell’s accountability for its activities in Nigeria. Ultimately, the rise of transnational claims against MNEs is linked to the absence of effective global mechanisms to hold corporations accountable. Until political leaders address the imbalance between corporate rights and obligations, NGOs and local communities will continue to call for further litigation against MNEs.⁵⁶

The existence of a hostile legal opportunity structure⁵⁷ and the strategic nature of transnational litigation affect the number of claims which end up in home country courts. To date, plaintiffs have faced a number of obstacles (eg high litigation costs, complex regimes of corporate liability, limited substantive legal victories, etc.). To improve their chances of success, litigators carefully select the claims they bring against MNEs.⁵⁸ The claim must also

⁵³ Proposition de loi n°1524 & Proposition de loi n°1519 du 6 novembre 2013 relatives au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.

⁵⁴ ‘Criminal Complaint against Senior Manager of Danzer’ (n 48) 10.

⁵⁵ Interview with Campaigner 1 (The Netherlands, 2013).

⁵⁶ Jędrzej Frynas, ‘Social and Environmental Litigation against Transnational Firms in Africa’ (2004) 42 *Journal of Modern African Studies* 363, 385.

⁵⁷ For a discussion of legal opportunity structures, see Lisa Vanhala, ‘Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK’ (2012) 46 *Law & Society Review* 523.

⁵⁸ Scholars hold that cause lawyers have the propensity to transgress conventional or generally accepted professional ethical standards of legal practice. A first area of possible transgression is client selection, which offends the principle of neutrality dictating that lawyers accept all clients. However, such a principle appears to be more predominant in some countries, such as the US, than others. See Andrew Boon, ‘Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression’ (2004) 7 *Legal Ethics* 250, 254-257.

‘make sense’ in the context of the litigator’s aims and activities. In France, Sherpa brought the claim against Vinci at a time where it strategically coincided with the debate on the duty of care of parent and controlling companies in the French Parliament. Sherpa claimed that the human rights violations alleged in the claim demonstrated the need to enact a law which would regulate MNE activities abroad.⁵⁹ Ability to collaborate with victims and CSOs in host States is also an important criteria for litigators. They will evaluate victims’ profile and motivations as potential claimants. A campaigner pointed out the need to find reliable partners in host countries ‘who were not just going for easy money but who were also dedicated to the case and to justice, even if it would take a long time.’⁶⁰ Some litigators have developed specific procedures to select potential cases. In 2013, Sherpa created a formal procedure to select situations of alleged abuse that could potentially become claims based on their strategic importance and the amount of resources required.⁶¹ The case must comply with the mandate of Sherpa and it must give rise to judicial or non-judicial proceedings.⁶² Ultimately, the strategic benefit that the claim may provide appears to be the most important criterion to launch proceedings.⁶³ The selection of cases is questionable from the perspective of victims, as it restricts the number of them who may obtain remedy in home country courts, regardless of the harm they suffered or their need to be compensated.

3.1.2 Host country victims and CSOs

The strategic nature of transnational litigation against MNEs raises a number of questions regarding the involvement of host country victims and CSOs on the one hand, and home country CSOs and lawyers on the other. Scholars have questioned the way litigation impacts host State victims and CSOs and, ultimately, defends and promotes their interests. Legal strategies often reduce complex social problems to questions of monetary compensation, and

⁵⁹ ‘Mondial 2022 au Qatar: Sherpa Porte Plainte Contre Vinci Construction et les Dirigeants de sa Filiale au Qatar QDVC’ (*Sherpa*, 23 March 2015) <<http://www.asso-sherpa.org/mondial-2022-au-qatar-sherpa-porte-plainte-contre-vinci-construction-et-les-dirigeants-de-sa-filiale-au-qatar-qdvc#.VkY3i7v81Og>> accessed 30 November 2015.

⁶⁰ Interview with Campaigner 1 (n 55).

⁶¹ ‘Règlement du COPIL’ (*Sherpa* 5 April 2013), Préambule.

⁶² Petitjean (n 32) (author’s translation).

⁶³ As seen in Chapter 3, Boon suggests that most lawyers build practices on the best business opportunities rather than out of commitment to a cause. See Boon (n 58) 253.

the interests and concerns of victims may be absorbed ‘within narrow strategic legal calculations driven by the desire to reap the largest financial return.’⁶⁴ Scholars have pointed out how some lawyers may exploit ‘opportunities provided by the plight of the poor for their own ends.’⁶⁵ In some cases, lawyers looked for victims to bring a case on their behalf on the condition that the lawyers would receive a substantial sum of any court award.⁶⁶ Furthermore, victims who lack legal literacy or are unfamiliar with technical legal vocabulary can often be alienated from the process.

Scholars have also questioned the involvement of home country CSOs and lawyers. Excessive foreign intervention, in terms of funding and expertise, may taint the case with the impression that ‘it is a proxy for foreign interests.’⁶⁷ Moreover, CSOs from host and home countries may compete to gain access to financial and other resources to bring claims against MNEs, with host State CSOs being at a disadvantage compared to home State CSOs. Furthermore, they may not be able to make their voice heard in transnational claims against MNEs. Legal recourse may also be limited to groups from selected countries that benefit from CSO support and financial resources.⁶⁸ For example, international CSOs and lawyers have unevenly supported plaintiffs from South Africa and Nigeria rather than those from other countries where corporate abuse is also taking place.⁶⁹ They may also choose plaintiffs on the basis of available legal remedies and chances of success. As a result, some wrongs may be addressed at the expense of others.⁷⁰ Finally, the interests and priorities of victims and home State CSOs may, at times, differ, thus prompting potential conflicts during the proceedings. This has been the case with the conclusion of out-of-court settlements in the past. At the same time, there is a role for foreign CSOs and lawyers where local activists are

⁶⁴ Peter Newell, ‘Access to Environmental Justice? Litigating against TNCs in the South’ (2001) 32 IDS Bulletin 83, 86-88.

⁶⁵ *ibid*; Frynas (n 56) 381.

⁶⁶ Newell (n 64) 86.

⁶⁷ *ibid* 89.

⁶⁸ Frynas (n 56) 381.

⁶⁹ *ibid*.

⁷⁰ *ibid*.

more likely to be subject to threat and where institutional capacity is lacking in host countries.⁷¹

3.1.3 Media

The strategic nature of transnational litigation against MNEs is visible in the way lawyers and CSOs cultivate links with the media. William Bourdon, the founder of Sherpa, stated that ‘the media are an instrument for lawyers.’⁷² They are ‘a tool to spark public debates, to create power relations, and, sometimes, to use as a strategy of intimidation of the opponent.’⁷³ Media attention reinforces public pressure on MNEs and adversely impacts their reputation. Lawyers and CSOs strategically use the media to raise the profile of claims.⁷⁴ In England, the *Monterrico* case became highly publicized after the newspaper *The Guardian* published pictures of police and army officers brutalizing local demonstrators in Peru.⁷⁵ Transnational cases against MNEs targeting companies with highly visible brands are more likely to receive media attention.⁷⁶ For instance, litigation against Shell in England, the Netherlands, and the USA has received large media coverage, most notably due to campaigns running in parallel. In the Netherlands, Milieudefensie and VARA, a Dutch public broadcaster, produced a TV programme on the oil spills caused by Shell in Nigeria, which was broadcasted a few days before the first hearing in *Shell*.⁷⁷ Ultimately, the relationship between the media on the one hand and CSOs and lawyers on the other is mutually enriching, as litigators may benefit from broad public coverage while the media may have access to sellable stories.⁷⁸

⁷¹ Newell (n 64) 89.

⁷² Les Nouveaux Métiers de l’Avocat podcast, ‘L’Avocat Militant’ (25 February 2014) comments by William Bourdon, Centre Perelman de Philosophie du Droit in Brussels <<http://www.philodroit.be/L-avocat-militant?lang=fr>> accessed 30 November 2015.

⁷³ *ibid.*

⁷⁴ Interview with Campaigner 1 (n 55); Interview with Lawyer 1 (The Netherlands, 2013).

⁷⁵ Ian Cobain, ‘Abuse Claims against Peru Police Guarding British firm Monterrico’ *The Guardian* (London, 18 October 2009) <<http://www.theguardian.com/environment/2009/oct/18/british-mining-firm-peru-controversy>> accessed 30 November 2015.

⁷⁶ Ward (n 1) 465.

⁷⁷ ‘Hello World? There is an Oil Spill Here’ (*Milieudefensie*, 21 August 2012) <<https://www.milieudefensie.nl/english/shell/news/hello-world-there2019s-an-oil-spill-here>> accessed 30 November 2015.

⁷⁸ A campaigner mentioned that ‘in the court case, it is four Nigerians who have an issue with [MNE], so it is quite an easy story, and therefore a nice story for the media.’ Interview with Campaigner 1 (n 55).

At the same time, litigators prudently use the media. Publicity can be detrimental to the outcome of a case and can influence the conclusion of a settlement agreement between the parties.⁷⁹ In the context of criminal proceedings, publicity can affect the outcome of a preliminary investigation or result in political pressure on the prosecutor. In addition, journalists can struggle to explain complex legal proceedings to a public unfamiliar with it. A lawyer pointed out:

The topic of tax evasion is more attractive for the media. However, proceedings related to CSR are problematic. They are more difficult to explain, to schematize, and to simplify. These cases relate to issues of corporate groups, control, liability, [...]. These proceedings are too technical to be understood and to receive media coverage.⁸⁰

3.2 Measuring the success of transnational litigation against MNEs

This section questions whether transnational litigation against MNEs has been successful so far. As mentioned above, transnational litigation against MNEs aims to achieve various goals: victims seek to gain access to remedies, lawyers want to hold corporate actors liable, and CSOs seek to shed light on corporate human rights abuse and the need for legal and policy reform. Legal mobilization may successfully achieve one or several of these aims while failing to attain others.

The concept of ‘success’ is subjective and various actors, including corporate defendants, have different readings of success depending on the result they expect to obtain. At times, both plaintiffs and corporate defendants may see the outcome as a success from their own perspective. In *Shell*, the District Court of The Hague rejected all the allegations against the parent company and recognized that the Nigerian subsidiary was liable for oil pollution in only one claim. Nonetheless, the plaintiffs, Milieudefensie, and corporate accountability activists hailed the judgement as a landmark case. One of the Nigerian plaintiffs whose claim had been rejected expressed his happiness for the village that won compensation. He stated,

⁷⁹ Interview with Lawyer 1 (n 74).

⁸⁰ Interview with Lawyer 2 (France, 2013) (author’s translation).

‘For my colleagues who succeeded, that is victory. [...] Shell is brought to book. I believe this is a revolutionary case.’⁸¹ At the same time, Shell also saw the judgement as a success. Allard Castelein, of Shell, declared, ‘We are very pleased with the verdict. [...] First of all I should say that we were never pleased with the court case in its own right but we are very pleased that the parent company is not liable under any of the complaints issued.’⁸²

3.2.1 Legal and non-legal benefits

Legal mobilization theory shows that there are multiple ways of assessing the ‘success’ or the ‘failure’ of litigation for law reform.⁸³ In transnational litigation against MNEs, success may be interpreted in terms of legal and non-legal benefits.

To date, few cases have reached the merits stage and, when they did so, home State courts have rarely found MNEs liable for human rights or environmental abuse taking place for their activities in host countries. As a result, one could suggest that legal mobilization has accomplished little towards achieving corporate liability. Furthermore, plaintiffs have rarely been awarded financial compensation for the harm suffered or other remedies, such as clean-up of environmental pollution. At the same time, litigators have won on some legal and procedural issues, such as jurisdiction or NGO standing. In the Netherlands, the plaintiffs and their lawyers, as well as corporate accountability activists saw the District Court’s decision to hear the claims against Shell as a victory. For a lawyer, ‘it was a victory when the court said, “Indeed it is very well possible that a mother company is responsible for what is going on [in Nigeria],” even when the system of corporate law does not foresee such liability.’⁸⁴ A campaigner also saw the court’s acceptance of its own jurisdiction over the claim and of Milieudefensie’s standing as ‘a big step.’⁸⁵

⁸¹ ‘Shell Nigeria Case: Court Acquits Firm on Most Charges’ *BBC* (London, 30 January 2013)

<<http://www.bbc.co.uk/news/world-africa-21258653>> accessed 30 November 2015.

⁸² *ibid.*

⁸³ Vanhala (n 57) 526-527.

⁸⁴ Interview with Lawyer 1 (n 74).

⁸⁵ Interview with Campaigner 1 (n 55).

Scholars have suggested that the most important benefits of transnational litigation against MNEs are its indirect effects. In some instances, plaintiffs and litigators may pursue litigation for reasons other than winning legal arguments or obtaining financial compensation.⁸⁶ Victims may get the mental satisfaction of obtaining ‘justice’ by having an official acknowledgement of the corporate wrongs or crimes.⁸⁷ Litigation may also buy time to mobilise resistance around a project.⁸⁸ In one case, the ECCHR stated that:

[T]he acts of investigating the circumstances of what happened and drafting a legal complaint can in themselves represent important steps for victims in voicing their complaints, overcoming their trauma, and fighting for their rights. Irrespective of whether an action succeeds before a judge, legal proceedings can play a significant role when it comes to the political debate on responsibility for human rights abuses.⁸⁹

The impact of bringing or threatening to bring cases may also be more important than the legal outcomes.⁹⁰ Litigation may affect corporate behaviour in host countries by incentivizing companies to pay attention to the impacts of their activities on local communities, employees, and the environment. However, it is difficult to evaluate how exactly litigation changes corporate behaviour.⁹¹ Since litigation may play a key part in larger activist campaigns against a specific company, ‘it is often impossible to disaggregate the impact of litigation from the impact of other forms of activist campaigning on the firm’s public perception or its share price.’⁹²

Holzmeier also explains that legal mobilization in *Doe v Unocal*⁹³ had four principal indirect effects on the corporate accountability movement: organizational growth and capacity

⁸⁶ Frynas (n 56) 378.

⁸⁷ *ibid* 379; Newell (n 64) 85.

⁸⁸ Newell (n 64) 85.

⁸⁹ ‘Criminal Complaint against Senior Manager of Danzer’ (n 48) 3.

⁹⁰ Newell (n 64) 85.

⁹¹ Ward (n 1) 466.

⁹² Frynas (n 56) 377.

⁹³ *Doe v Unocal* was a pivotal human rights and corporate accountability case filed in the US by Burmese plaintiffs and US litigators under the ATS in 1996. See *Doe v Unocal* 395 F 3d 932 (9th Cir 2002); 395 F 3d 978 (9th Cir 2003).

building; growth of transnational advocacy networks and potentials for boomerang effects; broadening tactical repertoires of activists and litigators, including possibilities for synergy among different tactics and movements; and cultivation of symbolic and communicative resources for movement building and mobilization.⁹⁴ Therefore, transnational claims against MNEs can bolster the organizational strength, tactical repertoires, and discursive resources of activists.⁹⁵

Transnational litigation against MNEs can also be an efficient public education and reform tool.⁹⁶ It may demonstrate inequities in existing laws and point out to the need for legal and policy change, such as the case against Vinci in France. Therefore, the success of legal mobilization against MNEs is linked to the capacity of its participants to create an alternative discursive space where hegemonic discourse on neoliberal globalization and legal norms sustaining inequality and corporate impunity are challenged.⁹⁷

3.2.2 Out-of-court settlements

Increasingly, plaintiffs and business defendants are reaching out-of-court settlements. In general, MNEs agree to compensate the claimants or to create a fund to develop local projects to help host country communities. For instance, in France, Total and the plaintiffs reached a confidential out-of-court settlement in 2005.⁹⁸ Total agreed to pay €10,000 to each plaintiff in exchange for the withdrawal of the complaint. In addition, the company pledged to create a fund of €5.2m to implement humanitarian and development projects.⁹⁹

Settlements offer advantages to both claimants and corporate defendants. Transnational litigation against MNEs is expensive and time-consuming, and its outcome is uncertain for

⁹⁴ Cheryl Holzmeyer, 'Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe v. Unocal*' (2009) 43 *Law & Society Review* 271, 286-287.

⁹⁵ *ibid* 287.

⁹⁶ *ibid* 292.

⁹⁷ Dale (n 25) 200-201.

⁹⁸ 'Myanmar: Total et l'Association Sherpa Concluent un Accord Prévoyant la Création d'un Fonds de Solidarité pour des Actions Humanitaires' *Nextnews* (Paris, 29 November 2005)

<http://www.nextnews.fr/if_communique.asp?id_communique=5124&lg=fr&type_com=html&type_source=d> accessed 30 November 2015.

⁹⁹ 'Annual Report 2006' (Sherpa 2 May 2007) 2.

both parties, especially plaintiffs. Therefore, settlements offer victims a negotiated resolution of the conflict and improve their opportunities to obtain remediation in a much faster way in comparison with litigation.¹⁰⁰ Litigation can also damage the MNE's reputation and negatively impact business opportunities. Settlements limit such risks by ending the legal proceedings, since plaintiffs generally agree to withdraw their claim. Furthermore, settlements can influence the dismissal of criminal complaints, such as in the case against Total in France.¹⁰¹ Scholars have suggested that Total's settlement in France has allowed the company 'to buy a certain peace of mind by ending the embarrassing proceedings and limiting the subsequent publicity.'¹⁰²

Litigators usually present out-of-court settlements as great successes. Following the settlement with Total, William Bourdon, the founder of Sherpa, stated:

The agreement reached is an innovative, pragmatic, and generous solution that solves problems related to the conditions that an industrial group sometimes faces when operating in certain developing countries. [...] [B]eyond the financial compensation for the damage alleged by the complainants, for acts which the Total Group has always said it had not been informed of, the agreement brings concrete remedies for some citizens of the concerned States whom face difficult situations. [...] [T]his exemplary agreement heralds, for the future, what could be the resolution of this type of situations.¹⁰³

Scholars and lawyers have argued that settlements may be the favoured way to solve disputes in the future, as part of 'the contemporary trend to "privatize" justice.'¹⁰⁴ In particular, they would provide a 'pragmatic'¹⁰⁵ approach to achieve the ideals behind transnational litigation

¹⁰⁰ Ludovic Hennebel and Benoit Frydman, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' (2009) 32 <<http://ssrn.com/abstract=1922188>> accessed 30 November 2015.

¹⁰¹ *ibid* 31.

¹⁰² *ibid* 32.

¹⁰³ 'Myanmar' (n 98) (author's translation).

¹⁰⁴ Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Rights* (OUP 2007) 5.

¹⁰⁵ William Bourdon used that word. See 'Myanmar' (n 98) (author's translation).

against MNEs in comparison with judicial proceedings, especially since courts are reluctant to remedy corporate human rights and environmental abuse.¹⁰⁶ Future settlements could include ‘the creation of pre-emptive codes, the aggressive monitoring of those codes, the involvement of communities and local NGOs, and efforts to persuade consumers, NGOs, and judges to give force to the norms expressed in those codes.’¹⁰⁷

At the same time, settlements raise a number of issues. First, claimants and MNEs may struggle to reach an out-of-court settlement. In *Bodo*, despite SPDC, the corporate defendant, formally admitting liability for the oil spills in 2011,¹⁰⁸ the plaintiffs and the company were originally unable to reach an agreement regarding various aspects of a potential settlement (eg the quantity of spilled oil, the extent of the damage to the Bodo community and the ecosystems of the Bodo region, and the amount of financial compensation owed by SPDC).¹⁰⁹ After four years of intermittent talks, SPDC and Leigh Day eventually agreed to a £55m settlement in January 2015.¹¹⁰

Second, settlements are usually confidential. Apart for the parties’ press releases, it is very difficult to know how those agreements are negotiated and what they contain. NGOs and scholars have suggested that the lack of transparency prevents the rights of victims to justice, truth, and remedy.¹¹¹ Furthermore, the confidentiality of these agreements may have a negative impact on other victims of corporate abuse. Following the settlement between Leigh

¹⁰⁶ Fishman (n 45) 1466.

¹⁰⁷ *ibid* 1467.

¹⁰⁸ ‘Shell Accepts Responsibility for Oil Spill in Nigeria’ (*Leigh Day*, 3 August 2011) <<http://www.leighday.co.uk/News/2011/August-2011/Shell-accepts-responsibility-for-oil-spill-in-Nige>> accessed 30 November 2015.

¹⁰⁹ John Vidal, ‘Shell Nigeria Oil Spill ’60 Times Bigger Than I Claimed’ *The Guardian* (London, 23 April 2012) <<http://www.theguardian.com/environment/2012/apr/23/shell-nigeria-oil-spill-bigger>> accessed 30 November 2015; John Vidal, ‘Shell Attacked Over Four-Year Delay in Niger Delta Oil Spill Clean-Up’ *The Guardian* (London, 23 September 2012) <<http://www.theguardian.com/environment/2012/sep/23/shell-attacked-niger-oil-spill-clean-up-delay>> accessed 30 November 2015.

¹¹⁰ ‘Shell Agrees £55m Compensation Deal for Niger Delta Community’ (*Leigh Day*, 7 January 2015) <<http://www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del>> accessed 30 November 2015.

¹¹¹ ‘L’Affaire du “Probo Koala” ou la Catastrophe du Déversement des Déchets Toxiques en Côte d’Ivoire’ (FIDH, LIDHO and MIDH 2011) 42.

Day and Trafigura, medical expert evidence could not be seen by other victims or used to aid effective health interventions.¹¹²

Third, in most cases, MNEs refuse to recognize their involvement, or liability, in the human rights abuse or environmental pollution raised by the claimants. For instance, Trafigura rejected any responsibility, stating that it did not foresee, and could not have foreseen, the illegal dumping of toxic waste in Abidjan.¹¹³

Fourth, the conclusion of settlements does not ensure that all victims will obtain financial compensation, especially in the context of group actions, or that the MNE is not exposed to more litigation risks. Despite Trafigura and Leigh Day reaching an out-of-court settlement for 30,000 victims, more than 100,000 Ivorian victims brought a new tort claim against Trafigura in the Netherlands in February 2015.¹¹⁴ They demanded compensation for ‘bodily, moral and economic injury’ caused to them as well as a clean-up of the toxic waste in Ivory Coast. This highlights that settlements often neglect to remediate long-term social and environmental issues.

Fifth, settlements prevent the set of legal precedent or the adoption of legal and policy reform of corporate liability standards for MNEs.

Out-of-court settlements between plaintiffs and corporate defendants may prove a stumbling block to the aims of the corporate accountability movement and may create potential conflicts between cause lawyers and activists. While cause lawyers tend to praise these agreements for allowing victims to gain effective access to remedy, corporate accountability activists have sometimes condemned them for preventing the emergence of strong corporate liability standards. For instance, Total’s out-of-court agreement in France sparked tensions

¹¹² ‘The Toxic Truth About a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Cote d’Ivoire’ (Amnesty International and Greenpeace Netherlands 2012) 162.

¹¹³ ‘Agreed Final Joint Statement (Issued on Behalf of All Parties to the Trafigura Personal Injury Group Litigation)’ (Trafigura and Leigh Day 2009) (Agreed Final Joint Statement).

¹¹⁴ ‘100,000 Victims of Ivory Coast Toxic Spill Launch Dutch Suit’ *AFP* (The Hague, 20 February 2015) <<http://news.yahoo.com/100-000-victims-ivory-coast-toxic-spill-launch-164550722.html>> accessed 30 November 2015.

amongst the different activist groups campaigning against the MNE for its activities in Myanmar.¹¹⁵ While some activists welcomed the settlement,¹¹⁶ a number of NGOs, lawyers, and academics criticized it for ‘ignor[ing] responsibilities for the commission of serious violations of human rights in favour of a financial transaction allowing the Total group to clean up its acts.’¹¹⁷ In particular, the position of Sherpa received a lot of criticism for ‘endors[ing] Total’s version of its lack of responsibility for the acts alleged against the group.’¹¹⁸ It should be pointed out that, in parallel, Total’s lawyers also tried to reach an out-of-court settlement with another group of victims who had brought a criminal claim against the MNE in Belgium. However, the plaintiffs refused the offer on the grounds that their complaint aimed at holding Total accountable for its behaviour in Myanmar.¹¹⁹

Similarly, a number of international and Ivorian CSOs criticized the settlement between Leigh Day and Trafigura for exonerating the MNE from its responsibility for the ‘social, health, and environmental disaster’ caused in Abidjan. In particular, FIDH, LIDHO and MIDH stated:

[W]hile respecting the right and the wish of the victims to be compensated for the significant damage they suffered, [FIDH, LIDHO and MIDH] consider, that in the presence of a decision by a British civil court simply approving a settlement agreement between the parties, and in the absence of an impartial ruling on the criminal liability of Trafigura, this latter cannot be exonerated from liability by the mere fact that it settled with the victims. FIDH, LIDHO, and MIDH can only denounce the indecent attitude of Trafigura, which has built, in the French and international media, an institutional operation of communication and public relations

¹¹⁵ ‘Info Birmanie, la Ligue des Droits de l’Homme et la FIDH Dénoncent l’Accord Intervenu entre Total et Sherpa’ (Info Birmanie, LDH and FIDH 30 November 2005); Véronique Van Der Plancke and others, ‘Total: Le Viol de la Démocratie en Birmanie et en Belgique’ (2005) 12 *La Revue Nouvelle* 34.

¹¹⁶ Ludovic François, ‘Les Affrontements par l’Information entre les Entreprises et la Société Civile: L’Activisme Judiciaire en Question’ (2007) 7 *Market Management* 65, 82.

¹¹⁷ ‘Info Birmanie, la Ligue des Droits de l’Homme et la FIDH Dénoncent l’Accord Intervenu entre Total et Sherpa’ (n 115) (author’s translation).

¹¹⁸ *ibid* (author’s translation).

¹¹⁹ Hennebel and Frydman (n 100) 24; Interview with Lawyer 3 (Belgium, 2013).

on its lack of accountability, and in defiance of the families' pain and the victims' suffering.¹²⁰

On the other hand, for Leigh Day, 'the claims were successfully settled out of court.'¹²¹ It acknowledged, in the light of expert evidence, that 'the slops could at worst have caused a range of short term low level flu like symptoms and anxiety.'¹²²

The conclusion of out-of-court settlements may also create tensions between plaintiffs and their local community.¹²³ In the *Monterrico* case, the MNE made compensation payments to 33 of the victims, without admitting liability.¹²⁴ It appears that 'the decision by the victims to settle was seen by many as "selling out" and preventing the communities from having their day in court, although that was never the claimants' intention.'¹²⁵ Furthermore, in Peru, the settlement 'resulted in a significant division among some previously tight-knit communities, resulting in a number of the victims feeling the need to move away.'¹²⁶ It also created tension amongst the claimants. Some victims felt pressured into settling to support the others, and others felt guilty for receiving larger sums of money. In addition, a number of victims did not receive any compensation.¹²⁷

The tensions created by out-of-court settlements shed light on the dual nature of transnational litigation against MNEs, and the constraints imposed on cause lawyers and corporate accountability activists by legal mobilization and the politicization of the law. Settlements may prevent the achievement of aims linked to the corporate accountability movement, such

¹²⁰ 'L' Accord Intervenu à Londres Entre Trafigura et Près de 31 000 Victimes Ivoiriennes ne Doit pas Occulter la Responsabilité de Trafigura!' (*FIDH*, 25 September 2009) <<http://www.fidh.org/fr/afrique/cote-d-ivoire/Affaire-Cote-d-Ivoire-dechets/L-accord-intervenu-a-Londres-entre>> accessed 30 November 2015 (author's translation).

¹²¹ 'Ivory Coast' (*Leigh Day*) <<http://www.leighday.co.uk/International-and-group-claims/Ivory-Coast>> accessed 30 November 2015.

¹²² 'Agreed Final Joint Statement' (n 113).

¹²³ Gwynne Skinner and others, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, ECCJ & CORE 2013) 93-97.

¹²⁴ 'Peruvian Torture Claimants Compensated by UK Mining Company' (n 43).

¹²⁵ Skinner and others (n 123) 105.

¹²⁶ *ibid.*

¹²⁷ *ibid* 106.

as punishing MNEs for human rights or environmental abuse, or triggering policy and legal reform.

Settlements also challenge the twofold positions of cause lawyers as private practitioners acting in their client's best interests and as activists seeking to establish a precedent that will improve the legal position of the cause.¹²⁸ Speaking of out-of-court settlements, a lawyer stated:

In general, as a law firm, we do whatever is necessary to create the best outcomes and that is not always doing the whole civil procedure because it is very demanding on the people involved. Therefore, I could imagine that we will be willing to talk to [the MNE]. But, on the other hand, it very much depends on what is under discussion. Because it is not only a matter of money and because there has been so much of a principle question, I am not sure whether you could solve it in settling.¹²⁹

Legal practice also imposes a number of financial and other constraints on lawyers. In some countries, the cost of litigation is exorbitant and lawyers, who work on the basis of market-based mechanisms, are exposed to high financial risks when they take on transnational claims against MNEs. When the legal rules governing liability and procedure limit their chances of success, cause lawyers may be under pressure to reach a settlement with corporate defendants to avoid failure and not recovering any costs. Furthermore, lawyers must protect their clients' interests and are normally bound by their clients' decisions. As a result, they cannot prevent them from opting for a quick and easy way to obtain financial compensation. Ultimately, the tensions created by settlements reflect the conflict between the private interests of plaintiffs and, at times, of lawyers on one hand and the public interest that drives corporate accountability campaigns and claims against MNEs on the other. Cause lawyers understand the limitations of legal mobilization as a political tool to achieve reform.

¹²⁸ On partisanship and client representation, see Boon (n 58) 257-258.

¹²⁹ Interview with Lawyer 1 (n 74).

4 Strategic litigation against corporate accountability activism

One major challenge for corporate accountability activism is the increasing use of libel and compensation lawsuits by MNEs to discourage plaintiffs, cause lawyers, and CSOs from raising corporate human rights or environmental abuse in courts.¹³⁰ Such lawsuits are also called Strategic Lawsuits Against Public Participation (SLAPPs).¹³¹ SLAPPs generally refer to civil lawsuits or counterclaims (for monetary damages and/or injunction) filed against individuals and groups for having raised a public interest issue to a government body or official, the electorate, or a court.¹³² SLAPPs may target individuals and groups supporting various types of claims and actions, including plaintiffs to public interest and law reform lawsuits. The goal of SLAPPs is ‘to stop citizens from exercising their political rights or to punish them for having done so. SLAPPs send a clear message: that there is a “price” for speaking out politically.’¹³³ SLAPPs can take various forms: defamation; business torts; judicial torts; conspiracy; constitutional-civil rights violations; or nuisances.¹³⁴ In recent years, the main instigators of SLAPPs have been corporations, but they may also be governments, officials, or high profile business people.¹³⁵ SLAPPs are well recognized as challenging free speech and public participation in the US, Canada, and Australia. However, the concept remains largely ignored in Europe, despite the existence of SLAPPs in various European countries.¹³⁶ In England, SLAPPs gained some notoriety in the *McLibel* case, which resulted in an intense debate on libel law.¹³⁷ In 2005, the ECtHR ruled that English libel law was contrary to Article 6 ECHR.¹³⁸

¹³⁰ Interview with Lawyer 2 (n 80).

¹³¹ George Pring, ‘SLAPPs: Strategic Lawsuits against Public Participation’ (1989) 7 *Pace Environmental Law Review* 3, 4. The phrase ‘SLAPPs’ was coined in the US in the 1980s

¹³² *ibid* 8.

¹³³ *ibid* 5-6.

¹³⁴ *ibid* 8.

¹³⁵ Fiona Donson, ‘Libel Cases and Public Debate – Some Reflections on Whether Europe Should Be Concerned About SLAPPs’ (2010) 19 *RECIEL* 83, 84.

¹³⁶ *ibid* 83.

¹³⁷ *McDonald’s Corporation v Steel and Morris* [1997] EWHC QB 366. See also John Vidal, *McLibel – Burger Culture on Trial* (Macmillan 1997); Marlene Nicholson, ‘McLibel: A Case Study in English Defamation Law’ (2000) 18 *Wisconsin International Law Journal* 1.

¹³⁸ *Steel and Morris v UK* (2005) 41 EHRR 22.

SLAPPs have become a major risk for plaintiffs, cause lawyers, and CSOs in transnational litigation against MNEs. In England, Trafigura brought libel proceedings against Leigh Day, The Guardian, and the BBC following comments in the media¹³⁹ alleging that the illegal dumping of toxic waste in Ivory Coast involving the MNE had caused a number of deaths and miscarriages.¹⁴⁰ In France, SLAPPs also pose a significant threat to human rights activists.¹⁴¹ In 2015, the French MNE Vinci sued Sherpa and its staff members following the criminal complaint brought by Sherpa alleging that Vinci was involved in forced labour in Qatar.¹⁴² However, French courts dismissed Vinci's claims.¹⁴³

SLAPPs are problematic because they attack activist CSOs and individuals, discouraging them from raising human rights or environmental abuse. They also add additional pecuniary costs to CSOs with already limited financial resources. The law may, nonetheless, provide activists with defence. In the Netherlands, for example, courts may grant an anti-suit injunction when it can be shown that the party bringing a claim is abusing the legal system. However, Dutch courts usually grant this on an exceptional basis.¹⁴⁴

5 Conclusions

Chapter 8 described the dynamics between social movements, cause lawyering, and legal mobilization in transnational litigation against MNEs in Europe.

¹³⁹ David Leigh and Afua Hirsch, 'Paper Prove Trafigura Ship Dumped Toxic Waste in Ivory Coast' *The Guardian* (London, 14 May 2009) <<http://www.guardian.co.uk/environment/2009/may/13/trafigura-ivory-coast-documents-toxic-waste>> accessed 30 November 2015.

¹⁴⁰ 'The Toxic Truth' (n 112) 167. Further attempts were made to prevent some British newspapers reporting parliamentary questions regarding the dumping of toxic waste by Trafigura in Ivory Coast. See Paul Farrelly, 'A Chance to Overhaul Libel Laws' *The Guardian* (London, 24 February 2010) <<http://www.guardian.co.uk/commentisfree/2010/feb/24/report-chance-overhaul-laws>> accessed 30 November 2015.

¹⁴¹ 'Campagne SLAPP de RAIDH: Quand les Entreprises Menaçent la Liberté d'Expression et le Droit d'Association' (RAIDH) <<http://www.raidh.org/-Campagne-SLAPP-Quand-les-.html>> accessed 30 November 2015.

¹⁴² Dominique Vidalon and Gilles Guillaume, 'French Builder Vinci to Sue Over Claims of Forced Labor in Qatar' *REUTERS* (Paris, 24 March 2015) <<http://www.reuters.com/article/2015/03/24/us-vinci-qatar-labour-conditions-idUSKBN0MK00H20150324>> accessed 30 November 2015.

¹⁴³ 'Vinci Échoue à Faire Condamner Sherpa pour Atteinte à la Présomption d'Innocence' *Le Moniteur* (Paris, 30 June 2015) <<http://www.lemoniteur.fr/article/vinci-echoue-a-faire-condamner-sherpa-pour-atteinte-a-la-presomption-d-innocence-28983008>> accessed 30 November 2015.

¹⁴⁴ Marieke Van Hooijdonk and Peter Eijvoogel, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation* (Kluwer Law International 2013) 61.

For several decades, civil society actors concerned with business abuse have alternated between various strategies to influence corporate conduct, ranging from pressure to collaboration. However, increased corporate power and limited results of voluntary initiatives to effectively prevent business-related abuse of human rights and environmental pollution resulted in the emergence of a distinct social movement at the turn of the 21st century. The corporate accountability movement focuses on the role of policy-makers and courts to effectively regulate corporate conduct through binding obligations and punishment. If this movement is global, it has also developed specific characteristics in Europe. Various national and regional coalitions specifically dedicated to the pursuit of corporate accountability have emerged. They focus on legal and policy reform, awareness-raising, and advocacy. The existence of a regional institutional and legal framework, most notably the EU, has triggered the development of collective strategies and campaigns on corporate accountability between activist groups, organizations, and networks. The last two decades have also seen the emergence of law firms and legal NGOs fully or partly dedicated to corporate accountability litigation in Europe. The interaction of these cause lawyers with actors of the corporate accountability movement has triggered the use of legal mobilization as a strategy to hold MNEs accountable and shed light on the need for legal and policy reform.

Transnational litigation against MNEs is therefore a strategic type of legal mobilization which aims to achieve various objectives, including remediation of corporate abuse, corporate group liability, and legal and policy reform. If victories on issues such as MNE liability or access to remedies have been rare in courts so far, litigation has produced various other legal and non-legal benefits. Litigators have obtained successful judicial clarification on a range of legal and procedural issues, such as court jurisdiction to hear claims raising transnational issues of corporate liability. Furthermore, legal mobilization has contributed to improving the visibility of the corporate accountability movement, especially in the context of campaigns against specific MNEs. Moreover, cause lawyers and CSOs have revealed the need for legal and policy reform, such as in France where CSOs have been able to gain support for the introduction of a legislative bill on the duty of care of parent and controlling companies.

However, the conclusion of confidential and out-of-court settlements between plaintiffs and corporate defendants has been a source of conflicts within the corporate accountability movement, revealing the constraints that legal mobilization imposes on both cause lawyers and activists. Such conflicts may be detrimental to the cohesion of activist networks and to the efficiency of broader campaigns on corporate accountability. Furthermore, the increasing use of libel and compensation lawsuits by MNEs to discourage plaintiffs, cause lawyers, and CSOs from raising corporate human rights or environmental abuse in courts needs to be addressed. Without legislative intervention, it is likely that such a practice will increase in the future, adding complexity and uncertainty to legal activism for corporate accountability.

CHAPTER 9

Conclusions

This thesis provided a comparative socio-legal analysis of transnational litigation in Europe against MNEs for harm resulting from their involvement in human rights abuse and environmental damage in host countries. It assessed how the limited responses by public international law and host States partly led to the emergence of litigation in home countries. This thesis also identified how the substantive and procedural laws of two civil law countries, namely France and the Netherlands, affect the opportunities to gain access to civil and criminal justice for business-related abuse. Moreover, it explored the socio-legal dimension of this type of litigation by examining its links to social movements and cause lawyers. In particular, it describes the emergence and characteristics of the European corporate accountability movement and how its actors have used legal mobilization as a political strategy to hold MNEs to account and trigger legal and policy reform.

1 Summary

An internationally coordinated approach appears as an appropriate way to provide an effective normative framework to regulate MNE activity and offer judicial redress in situations of corporate human rights abuse and environmental damage. Under the current state of public international law, home States have the obligation to protect the enjoyment of human rights against interference from MNEs. Nonetheless, it remains unclear whether such an obligation extends extraterritorially. Furthermore, while States have international obligations to prevent transboundary pollution, it is unclear whether such an obligation applies to MNEs operating abroad. Under the traditional State-centric approach to international law, non-State actors, such as MNEs, do not have international legal personality. Therefore, they have neither rights nor obligations, and they cannot be held liable for breach of international law standards, such as human rights or environmental standards. At the same time, scholars, lawyers, and CSOs increasingly challenge such a view, and international bodies have occasionally accepted that non-State actors should have international obligations in specific circumstances. Victims of corporate abuse enjoy a number of international and regional rights and guarantees related to access to justice for human rights abuse and

environmental damage. In Europe, however, it is unclear how the existence of various instruments may ensure that foreign victims of corporate abuse gain access to justice in home countries. To date, States have favoured the adoption of international soft-law instruments to regulate business impacts on human rights and the environment, such as the UN Framework and the UNGPs. Nonetheless, various academics and CSOs have criticized the nature and content of such documents, especially the pillar on judicial remedies, and have called for obligations on MNEs through binding international instruments. The failure of public international law in offering clear or adapted solutions to address issues raised by the transnational activities of MNEs has contributed to increase demands for corporate accountability at the domestic level.

It has been argued that transnational litigation against MNEs emerged from the need to compensate for the lack of access to justice in host States. However, this thesis has pointed out that access to remedies for corporate abuse varies amongst host States, depending on their level of economic and social development, and the nature and the stability of the political regime in place. Access to justice is particularly limited in fragile, conflict-affected, and post-conflict States, such as the DRC. In other countries, the legal framework may offer potential avenues to hold companies liable for human rights abuse and environmental damage. Furthermore, some host States have innovative laws and procedures in place to promote the sustainable role of companies in society and ensure access to justice. However, several common obstacles subsist in many host countries, including the absence of enforcement or execution of judgements, State dependence on foreign investment, and the lack of independent and impartial judiciaries. Ultimately, the emergence of transnational litigation against MNEs cannot be explained solely on the basis of the lack of effective access to remedies in host countries. Other reasons, such as the possibility to gain high financial compensation in home countries (eg the US) and opportunities to build campaigns for corporate accountability in home countries, seem to play an important role. Nonetheless, transnational litigation against MNEs may slow down efforts in host countries to reform their legal system and improve local conditions to gain access to justice.

In Europe, transnational litigation against MNEs first emerged in England in the shape of tort claims brought against the English parent companies of foreign subsidiaries operating in host countries. Flexible standards of disclosure and group actions have facilitated such claims. To date, the conclusion of out-of-court settlements with MNEs has been the favoured way to gain access to financial compensation. Since the turn of the 21st century, transnational litigation against MNEs has expanded to European civil law countries, in particular France and the Netherlands. However, it has adapted to the legal tradition and litigation culture existing in those countries. For instance, criminal proceedings have been the favoured way to seek corporate accountability and remediation through courts in France.

Transnational litigation against MNEs poses a number of legal challenges as to whether the home State is competent to hear the claims, and whether the home or the host State law applies to the proceedings. In France and the Netherlands, the EU harmonization of private international law has had a direct effect on the domestic rules governing court jurisdiction and applicable law in civil matters. Under the Brussels I Regulation, plaintiffs can bring a civil claim against a parent company domiciled in the EU. The situation is different for claims targeting foreign subsidiaries, in which case EU law remains silent. However, French and Dutch courts have agreed to hear civil complaints against foreign subsidiaries of EU-based MNEs in case of co-defendants or based on the *forum necessitatis* doctrine. Under the Rome II Regulation, the host State law applies to transnational civil claims against MNEs. Nonetheless, the Rome II Regulation provides for a number of exceptions, including in case of environmental damage. In criminal matters, the territorial principle is surprisingly relevant to justify the jurisdiction of French and Dutch courts over the extraterritorial offences committed by MNEs. Moreover, French and Dutch criminal laws provide for alternative principles of jurisdiction based on extraterritoriality, which may allow the prosecution of MNEs in various circumstances. Nonetheless, specific procedural requirements, such as double criminality or a foreign court ruling, and the reluctance of public prosecutors to bring corporate offenders to trial limit the opportunities offered by the French and Dutch criminal systems to gain access to justice. One advantage of criminal proceedings, however, is that the law of the home country will automatically apply to the case.

The existence of liability standards punishing abuse occurring in the context of corporate group activities is crucial to the success of transnational claims against MNEs. Despite the existence of statutory rules providing for the application of separate legal personality and limited liability to specific companies, French and Dutch courts have occasionally held parent companies liable for harm caused by their subsidiaries based on either statutory rules or jurisprudential theories. However, the parent company must have generally committed a fault. Courts are willing to punish fraud and abusive arrangements where the parent company seeks to avoid liability by subsidiarizing an activity. At times, French and Dutch courts have also taken voluntary commitments of parent companies into account to determine their duty of care and hold them liable in the context of group activities. Nonetheless, French and Dutch courts make a careful and sporadic use of voluntary norms to hold companies liable.

French and Dutch procedural rules also affect the opportunities of plaintiffs to gain effective access to remedy. In civil proceedings, in France, while foreign victims can generally bring a claim against an MNE, NGOs face significant obstacles in bringing similar claims. In criminal proceedings, the French and Dutch public prosecutors enjoy a large discretion to initiate prosecution. Such a situation is problematic, as they are usually reluctant to sue MNEs. However, French law allows victims and NGOs to initiate criminal proceedings, even when the prosecutor has rejected this option. Furthermore, in the Netherlands, victims and NGOs can appeal the prosecutor's refusal to prosecute. In general, collective redress mechanisms are unavailable to plaintiffs in French and Dutch proceedings. Nonetheless, both France and the Netherlands are progressively allowing representative mechanisms and group settlements in specific situations. Plaintiffs also face a number of obstacles related to the production of evidence. For instance, strict disclosure rules affect their ability to demonstrate the validity of their claims, especially since they often have limited access to crucial evidence possessed by MNEs. Moreover, transnational litigation against MNEs is generally expensive, and the application of the loser pays principle and limited access to legal aid create further barriers for plaintiffs. Finally, French and Dutch civil procedures relating to remedy are more flexible than in common law countries. However, under the Rome II Regulation, the host country law generally governs the choice of remedy.

The turn of the 21st century saw the emergence of a global corporate accountability movement, as a result of perceived increased corporate power and limited results of CSR initiatives to effectively prevent MNE human rights and environmental abuse. In Europe, CSOs have created various national and regional coalitions specifically dedicated to the pursuit of corporate accountability through legal and policy reform, awareness-raising, and advocacy. The existence of a European institutional and legal framework has triggered the development of collective strategies and campaigns on corporate accountability between various activist groups and networks. The existence of law firms and legal NGOs dedicated to corporate accountability has provided the main impetus for the development of transnational litigation against MNEs in European countries. Cause lawyers and CSOs have used legal mobilization not only to gain access to remedy and hold MNEs liable for human rights abuse and environmental damage but also to raise awareness and trigger legal and policy reform. If legal victories in courts have been rare so far, litigation has produced various other legal and non-legal benefits. However, the conclusion of confidential out-of-court settlements between plaintiffs and corporate defendants has been a source of conflicts within the corporate accountability movement, revealing the constraints that legal mobilization imposes on both cause lawyers and activists. Such conflicts may be detrimental to the cohesion of activist networks and to the efficiency of broader campaigns on corporate accountability. Finally, the use of SLAPPs by MNEs to discourage plaintiffs and activists from raising corporate human rights or environmental abuse is a worrying trend that might increase in the future.

2 Principled conclusions

This thesis demonstrated that transnational litigation against MNEs is not solely a tort law phenomenon limited to common law countries. On the contrary, it has spread to European civil law countries where litigators have creatively used the various opportunities offered by their legal systems to bring claims against MNEs. Litigation culture and legal tradition are significant factors to explain the different legal strategies used to seek corporate accountability. If tort proceedings appear to be the favoured way to seek remedies and encourage reform in common law countries, criminal and specialized civil proceedings are viable alternatives to achieve similar goals in civil law countries.

This thesis also showed that the argument of the lack of access to justice in host countries, frequently used by litigators, is not solid enough to entirely justify the emergence of transnational litigation against MNEs. Although uncontested obstacles to access justice exist in host countries, other legal and social factors play a crucial role, such as the legitimization of corporate accountability campaigns in home countries. This argument is strengthened by the fact that, to date, litigators have had limited success in obtaining remedies and holding MNEs to account in home countries. However, transnational litigation against MNEs has been a successful strategy to trigger the debate on corporate accountability.

Furthermore, the existence of cause lawyers, who understand the benefits of using legal mobilization as a political strategy to achieve legal and policy reform, and their interactions with activist networks, which pursue a corporate accountability agenda, are crucial factors explaining the emergence of transnational litigation against MNEs. In particular, transnational claims against MNEs are more likely to emerge in countries where both cause lawyers and activist networks are active and have developed transnational collaborative relationships with similar actors in other countries.

Ultimately, transnational litigation against MNEs is less a way to obtain remedies for victims of corporate abuse than a strategy used by insurgent cosmopolitans to resist corporate power. Therefore, it contributes to the counter-hegemonic dimension of globalization.

3 Potential future developments

The lack of satisfying solutions to solve issues raised by corporate abuse and the lack of effective access to remedies has led to various calls for further binding and non-binding regulation at national, regional, and international levels. It appears important that legislators and policy-makers take into account lessons learnt from transnational litigation against MNEs. Furthermore, they should be aware of, and learn from, parallel initiatives in other countries and/or international organizations, complementing each other to create a more coherent legal framework to reduce the occurrence of corporate abuse and improve access to remedies for victims.

In Europe, the adoption of the UN Framework and the UNGPs triggered efforts by the CoE and the EU to consider how their work could address business-related human rights abuse. An important step in this process was the CoE's acknowledgment that the ECHR presented serious limitations to prevent human rights violations by private companies and to guarantee access to remedies to victims of corporate abuse.¹ Recently, the CoE has been active in developing policies and legal documents on business and human rights and access to justice. In 2014, the Committee of Ministers called on the Member States to take appropriate steps to ensure that when corporate human rights abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.² A Drafting Group on Human Rights and Business (CDDH-CORP) is currently preparing a non-binding instrument on the subject, which should be finalised during 2015.

In the EU, the EC published a long-awaited staff working document on the implementation of the UNGPs (staff working document).³ However, the staff working document is not a policy document and only describes the current division of competences between Member States and the EU institutions to implement the UNGPs, and the EU policy and legal provisions supporting the implementation of the three pillars. Several observations can be made. First, the EC sees a limited role for the EU to implement the State duty to protect while it barely elaborates on the role EU policies and legislation can play in relation to the corporate responsibility to respect. This is a missed opportunity in view of the EU competences in the field of company law. Second, the staff working document is more detailed regarding the access to effective remedy pillar, as a result of increased EU competences in the field of justice over the last years. Third, the EC continues to put a strong emphasis on voluntary and CSR-based initiatives to address business and human rights related issues. This position appears in line with the EU's cautious approach to mandatory

¹ See CoE (Steering Committee for Human Rights), 'Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights: Existing Standards and Outstanding Issues' (4 June 2012) CDDH(2012)012.

² Committee of Ministers, 'Declaration on the UN Guiding Principles on Business and Human Rights' (16 April 2014), Point 10 (c).

³ Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD(2015) 144 final.

regulation of corporate behaviour towards human rights and the environment.⁴ Ultimately, both the CoE and the EU remain averse to enacting mandatory standards to improve corporate accountability.

At the international level, a number of countries, CSOs, and academics have pushed for the adoption of an international legally binding instrument to regulate MNE activities over the last decades.⁵ In June 2014, the UNHRC decided to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.⁶ While this decision has received support from a number of CSOs and developing countries, it has received little support from business actors and various home States, including France, Germany, the UK, and the US. Beyond the lack of political adherence to this new process, the nature and the content of the future treaty are sources of concerns, in particular with regards to access to remedies.⁷ Ultimately, the future and the success of an international legally binding instrument on business and human rights remain uncertain.

4 Avenues for future research

During this research, a number of questions emerged which deserve to be further explored.

⁴ 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' (2011) 3 JETL 221, 227. On the prominence of corporate regulation through CSR policies in the EU, see Olivier de Schutter, 'Corporate Social Responsibility European Style' (2008) 14 European Law Journal 203.

⁵ See Halina Ward, 'Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemicals and Cape PLC Cases' [2002] Yearbook of International Environmental Law 105; Jennifer Clapp, 'Global Environmental Governance for Corporate Responsibility and Accountability' (2005) 5 Global Environmental Politics 23, 29; 'Briefing: Corporate Accountability' (Friends of the Earth 2005) 5.

⁶ UNHRC, Res 26/9 (2014) UN doc A/HRC/26/L.22/Rev.1.

⁷ See Peter Muchlinski, 'Beyond the Guiding Principles? Examining New Calls for a Legally Binding Instrument on Business and Human Rights' (IHRB, 15 October 2013) <<http://www.ihrb.org/commentary/guest/beyond-the-guiding-principles.html>> accessed 30 November 2015; Olivier de Schutter, 'Towards a Legally Binding Instrument on Business and Human Rights' (2015) CRIDHO Working Paper 2015/2. For general comments from scholars, NGOs, and lawyers on the treaty process, see 'Statements, Initiatives & Commentaries' (BHRRC) <<http://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries>> accessed 30 November 2015.

First, transnational litigation against MNEs does not guarantee systematic access to remedies by victims of business-related abuse. Therefore, it is crucial that future research looks into alternative ways to gain access to remedies. The UN Framework and various authors have suggested that cooperation and assistance between host and home States could enhance the chance of victims to effectively gain access to remedies.⁸ Such cooperation could focus on the execution of judgements of host State courts in the home State. Another solution may be to create an international or regional ombudsman who would deal with allegations of human rights and environmental abuses by businesses.⁹ Authors have also suggested that the jurisdiction of the ICC could be extended to legal persons.¹⁰ In this case, the criminal liability of companies would be, however, restricted to international crimes.

Second, it remains unsustainable for the international community and for lawyers to defend the absence of corporate obligations towards human rights and the environment. Such a view ignores that the law should be a flexible instrument that must evolve to solve contemporary issues and balance the rights and obligations of all actors, including businesses. In particular, academics and lawyers should reflect on pragmatic and realistic alternatives to traditional concepts, such as international legal personality, separate legal personality, and limited liability. Some authors have already called for innovative legal provisions on liability within corporate groups. Dine suggests that the recently enacted Albanian company law contains innovative provisions, which provide for a promising legal framework for the construction of MNE accountability for human rights and environmental abuse.¹¹

⁸ See UNHRC, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5, para 46; Mark Taylor, Robert Thompson and Anita Ramasastry, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (FAFO 2010) 27; Iman Prihandono, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries' (2011) 3 *Journal of Law and Conflict Resolution* 89.

⁹ UN Framework (n 8) para 103; 'Synopsis from the Conference: "The EU's Business? Ensuring Remedy for Corporate Human Rights Abuses' (Frank Bold 2014) 5.

¹⁰ See Andrew Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899.

¹¹ See Janet Dine, 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' (2012) 3 *Journal of Human Rights and the Environment* 44.

Third, the current efforts to develop various legal and policy frameworks at national, regional, and international levels provide an excellent research opportunity. In particular, the elaboration of an international treaty on business and human rights raises a number of challenging questions regarding the respective obligations and responsibilities of States and companies under international law.

Fourth, this research originally started as an inquiry into the role of courts to regulate corporate actors where statutory rules remain silent. While this thesis went in a different direction, research on the subject remains needed. As this thesis demonstrated, courts can become creative actors to regulate private behaviour, correct inequality and abuse between parties, and encourage the legislator to enact needed regulation. However, it is important to understand the opportunities and constraints they face when doing so.

Fifth, the accountability of CSOs and cause lawyers involved in transnational litigation against MNEs and, more generally, in the corporate accountability movement also deserves to be further explored.¹² It appears important to assess the success and failure of their strategies to hold MNEs to account and help victims of corporate abuse gain access to remedies. In particular, there should be further research on the impacts of these strategies on local communities, victims of corporate abuse, and local CSOs in host countries, as well as on the economic, social, and legal development of host countries. Ultimately, research is needed on the interplay and the power relationships between CSOs and cause lawyers in home countries on the one hand, and victims, CSOs, and other actors in host countries on the other.

¹² For instance, Yaziji and Doh suggest that the accountability of NGOs advocating for regulatory efforts of business conduct will become more relevant and substantial in the coming years. Michael Yaziji and Jonathan Doh, *NGOs and Corporations: Conflict and Collaboration* (CUP 2009) 25-26.

Bibliography

1 Table of cases

England

- Arroyo v BP Exploration Company (Colombia) Ltd [2010] EWHC 1643 (QB)
- Arroyo v Equion Energia Ltd [2013] EWHC 3150 (TCC)
- Bodo Community v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC)
- Chandler v Cape Plc [2011] EWHC 951 (QB), [2012] EWCA Civ 525
- Connelly v RTZ Corporation Plc [1996] QB 361 (CA), [1997] UKHL 30, [1998] AC 854, [1999] CLC 533
- Guerrero v Monterrico Metals Plc [2009] EWHC 2475 (QB), [2010] EWHC 160 (QB), [2010] EWHC 3228 (QB)
- Lubbe v Cape Plc, [1998] EWCA Civ 1351, [2000] UKHL 41
- McDonald's Corporation v Steel and Morris [1997] EWHC QB 366
- Motto v Trafigura Ltd [2006] Claim BV HQ06X03370, [2009] EWHC 1246 (QB), [2011] EWCA Civ 1150
- Ngcobo v Thor Chemicals Holdings Ltd The Times (10 November 1995)
- Sithole v Thor Chemicals Holdings [1999] EWCA Civ 706, [2000] WL 1421183
- Vava v Anglo American South Africa Ltd [2011] Claim No HQ11X03245, [2012] EWHC 1969 (QB)

France

- Chambre de l'Instruction, CA Paris 13 February 2004
- Cons Conc, Décision n°05-D-49 du 28 juillet 2005 relative à des pratiques mises en œuvre dans le secteur de la location entretien des machines d'affranchissement postal
- Cons Conc, Décision n° 07-D-12 du 28 mars 2007 relative à des pratiques mises en œuvre dans le secteur du chèque-cinéma
- Conseil des Prud'Hommes Paris 26 January 2011, n° F 08/06791
- CA Nîmes 8 July 2002 (Ould Dah)
- CA Paris 20 March 1986 (1987) Rev Soc 98 (comments Y Guyon)
- CA Paris 12 May 1987 (1989) Somm D 5f (comments F Derrida)
- CA Paris 15 January 1999, n° 1998/04408
- CA Paris 30 March 2010, n° 08/02278
- CA Paris 20 June 2013, n° 08/07365
- CA Paris 24 October 2013, n° 12/05650, 12/05777, 12/05651
- CA Versailles 17 December 2009, n° 09/04772, 09/04795
- CA Versailles 22 March 2013, n° 11/05331
- Cour d'assises Nîmes 1 July 2005 (Ould Dah)
- Cass ch réunies 15 June 1923, DP 1924 1 153, S 1924 1 49, note Chavegrin (Cardinal Luçon)
- Cass civ 23 July 1918, DP 1918, 1, 52

- Cass civ 25 May 1948, D 1948 357 (Lautour v Guiraud)
- Cass civ (1) 27 May 1975, D 1976, 318, obs Viney
- Cass civ (2) 20 March 1989, n° 88-11585
- Cass civ (3) 17 July 1997, n° 95-18100
- Cass civ (1) 6 November 2002, n° 00-15.220
- Cass civ (3) 25 February 2004, n° 01-11764
- Cass civ (2) 13 January 2005, n° 03-13.531
- Cass civ 23 January 2007, D 2007, AJ 503
- Cass civ (3) 26 September 2007, n° 04-20636
- Cass civ (2) 10 February 2011
- Cass civ 22 January 2015, n° 13-28.414
- Cass com 5 February 1985, n° 82-15.119
- Cass com 8 November 1988 (1990) Rev Soc 71
- Cass com 20 October 1992 (1993) Rev Soc 449
- Cass com 2 April 1996, n° 94-1680
- Cass com 4 March 1997, n° 95-10756
- Cass com 13 February 2001, n° 98-15190
- Cass com 19 April 2005, n° 05-10.094 (Theetten v SA Metaleurop)
- Cass com 26 March 2008, n° 07-11619
- Cass com 15 November 2011, n° 10-21701 (Sté JCB Service (FD))
- Cass com 12 June 2012, n° 11-16109
- Cass com 2 July 2014, n° 13-15.208 (Molex)
- Cass com 3 February 2015, n° 13-24.895
- Cass crim 9 December 1933, Bull crim n° 237
- Cass crim 4 June 1941, Gaz Pal 1941 II 354
- Cass crim 4 February 1985, n° 84-91581 (Rozenblum)
- Cass crim 6 February 1996, Bull crim n° 60
- Cass crim 14 December 1999, n° 99-80.101
- Cass crim 18 January 2000, n° 99-80318
- Cass crim 26 June 2001, Bull Crim (2001) 161 (Sté Carrefour)
- Cass crim 23 October 2002 (Ould Dah)
- Cass crim 12 April 2005, n° 04-82318
- Cass crim 31 January 2007, Bull crim n° 28
- Cass crim 20 June 2006, n° 05-85255
- Cass crim 1 April 2008, n° 07-84839
- Cass crim 25 June 2008, n° 07-80261
- Cass crim 13 October 2009, n° 09-80857
- Cass crim 27 October 2009, n° 09-80490
- Cass crim 13 April 2010, n° 09-86429
- Cass crim 25 September 2012, n° 10-82938
- Cass crim 22 January 2013, n° 12-80022
- Cass soc 19 June 2007, n° 05-42.570
- Cass soc 18 January 2011, n° 09-69.199
- Cass soc 28 September 2011, n° 10-12.278
- Cass soc 30 November 2011, n° 10-22.964 to 10-22.985 and 10-22.994
- Cass soc 25 September 2013, n° 11-25.733

- Cass soc 28 January 2015, n° 13-22.994 to 13-23.006
- TASS Melun 11 May 2012, n°10-00924/MN
- T com Orléans 1 June 2012, n° 2010-11170
- T corr Versailles 18 December 1995, Dr Pénal (1996) 71 obs Robert
- TGI Nanterre 15 April 2009, n° 07/2902
- TGI Nanterre 30 May 2011, n° 10/02629
- TGI Paris (11) 16 January 2008, n° 9934895010
- Conclusions, 17 June 2010, n° 09/10495 (Akala v COMILOG)

India

- MC Mehta v Union of India (1986) 1987 SCR (1) 819

Netherlands

- Central Appeal Council 11 November 1980, WW 1980/79 (Centrale Raad Van Beroep)
- CA Amsterdam 21 June 1979, NJ 1980, 217 (BATCO)
- CA Arnhem 10 May 1994, TMA 94-6, 155 et seq (Roco BV v De Staat der Nederlanden)
- CA The Hague 9 May 2007, Case No 2200050906 – 2 (Public Prosecutor v Van Anraat)
- CA The Hague 10 March 2008, Case No 220043306 (Public Prosecutor v Kouwenhoven)
- CA The Hague 12 April 2011, NJFS 2011, 137
- DC The Hague 23 December 2005, Case No 09/751003-04 (Public Prosecutor v Van Anraat)
- DC The Hague 7 June 2006, Case No AX7098 (Public Prosecutor v Kouwenhoven)
- DC The Hague 30 December 2009, Judgement in Motion Contesting Jurisdiction, 330891/HAZA09-579
- DC The Hague 14 September 2011, Judgment in the Ancillary Actions Concerning the Production of Exhibits and in the Main Actions, 337050/HAZA09-1580 (Akpan v Royal Dutch Shell Plc); 330891/HAZA09-0579 (Oguru v Royal Dutch Shell Plc); 337058/HAZA09-1581 (Dooh v Royal Dutch Shell Plc)
- DC The Hague 30 January 2013, C/09/337050/HAZA09-1580 (Akpan v Royal Dutch Shell Plc); C/09/330891/HAZA09-0579 (Oguru v Royal Dutch Shell Plc); C/09/337058/HAZA09-1581 (Dooh v Royal Dutch Shell Plc)
- DC Zutphen 1 August 1991, Vermande D-8-85 (Roco BV v De Staat der Nederlanden)
- HR 6 April 1915, NJ 1915, 475
- HR 14 March 1950, NJ 1952, 656
- HR 30 June 1950, NJ 1950, 646
- HR 6 April 1954, NJ 1954, 368
- HR 25 September 1981, NJ 1982, 443 (Osby-Pannan A/B v Las Verkoopmaatschappij BV)
- HR 17 June 1986, NJ 1987, 743
- HR 19 February 1988, NJ 1988, 487
- HR 18 October 1988, NJ 1989, 496
- HR 11 December 1990, NJ 1991, 466
- HR 12 February 1991, NJ 1991, 528
- HR 24 January 1995, NJ 1995, 352

- HR 16 June 1995, NJ 1996, 214
- HR 3 November 1995, NJ 1996, 215
- HR 15 October 1996, NJ 1997, 109
- HR 18 February 1997, NJ 1997, 628
- HR 23 October 2001, NJ 2002, 77 (Bouterse)
- HR 21 December 2001, NJ 2005, 96
- HR 21 May 2002, NJ 2003, 316 (Asean Explorer)
- HR 21 October 2003, NJ 2006, 328
- HR 30 June 2009, Case No 07/10742 (Public Prosecutor v Van Anraat)
- HR 20 April 2010, Case No 08/01322 (Public Prosecutor v Kouwenhoven)
- HR 18 March 2011, RvdW 2011, 392

- ‘Al Haq/Report of War Crimes and Crimes against Humanity by Riwal’ (Complaint to National Public Prosecutor’s Office) (Böhler Advocaten 15 March 2010)
- ‘Complaint Concerning Failure to Prosecute for an Offence (Article 12 of the Dutch Code of Criminal Procedure)’ (Greenpeace Nederland 16 September 2009)
- Letter of Dismissal from National Public Prosecutor’s Office to Mr Van Eijck (14 May 2013)
- ‘Motion for the Court to Decline Jurisdiction and Transfer the Case, Also Conditional Statement of Defense in the Main Action’ (De Brauw Blackstone Westbroek 13 May 2009)
- ‘Motion to Produce Documents’ (Prakken d’Oliveira 10 September 2013) 200.126.843 (Dooh v Royal Dutch Shell Plc); 200.126.849 (Milieudéfensie v Royal Dutch Shell Plc); 200.126.834 (Oguru v Royal Dutch Shell Plc)
- ‘Statement of Appeal Regarding the Dismissal of the Motion to Produce Documents by Virtue of Section 834A DCCP (Interlocutory Judgement District Court of The Hague 14-09-2011)’ (Prakken d’Oliveira 2014)
- ‘Writ of Summons: Oguru, Efanga & Milieudéfensie vs Shell plc and Shell Nigeria’ (Böhler Advocaten 7 November 2008)

South Africa

- Government of the Republic of South Africa v Grootboom [2000] ZACC 19
- The State v Blue Platinum Ventures Pty Ltd [2014] RN126/13

United States

- Doe v Unocal 395 F 3d 932 (9th Cir 2002); 395 F 3d 978 (9th Cir 2003)
- Kiobel v Royal Dutch Petroleum Co 133 S.Ct. 1659 (2013)
- Joint Submission of United Kingdom and Netherlands in Kiobel v Royal Dutch Petroleum Co (February 2012)
- Supplemental Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co (June 2012)

International

African Commission on Human and Peoples' Rights

- Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria, Decision Regarding Communication 155/96, ACHPR/COMM/A044/1, 27 May 2002

Court of Justice of the European Union

- Akzo Nobel NV v Commission (C-97/08) [2009] ECR I-8237
- ArcelorMittal Luxembourg SA v Commission (C-201/09 P and C-216/09 P) [2011] ECR I-2239
- DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (C-279/09) [2010] ECR I-13849
- Deo Antoine Homawoo v GMF Assurances SA (C-412/10) [2011] ECR I-11603
- ENI SpA v Commission (C-508/11) [2013] OJ 225/11
- General Química e.a. v Commission (C-90/09 P) [2011] ECR I-0000
- Imperial Chemical Industries Ltd v Commission (C-48/69) [1972] ECR 619
- Owusu v Jackson (C-281/02) [2005] ECR I-1383
- Viho European BV v Commission (C-73/95 P) [1996] ECR I-5457

European Court of Human Rights

- Bellet v France (1995) Series A no 333-B
- Fadeyeva v Russia (2007) 45 EHRR 10
- Golder v the UK (1975) Series A no 18
- López Ostra v Spain (1995) 20 EHRR 277
- Lupsa and v Romania ECHR 2006-VII
- Moulin v France App no 37104/06 (ECtHR, 23 November 2010)
- Ould Dah v France App no 13113/03 (ECtHR, 17 March 2009)
- Pérez de Rada Cavanilles v Spain (1998) 29 EHRR 109
- Philis v Greece (1991) Series A no 209
- Sibson v UK (1993) 17 EHRR 193
- Steel and Morris v UK (2005) 41 EHRR 22
- The Holy Monasteries v Greece (1995) Series A no 301-A
- Young, James and Webster v UK (1981) 4 EHRR 38

International Court of Justice

- Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgement) [1997] ICJ Rep 7
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136
- Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226
- Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174

Others

- Judgement of the Nuremberg International Military Tribunal 1946 (1947) 41 AJIL 172
- Trail Smelter Arbitration (US v Canada) (1938 and 1941) 3 RIAA 1905

2 Table of legislation

England

- Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

France

- Code civil
- Code de l'environnement
- Code de la consommation
- Code de la sécurité sociale
- Code de procédure civile
- Code de procédure pénale
- Code du commerce
- Code du travail
- Code monétaire et financier
- Code pénal
- Loi du 1er juillet 1901 relative au contrat d'association
- Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires (Loi sur les professions judiciaires)
- Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique (Loi sur l'aide juridique)
- Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité
- Loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement (Loi Grenelle I)
- Loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (Loi Grenelle II)
- Loi n° 2014-344 du 17 mars 2014 relative à la consommation (Loi Hamon)
- Loi n° 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France
- Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière
- Proposition de loi n°1524 du 6 novembre 2013 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre
- Proposition de loi n°1519 du 6 novembre 2013 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre
- Proposition de loi n° 2578 du 11 février 2015 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre

The Netherlands

- Burgerlijk Wetboek
- Legal Aid Act 1994
- The Constitution of the Kingdom of the Netherlands 2008
- Wet Collectieve Afhandeling Massaschade 2005 (WCAM)
- Wet Conflictenrecht Onrechtmatige Daad 2001 (WCOD)
- Wet Internationale Misdrijven 2003
- Wetboek van Burgerlijke Rechtsvordering
- Wetboek van Strafrecht

United States

- Alien Tort Statute 28 USC § 1350 (1789) Alien's Action for Tort

European Union

- Charter of Fundamental Rights of the EU [2012] OJ C326/392 (EU Charter)
- Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 (Recommendation on collective redress)
- Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41 (Directive on legal aid)
- Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I Regulation)
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57 (Directive on the rights of victims of crimes)
- European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI))
- Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II Regulation)
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2012] OJ L351/1 (recast Brussels I Regulation)
- Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1 (Treaty of Lisbon)

International

- African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter)

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention against Torture)
- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention)
- Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79
- Convention on the Protection of the Environment through Criminal Law (adopted 4 November 1998) CETS No 172
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)
- Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (adopted 27 September 1968, entered into force 1 February 1973) 1262 UNTS 153
- Declaration of the UN Conference on the Human Environment (adopted on 16 June 1972) UN Doc A/CONF.48/14/Rev.1
- International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3
- International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3
- International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
- Rio Declaration on Environment and Development (adopted on 13 June 1992) UN Doc A/CONF.151/26 (vol I)
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3
- Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

3 Table of other international documents

Council of Europe

Committee of Ministers, ‘Declaration on the UN Guiding Principles on Business and Human Rights’ (16 April 2014)

CoE (Steering Committee for Human Rights), ‘Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights: Existing Standards and Outstanding Issues’ (4 June 2012) CDDH(2012)012

— — ‘Feasibility Study on Corporate Social Responsibility in the Field of Human Rights’ (30 November 2012) CDDH(2012)R76 Addendum VII

European Union

Commission, 'A Renewed EU Strategy 2011-2014 for Corporate Social Responsibility' COM(2011) 681 final

— — 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD(2015) 144 final

— — 'DG Justice guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA' (2013) (Guidance document)

— — 'Green Paper: Promoting a European framework for Corporate Social Responsibility' COM(2011) 366 final

— — 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters' COM(2010) 748 final

— — 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations' COM(2003) 427 final

— — 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final

Council of the European Union, 'Recast of the Brussels I Regulation: Towards Easier and Faster Circulation of Judgements in Civil and Commercial Matters Within the EU' PRESSE(2012) 483

United Nations

— — 'Environmental Assessment of Ogoniland' (UNEP 2011)

— — 'Initiative on Enhancing Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses' (OHCHR)
<<http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>> accessed 30 November 2015

— — 'Ratification of 18 International Human Rights Treaties' (OHCHR)
<<http://indicators.ohchr.org/>> accessed 30 November 2015

— — 'State Positions on the Use of Extraterritorial Jurisdiction in Cases of Allegations of Business Involvement in Severe Human Rights Abuses: A Survey of Amicus Curiae Briefs Filed by States and State Agencies in ATS cases (2000-2015)' (OHCHR 2015)

— — 'The Aarhus Convention: An Implementation Guide' (2nd edn, UNECE 2014)

— — 'UN Global Compact' (UN) <<https://www.unglobalcompact.org/about>> accessed 30 November 2015

— — 'World Investment Report 2009: Transnational Corporations, Agricultural Production and Development' (UNCTAD 2009)

UNCCPR, 'Concluding Observations on the Sixth Periodic Report of Germany' (12 November 2012) UN Doc CCPR/C/DEU/CO/6

— — 'General Comment 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13

— — 'General Comment 32' (23 August 2007) UN Doc CCPR/C/GC/32

UNCERD, ‘Concluding Observations’ (25 May 2007) UN Doc CERD/C/CAN/CO/18

UNCESRC, ‘General Comment 12’ (12 May 1999) UN Doc E/C.12/1999/5

UNCHR, ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (22 February 2006) UN Doc E/CN.4/2006/97

— — ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’ (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2

— — Res 69 (2005) UN Doc E/CN.4/RES/2005/69

— — ‘Situation of Human Rights in Nigeria’ (16 February 1998) UN Doc E/CN.4/1998/62

UNHRC, ‘Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse’ (23 May 2008) UN Doc A/HRC/8/5/Add.2.

— — ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31

— — ‘Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special-Representative’ (23 May 2011) UN Doc A/HRC/17/31/Add.2

— — ‘Mission to Côte d’Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008)’ (3 September 2009) UN Doc A/HRC/12/26/Add.2

— — ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ (7 April 2008) UN Doc A/HRC/8/5

— — Res 26/9 (2014) UN doc A/HRC/26/L.22/Rev.1

— — ‘State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries’ (13 February 2007) UN Doc A/HRC/4/35/Add.1

Others

‘OECD Guidelines for Multinational Enterprises: 2011 Edition’ (OECD 2011)

4 Secondary sources

— — ‘100,000 Victims of Ivory Coast Toxic Spill Launch Dutch Suit’ *AFP* (The Hague, 20 February 2015) <<http://news.yahoo.com/100-000-victims-ivory-coast-toxic-spill-launch-164550722.html>> accessed 30 November 2015

— — ‘£105m Trafigura Costs Dispute Settles, Leaving Lawyers Seeking Clarity on Interest’ (*Legal Futures*, 18 January 2012) <<http://www.legalfutures.co.uk/latest-news/105m-trafigura-costs-dispute-settles-leaving-lawyers-seeking-clarity-on-interest>> accessed 30 November 2015

— — ‘About the Silicosis Litigation’ (*Richard Spoor Inc Attorneys*) <<http://goldminersilicosis.co.za/about-the-silicosis-litigation/>> accessed 30 November 2015

- — ‘Access to Justice: Human Rights Abuses Involving Corporations – Federal Republic of Nigeria’ (International Commission of Jurists 2012)
- — ‘Access to Justice: Human Rights Abuses Involving Corporations – India’ (International Commission of Jurists 2011)
- — ‘Access to Justice: Human Rights Abuses Involving Corporations – South Africa’ (International Commission of Jurists 2010)
- — ‘Access to Justice: Human Rights Abuses Involving Corporations – The Democratic Republic of the Congo’ (International Commission of Jurists 2012)
- — ‘Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands’ (International Commission of Jurists 2010)
- — ‘Access to Justice in Africa and Beyond: Making the Rule of Law a Reality’ (Penal Reform International 2007)
- — ‘Accountable’ (*Oxford Dictionaries*, OUP 2015)
<<http://www.oxforddictionaries.com/definition/english/accountable>> accessed 30 November 2015
- — ‘Accusations de Travail Forcé au Qatar: Enquête sur Vinci Ouverte à Nanterre’ *Le Parisien* (Paris, 25 April 2015) <<http://www.leparisien.fr/flash-actualite-sports/accusations-de-travail-force-au-qatar-enquete-sur-vinci-ouverte-a-nanterre-25-04-2015-4723901.php#xtref=https%3A%2F%2Fwww.google.co.uk%2F>> accessed 30 November 2015
- — ‘Affaire Trafigura: Plainte des Ligues des Droits de l’Homme’ *RFI* (Paris, 19 December 2007) <http://www1.rfi.fr/actufr/articles/096/article_60521.asp> accessed 30 November 2015
- — ‘Agreed Final Joint Statement (Issued on Behalf of All Parties to the Trafigura Personal Injury Group Litigation)’ (Trafigura and Leigh Day 2009)
- — ‘Annual Briefing: Corporate Legal Accountability’ (*Business and Human Rights Resource Center*, January 2015) <<http://business-humanrights.org/en/corporate-legal-accountability/publications/corporate-legal-accountability-annual-briefings>> accessed 30 November 2015
- — ‘Annual Report 2006’ (Sherpa 2 May 2007)
- — ‘Association Sherpa Statuts’ (Sherpa 20 Mai 2009)
- — ‘Bangladesh Factory Collapse Toll Passes 1,000’ *BBC News* (London, 10 May 2013) <<http://www.bbc.com/news/world-asia-22476774>> accessed 30 November 2015
- — ‘Briefing: Corporate Accountability’ (Friends of the Earth 2005)
- — ‘Cambodia Land Cleared for Rubber Rights Bulldozed: The Impact of Rubber Plantations by Socfin-KCD on Indigenous Communities in Bousra, Mondulkiri’ (FIDH 2011)
- — ‘Campagne SLAPP de RAIDH: Quand les Entreprises Menacent la Liberté d’Expression et le Droit d’Association’ (*RAIDH*) <<http://www.raidh.org/-Campagne-SLAPP-Quand-les-.html>> accessed 30 November 2015
- — ‘Case Report: Luciano Romero and the Nestlé Case’ (ECCHR 2014)
- — ‘Cheap clothes from Bangladesh’ (ELS 2010)
- — ‘Civil Society Organizations in Resource-Rich Communities: Helping Ensure Beneficial Outcomes for All’ (Global Rights Business and Human Rights Roundtable, London, 10-11 October 2013)
- — ‘Coca-Cola in India’ (ELS 2010)

— — ‘Collective Redress in the Netherlands’ (US Chamber Institute for Legal Reform 2012)

— — ‘Communiqué sur l’État de la Procédure Engagée par l’AFPS et l’OLP Relative à la Construction et à l’Exploitation d’un Tramway à Jérusalem’ (AFPS, 2 October 2008) <<http://www.france-palestine.org/Communique-sur-l-etat-de-la>> accessed 30 November 2015

— — ‘Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War’ (*Global Witness*, 12 March 2014) <<https://www.globalwitness.org/en/archive/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-0/>> accessed 30 November 2015

— — ‘Concern that Ivory Coast Compensation Will Be Misappropriated’ (*Leigh Day*, 6 November 2009) <<http://www.leighday.co.uk/News/2009/November-2009/Concern-that-Ivory-Coast-compensation-will-be-misa>> accessed 30 November 2015

— — ‘Constitution of the Kingdom of the Netherlands 2008’ (*Ministry of the Interior and Kingdom Relations* 2012) <<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>> accessed 30 November 2015

— — ‘Corporate Complicity, Access to Justice and the International Legal Framework for Corporate Accountability’ (International Commission of Jurists 2013)

— — ‘Corporate Complicity and Legal Accountability: Criminal Law and International Crimes’ (International Commission of Jurists 2008)

— — ‘Country Reports on Human Rights Practices for 2014: Cameroon’ (*US Department of State*) <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dclid=236338>> accessed 30 November 2015

— — ‘Criminal Complaint against Senior Manager of Danzer: Accountability for Human Rights Violations in the Democratic Republic of Congo’ (ECCHR 25 April 2013)

— — ‘Directory of Business and Human Rights Lawyers’ (*Business and Human Rights Resource Center*) <<http://business-humanrights.org/en/corporate-legal-accountability/directory-of-business-human-rights-lawyers>> accessed 30 November 2015

— — ‘English Version of the Code of Conduct of the Netherlands Bar Association: The Rules of Conduct of Advocates 1992’ (CCBE 3 December 2008) (Dutch Bar Association’s Code of Conduct)

— — ‘Exploitation d’Enfants et Conditions de Travail Indignes: Samsung Accusée de Bafouer ses Engagements Éthiques en Chine’ (*Sherpa*, 26 February 2013) <<http://www.asso-sherpa.org/conditions-de-travail-indignes-sherpa-et-ses-partenaires-portent-plainte-contre-samsung-pour-publicite-trompeuse#.VldFZLv81Og>> accessed 30 November 2015

— — ‘Factsheet: Extra-Territorial Jurisdiction of States Parties to the European Convention on Human Rights’ (ECHR 2015)

— — ‘France - États-Unis: Regards Croisés sur l’Internationalisation du Droit’ (Collège de France 2007)

— — ‘Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity’ (Friends of the Earth Nigeria and Climate Justice Programme 2005)

— — ‘Global Witness Welcomes Dutch Court’s Decision to Hear New Prosecution Witnesses in Kouwenhoven Case’ (*Global Witness*, 8 February 2011)

<<https://www.globalwitness.org/archive/global-witness-welcomes-dutch-courts-decision-hear-new-prosecution-witnesses-kouwenhoven/>> accessed 30 November 2015
 — — ‘Hello World? There is an Oil Spill Here’ (*Milieudéfensie*, 21 August 2012)
 <<https://www.milieudéfensie.nl/english/shell/news/hello-world-there2019s-an-oil-spill-here>> accessed 30 November 2015
 — — ‘Home’ (*Business and Human Rights Resources Centre*) <<http://business-humanrights.org/en>> accessed 30 November 2015
 — — ‘Human Rights and Crude Oil in Nigeria’ (Amnesty International 2004)
 — — ‘Human Rights Violations Committed Overseas: European Companies Liable for Subsidiaries. The Kik, Lahmeyer, Danzer and Nestlé Cases’ (ECCHR 2015)
 — — ‘Info Birmanie, la Ligue des Droits de l’Homme et la FIDH Dénoncent l’Accord Intervenu entre Total et Sherpa’ (Info Birmanie, LDH and FIDH 30 November 2005)
 — — ‘Ivory Coast’ (*Leigh Day*) <<http://www.leighday.co.uk/International-and-group-claims/Ivory-Coast>> accessed 30 November 2015
 — — ‘L’Accord Intervenu à Londres Entre Trafigura et Près de 31 000 Victimes Ivoiriennes ne Doit pas Occulter la Responsabilité de Trafigura!’ (*FIDH*, 25 September 2009) <<http://www.fidh.org/fr/afrique/cote-d-ivoire/Affaire-Cote-d-Ivoire-dechets/L-accord-intervenu-a-Londres-entre>> accessed 30 November 2015
 — — ‘L’Affaire du “Probo Koala” ou la Catastrophe du Déversement des Déchets Toxiques en Côte d’Ivoire’ (FIDH, LIDHOA and MIDH 2011)
 — — ‘L’Affaire du PROBO KOALA Relancée: Le Président de TRAFIGURA Passible de Poursuites aux Pays-Bas - Quid de la Procédure en France?’ (*FIDH*, 3 February 2012) <<https://www.fidh.org/fr/themes/actions-judiciaires/actions-judiciaires-contre-des-etats/Affaire-Cote-d-Ivoire-dechets/L-affaire-du-PROBO-KOALA-relancee>> accessed 30 November 2015
 — — ‘L’Entreprise Forestière International DLH Accusée d’Avoir Financé la Guerre au Libéria’ (*Global Witness*, 18 November 2009) <<https://www.globalwitness.org/en/archive/7641/>> accessed 30 November 2015
 — — ‘Le Groupe Auchan Visé par une Plainte pour Pratique Commerciale Trompeuse dans le Cadre de l’Effondrement du Rana Plaza’ (*Sherpa*, 24 April 2014) <<http://www.asso-sherpa.org/le-groupe-auchan-verse-par-plainte-pour-pratique-commerciale-trompeuse-dans-le-cadre-de-leffondrement-du-rana-plaza#.Vlg4Lbv81Og>> accessed 30 November 2015
 — — ‘Le Sénat n’a pas Adopté la Proposition de Loi Relative au Devoir de Vigilance des Sociétés Mères’ (*Sénat*, 19 November 2015) <http://www.senat.fr/les_actus_en_detail/article/vigilance-des-societes-meres.html> accessed 30 November 2015
 — — Les Nouveaux Métiers de l’Avocat podcast, ‘L’Avocat Militant’ (25 February 2014) comments by William Bourdon, Centre Perelman de Philosophie du Droit in Brussels <<http://www.philodroit.be/L-avocat-militant?lang=fr>> accessed 30 November 2015
 — — Letter from John Ruggie to Jonathan Djanogly (16 May 2011)
 — — ‘Liability’ (*Oxford Dictionaries*, OUP 2015) <<http://www.oxforddictionaries.com/definition/english/liability>> accessed 30 November 2015
 — — ‘Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (*Maastricht Centre for Human Rights*)

<<http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPinciples.htm>> accessed 30 November 2015

— — ‘Mondial 2022 au Qatar : Sherpa Porte Plainte contre Vinci Construction et les Dirigeants de sa Filiale au Qatar QDVC’ (*Sherpa*, 23 March 2015) <<http://www.asso-sherpa.org/mondial-2022-au-qatar-sherpa-porte-plainte-contre-vinci-construction-et-les-dirigeants-de-sa-filiale-au-qatar-qdvc#.VRGd0eH9miw>> accessed 30 November 2015

— — ‘Multinationals and Transparency in Foreign Direct Liability Cases’ (Amnesty International Netherlands and NJCM 2014)

— — ‘Myanmar: Total et l’Association Sherpa Concluent un Accord Prévoyant la Création d’un Fonds de Solidarité pour des Actions Humanitaires’ *Nextnews* (Paris, 29 November 2005)

<http://www.nextnews.fr/if_communique.asp?id_communique=5124&lg=fr&type_com=html&type_source=d> accessed 30 November 2015

— — ‘Needs and Options for a New International Instrument in the Field of Business and Human Rights’ (International Commission of Jurists June 2014)

— — ‘Nigeria: Petroleum, Pollution and Poverty in the Niger Delta’ (Amnesty International 2009)

— — ‘Nigeria Repression of Women’s Protests in Crude Oil-Producing Delta Region’ (Amnesty International 2003)

— — ‘Nigeria - Ten Years On: Injustice and Violence Haunt the Crude Oil Delta’ (Amnesty International 2005)

— — ‘Nigeria: The Ogoni Crisis – A Case Study of Military Repression in South Eastern Nigeria’ (Human Rights Watch 1995)

— — ‘Our History’ (*Prakken d’Oliveira*) <<http://www.prakkendoliveira.nl/en/about-us/>> accessed 30 November 2015

— — ‘Peruvian Torture Claimants Compensated by UK Mining Company’ (*Leigh Day*, 20 July 2011) <<http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>> accessed 30 November 2015

— — ‘Press Release: 7 Cameroonian Farmers Confront the French Rougier Group and its Cameroonian Affiliate SFID Before French Tribunal’ (Les Amis de la Terre and Sherpa 2002)

— — ‘Press Release: General Acquittal in Appeal Kouwenhoven Case’ (*De Rechtspraak*, 10 March 2008) <<https://www.rechtspraak.nl/>> accessed 30 November 2015

— — ‘Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives’ (Misereor and Global Policy Forum Europe 2008)

— — ‘Public Prosecutor v Frans Cornelis Adrianus Van Anraat’ (*International Crimes Database*, 2013) <<http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/>> accessed 30 November 2015

— — ‘Règlement du COPIL’ (*Sherpa* 5 April 2013)

— — ‘Rana Plaza 2 Ans Déjà – Plainte contre Auchan pour Pratiques Commerciales Trompeuses: Les Associations se Constituent Partie Civile’ (*Sherpa*, 8 June 2015) <<http://www.asso-sherpa.org/rana-plaza-2-ans-deja-plainte-contre-auchan-pour-pratiques-commerciales-trompeuses-les-associations-se-constituent-partie-civile#.VbkrMfIVhBc>> accessed 30 November 2015

— — ‘Report of the Task Force on Extraterritorial Jurisdiction’ (IBA 2009)

— — ‘Research Ethics Policy’ (SOAS 2015)

— — ‘Responsibility’ (*Oxford Dictionaries*, OUP 2015)
 <<http://www.oxforddictionaries.com/definition/english/responsibility>> accessed 30 November 2015

— — ‘Shell Accepts Responsibility for Oil Spill in Nigeria’ (*Leigh Day*, 3 August 2011)
 <<http://www.leighday.co.uk/News/2011/August-2011/Shell-accepts-responsibility-for-oil-spill-in-Nige>> accessed 30 November 2015

— — ‘Shell Agrees £55m Compensation Deal for Niger Delta Community’ (*Leigh Day*, 7 January 2015) <<http://www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del>> accessed 30 November 2015

— — ‘Shell Nigeria Case: Court Acquits Firm on Most Charges’ *BBC* (London, 30 January 2013) <<http://www.bbc.co.uk/news/world-africa-21258653>> accessed 30 November 2015

— — ‘Shell-Shocked: The Environmental and Social Costs of Living with Shell in Nigeria’ (Greenpeace International 1994)

— — ‘Sherpa: Rapport d’Activités 2013’ (Sherpa 2014)

— — ‘Statements, Initiatives & Commentaries’ (*BHRRC*) <<http://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries>> accessed 30 November 2015

— — ‘Submission on Brussels I Regulation Legislative Proposal’ (Amnesty International 2011)

— — ‘Support the Nigerian People. Join the 500 Club’ (*Milieudefensie*)
 <<https://milieudefensie.nl/english/shell/courtcase/support-the-courtcase/the-500-club-1>> accessed 30 November 2015

— — ‘Synopsis from the Conference: “The EU’s Business? Ensuring Remedy for Corporate Human Rights Abuses’ (Frank Bold 2014)

— — ‘The Amesys Case’ (FIDH 11 February 2015)

— — ‘The Business and Human Rights Program – Why Corporations Must Be Held Accountable for Human Rights Violations’ (ECCHR 2013)

— — ‘The Powerful & the Powerless: A Case Study of Union Fenosa’s Electricity Monopoly in Colombia’ (ECCJ 2009)

— — ‘The Public Prosecutor v Guus Kouwenhoven’ (*International Crimes Database*, 2013)
 <<http://www.internationalcrimesdatabase.org/Case/2238/Kouwenhoven/>> accessed 30 November 2015

— — ‘The Toxic Truth About a Company Called Trafigura, a Ship Called the Probo Koala, and the Dumping of Toxic Waste in Cote d’Ivoire’ (Amnesty International and Greenpeace Netherlands 2012)

— — ‘The True Cost of Chevron: An Alternative Annual Report’ (The True Cost of Chevron 2009, 2010, 2011)

— — ‘Total en Birmanie : Vers un Procès ?’ *Le Nouvel Observateur* (Paris, 13 January 2005) <<http://tempsreel.nouvelobs.com/monde/20050111.OBS5970/total-en-birmanie-vers-un-proces.html>> accessed 30 November 2015

— — ‘Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Ruled Burma (Myanmar)’ (EarthRights International 2009)

— — ‘Trafigura Fine a Set-Back for Africa’s Environmental Justice’ (*Greenpeace Africa*, 21 November 2012) <<http://www.greenpeace.org/africa/en/News/news/Greenpeace-Trafigura-fine-a-set-back-for-Africas-environmental-justice/>> accessed 30 November 2015

— — ‘Trafigura’s Punishment Final, Top Executive Settles’ (*Openbaar Ministerie*, 16 November 2012) <<https://www.om.nl/onderwerpen/milieucriminaliteit/@31000/trafigura-punishment/>> accessed 30 November 2015

— — ‘Tramway Colonial: Un Jugement Incompréhensible de la Cour d’Appel’ (*AFPS* 25 March 2013) <<http://www.france-palestine.org/Tramway-colonial-un-jugement>> accessed 30 November 2015

— — ‘Trapped in Chains: Exploitative Working Conditions in European Fashion Retailers’ Supply Chain’ (ECCJ 2010)

— — ‘UN Forum on Business and Human Rights’ (*OHCHR*) <<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>> accessed 30 November 2015

— — ‘Une Interview de William Bourdon: L’Arrogance des Multinationales Devient Leur Pire Ennemi’ *Le Nouvel Observateur* (Paris, 14 March 2013).

— — ‘Universal Periodic Review – Myanmar (Burma): Submission to the Office of the High Commissioner for Human Rights’ (EarthRights International 2010)

— — ‘Vinci Échoue à Faire Condamner Sherpa pour Atteinte à la Présomption d’Innocence’ *Le Moniteur* (Paris, 30 June 2015) <<http://www.lemoniteur.fr/article/vinci-echoue-a-faire-condamner-sherpa-pour-atteinte-a-la-presomption-d-innocence-28983008>> accessed 30 November 2015

Addo MK (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)

— — ‘Human Rights and Transnational Corporations: An Introduction’ in Addo MK (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)

Adesina Okoli CS and Omoshemime Arishe G, ‘The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation’ (2012) 8 *Journal of Private International Law* 489

Afsharipour A and Rana S, ‘The Emergence of New Corporate Social Responsibility Regimes in China and India’ (2014) 14 *UC Davis Business Law Journal* 176

Aguirre D, ‘Corporate Social Responsibility and Human Rights Law in Africa’ (2005) 5 *African Human Rights Law Journal* 239

— — ‘Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation’ (2011) 42 *California Western International Law Journal* 123

Akandji-Kombe JF, ‘Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights’ (Council of Europe 2007)

Alston P (ed), *Non-State Actors and Human Rights* (OUP 2005)

Alvarez C, ‘Devoir de Vigilance: Une Filiale Gabonaise d’Eramet Condamnée par la Justice Française à Indemniser ses Ex-Salariés’ (*Novethic*, 14 September 2015)

<<http://www.novethic.fr/empreinte-sociale/sous-traitance/isr-rse/26-ans-apres-la-justice-francaise-donne-raison-aux-salaries-congolais-de-la-comilog-143600.html>> accessed 30 November 2015

Amao O, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011)

Amerson JM, 'What's in a Name? Transnational Corporations as Bystanders under International Law' 85 (2011) *St John's Law Review* 1

Anderson M, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 *Washburn Law Journal* 399
— — 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs' (2003) *IDS Working Paper* 178

Anderson S and Cavanagh J, 'Top 200: The Rise of Corporate Global Power' (Institute for Policy Studies 2000)

Anker-Sørensen L, 'Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches' (2014) 3 *The Dovenschmidt Quarterly* 9

Antonmattei PH, 'Groupe de Sociétés: La Menace du Co-Employeur se Confirme!' (2011) 1484 *Semaine Sociale Lamy* 12

Antunes JE, 'The Liability of Polycorporate Enterprises' (1999) 13 *Connecticut Journal of International Law* 197

Anziani A and Béteille L, 'Rapport d'Information n°558: Responsabilité Civile: Des Évolutions Nécessaires' (Sénat 2009)

Ascensio H, 'Contribution to the Work of the UN Secretary-General's Special Representative on Human Rights and Transnational Corporations and Other Businesses: Extraterritoriality as an Instrument' (Université Paris 1 2010)

Augenstein D, 'Report Prepared in Support of the Mandate of the SRSG: State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights' (Tilburg University 2011)
— —, Boyle A and Ghaleigh NS, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union' (European Commission 2010)
— — and Kinley D, 'When Human Rights "Responsibilities" Become "Duties": The Extraterritorial Obligations of States that Bind Corporations' in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)
— — Van Genugten W and Jägers N, 'Business and Human Rights Law in the Council of Europe: Nobless Oblige' (*EJIL: Talk!*, 10 February 2014)

<<http://www.ejiltalk.org/business-and-human-rights-law-in-the-council-of-europe-noblesse-oblige/>> accessed 30 November 2015

— — and Kinley D, 'Beyond the 100 Acre Wood: In Which International Human Rights Law Finds New Ways to Tame Global Corporate Power' (2015) 19 *International Journal of Human Rights* 828

Auzero G, 'Les Co-Employeurs' in Le Dolley E (ed), *Les Concepts Émergents en Droit des Affaires* (LGDJ 2010)

— — 'Co-Emploi: Le Rappel à l'Ordre de la Cour de Cassation' (2014) 1645 *Semaine Sociale Lamy* 7

Backer LC, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law* 287

— — 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator' (2007) 39 *Connecticut Law Review* 1739

— — 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations' (2008) 39 *Georgetown Journal of International Law* 591

— — 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) 14 *ILSA Journal of International and Comparative Law* 499

— — 'On the Evolution of the United Nations Protect-Respect-Remedy Project: The State, the Corporation and the Human Rights in a Global Governance Context' (2011) 9 *Santa Clara Journal of International Law* 37

— — 'Moving Forward the UN Guiding Principles for Business and Human Rights: between Enterprise Social Norm, State Domestic Legal Orders and the Treaty Law that Might Bing Them' (2015) 38 *Fordham International Law Journal* 457

Baderin M and McCorquodale R (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007)

Badge M, 'Transboundary Accountability for Transnational Corporations: Using Private Civil Claims' (Chatham House 2006)

Baetens Freya (ed), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013)

Bakan J, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable 2004)

Bakst D, 'Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive' (1996) 19 *Boston College International & Comparative Law Review* 323

Balch O, 'Activist NGOs Briefing Part 1: History of Campaigning – Manning the Barricades' (*Ethical Corporation*, 7 March 2013)

<<http://www.ethicalcorp.com/print/36583>> accessed XX November 2015

- Banakar R and Travers M, 'Law, Sociology and Method' in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- Banakas S, 'Private Law Remedies and Procedures: A Double-Edged Sword' (2009) 4(2) *Journal of Comparative Law* 3
- Bantekas I, 'Corporate Social Responsibility in International Law' (2004) 22 *Boston University International Law Journal* 309
 — — and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013)
- Barth R and Wolff F (eds), *Corporate Social Responsibility in Europe* (Edward Elgar 2009)
- Batut AM, 'Les Mesures d'Instruction "In Futurum"' (Cour de Cassation 1999)
 <https://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/anne_marie_5790.html> accessed 30 November 2015
- Baur D, *NGOs as Legitimate Partners of Corporations: A Political Conceptualization* (Springer 2011)
- Baxi U, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 *Human Rights Law Review* 1
 — — *The Future of Human Rights* (2nd edn, OUP India 2006)
 — — 'Justice Deferred: Transnational Lawyering & the Bhopal Gas Tragedy, 30 Years On' (King's College, London, 6 July 2015)
- Béal S and Terrenoire C, 'Coemploi et Groupes de Sociétés: Des Liaisons Apaisées?' (2015) 9 *La Semaine Juridique Entreprise et Affaires* 1105
- Béal S and others, 'Les Risques Juridiques Liés à la Mise en Place d'une Démarche Éthique dans l'Entreprise' (2012) 4 *Cahiers de Droit de l'Entreprise*
- Beckers A, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Bloomsbury 2015)
- Bekker P, Dolzer R and Waibel M (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010)
- Bendell J, 'Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement' (2004) UNRISD Technology, Business and Society Programme Paper 13
 <[http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/504AF359BB33967FC1256EA9003CE20A?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/504AF359BB33967FC1256EA9003CE20A?OpenDocument)> accessed 30 November 2015
 — — 'In Whose Name? The Accountability of Corporate Social Responsibility' (2005) 15 *Development in Practice* 362
 — — *The Corporate Responsibility Movement* (Greenleaf Publishing 2009)

Bennett C and Burley H, 'Corporate Accountability: An NGO Perspective' in Stephen Tully (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing 2005)

Bergkamp L and Pak WQ, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts' (2001) 8 *Maastricht Journal of European and Comparative Law* 167

Berman PS, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law* 485

— — 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301

Bernaz N, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 *Journal of Business Ethics* 493

Betlem G, *Civil Liability for Transfrontier Pollution: Dutch Environmental Tort Law in International Cases in the Light of Community Law* (Springer 1993)

— — 'Transnational Litigation against Multinational Corporations before Dutch Civil Courts' in Kamminga M and Zia-Zarifi S (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000)

Beyerlin U and Grote Stoutenburg J, 'Environment, International Protection', *MPEPIL* (2015) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Bilchitz D, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 12 *SUR – International Journal on Human Rights* 199

— — 'Corporations and Fundamental Rights: What is the Nature of their Obligations, if Any?' in Luetge C (ed), *Handbook on the Philosophical Foundations of Business Ethics* (Springer 2012)

— — 'A Chasm between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in Deva S and Bilchitz D, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)

— — 'Is a Business and Human Rights Treaty Necessary?' (Speech at Oxford Faculty of Law, Oxford, 10 March 2015) <<http://ohrh.law.ox.ac.uk/is-a-business-and-human-rights-treaty-necessary-prof-david-bilchitz-university-of-johannesburg/>> accessed 30 November 2015

— — and Deva S, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Deva S and Bilchitz D (eds), *Human Rights Obligations for Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)

Binder C and Schreuer C, 'Unjust Enrichment', *MPEPIL* (2013) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Birds J and others, *Boyle & Birds' Company Law* (8th edn, Jordans 2011)

- Birnie P, Boyle A and Redgwell C, *International Law and the Environment* (3rd edn, OUP 2009)
- Bjorge E, 'Human Rights, Treaties, Third-Party Effect', *MPEPIL* (2011) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Blair P, 'The Doctrine of Forum Non Conveniens in Anglo-American Law' (1929) 29 *Columbia Law Review* 1
- Blankenburg E, 'The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany' (1994) 28 *Law & Society Review* 789
- Blumberg PI, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporation Law* 573
 — — 'Book Review: Corporation Law' (1992) 40 *The American Journal of Comparative Law* 1011
 — — *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (OUP 1993)
 — — 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2001) 24 *Hastings International and Comparative Law Review* 297
 — — 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37 *Connecticut Law Review* 605
- Bode M, *Le Groupe International de Sociétés: Le Système de Conflit de Lois en Droit Comparé Français et Allemand* (Peter Lang 2010)
- Boele-Woelki K and Van Iterson D, 'The Dutch Private International Law Codification: Principles, Objectives and Opportunities' (2010) 14.3 *EJCL* <<http://www.ejcl.org/143/abs143-3.html>> accessed 30 November 2015
- Boggio A, 'The Global Enforcement of Human Rights: The Unintended Consequences of Transnational Litigation' (2006) 10 *International Journal of Human Rights* 325
 — — 'Linking Corporate Power to Corporate Structures: An Empirical Analysis' (2012) 22 *Social and Legal Studies* 107
- Bomann-Larsen L and Wiggen O, *Responsibility in World Business: Managing Harmful Side-Effects of Corporate Activity* (UN University Press 2004)
- Bonucci N and Kothari G, 'Organization for Economic Cooperation and Development (OECD)', *MPEPIL* (2013) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Boon A, 'Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression' (2004) 7 *Legal Ethics* 250

Boot-Matthijssen M and Van Elst R, 'Key Provisions of the International Crimes Act 2003' (2004) 35 *Netherlands Yearbook of International Law* 251

Böse M, 'Corporate Criminal Liability in Germany' in Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer, 2011)

Bouloc B, 'La Responsabilité Pénale des Entreprises en Droit Français' (1994) 46 *Revue Internationale de Droit Comparé* 669

Boyle A, 'Globalising Environmental Liability: the Interplay of National and International Law' (2005) 17 *Journal of Environmental Law* 3
— — 'Global Environmental Liability: The Interplay of National and International Law' in Winter G (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (CUP 2006)
— — 'Environmental Dispute Settlement', *MPEPIL* (2009) <<http://opil.ouplaw.com/>> accessed 30 November 2015
— — and Bowman M (eds), *Environmental Damage in International and Comparative Law* (OUP 2002)

Brach-Thiel D, 'La Victime d'une Infraction Extraterritoriale' [2010] *Revue de Science Criminelle* 819

Bradley CA, 'The Costs of International Human Rights Litigation' (2001) 2 *Chicago Journal of International Law* 457

Braithwaite J and Drahos P, *Global Business Regulation* (CUP 2000)

Brand R and Jablonski S, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (OUP 2007)

Chrisje Brants-Langeraar, 'Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure' (2007) 11.1 *EJCL* <<http://www.ejcl.org/111/abs111-6.html>> accessed 30 November 2015.

Broad R and Cavanagh J, 'The Corporate Accountability Movement: Lessons and Opportunities' (1999) 23 *The Fletcher Forum of World Affairs* 151

Broecker C, "'Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability' (2008) 41 *New York University Journal of International Law & Politics* 159

Buggenhoudt C and Colmant S, 'Justice in a Globalised Economy: A Challenge for Lawyers. Corporate Responsibility and Accountability in European Courts' (ASF 2011)

Bunn ID, 'Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community' (2004) 19 *American University International Law Review* 1265

- Burke J, 'Foreclosure of the Doctrine of Forum Non Conveniens under the Brussels I Regulation: Advantages and Disadvantages' (2008) 3 *The European Legal Forum* I-121
- Cafritz E and Tene O, 'Article 113-7 of the French Penal Code: the Passive Personality Principle' (2003) 41 *Columbia Journal of Transnational Law* 585
- Caillet MC, 'Le Droit à l'Épreuve de la Responsabilité Sociétale des Entreprises: Étude à Partir des Entreprises Transnationales' (PhD thesis, Université de Bordeaux 2014)
- Calice L and Diriar MC, 'Les Nouveaux Fronts Contentieux du Licenciement Économique: L'Impossible Équation entre l'Existence du Groupe et l'Autonomie Juridique de la Société' (2012) 5 *Cahiers de Droit de l'Entreprise*
- Cançado Trindade AA, *The Access of Individuals to International Justice* (OUP 2011)
- Cappelletti M, 'Vindicating the Public Interest through the Courts: A Comparativist's Contribution' (1976) 25 *Buffalo Law Review* 643
 — — and Garth B (eds), *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report* (AW Sijthoff 1978)
 — — and Garth B, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Review* 181
- Carbonnier J, *Sociologie Juridique* (Presses Universitaires de France 1978)
 — — 'Droit Civil – Vol 2: Les Biens. Les Obligations' (Presses Universitaires de France 2004)
- Carney W, 'Limited Liability', *Encyclopedia of Law and Economics III: The Regulation of Contracts* (2000) 669
- Carpentier C, 'Société Mère et Droit de l'Environnement' (2012) 4333 *Revue Lamy Droit des Affaires* 79
- Cartwright J and Whittaker S, 'Proposals for Reform of the Law of Obligations and the Law of Prescription' (2007)
- Cassels J, 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29 *Osgoode Hall Law Journal* 1
- Castermans AG and Van Der Weide JA, 'The Legal Liability of Dutch Parent Companies for Subsidiaries' Involvement in Violations of Fundamental, Internationally Recognised Rights' (Leiden University 2010)
- Catala P, *Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (La Documentation Française 2006)

Cefai D, *Pourquoi se Mobilise-t-on? Les Théories de l'Action Collective* (La Découverte 2007)

Cernic J, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 4 *Hanse Law Review* 71
— — 'Corporate Human Rights Obligations under Stabilization Clauses' (2010) 11 *German Law Journal* 210

Cerutti G and Guillaume M, 'Rapport sur l'Action de Groupe' (La Documentation Française 2005)

Chambers R, 'Is Home State Litigation the Way to Fill the Lacuna in Corporate Legal Accountability for Human Rights Violations Perpetrated in Host States?' (2009) 4 *Journal of Comparative Law* 133

Champeaux F and Marcon A, 'Le Juge Français, Dernier Espoir pour les Salariés Congolais' (2013) 1593 *Semaine Sociale Lamy* 9

Chaput F, 'L'Autonomie de la Filiale en Droit des Pratiques Anticoncurrentielles' [2010] *Contrats Concurrence Consommation* 11

Charney JI, 'Transnational Corporations and Developing Public International Law' [1983] *Duke Law Journal* 748

Chehtman A, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010)

Chorus J and Coppens EC, 'History' in Chorus J, Gerver PH and Hondius E (eds), *Introduction to Dutch Law* (4th edn, Kluwer Law 2006)

Choudhury B, 'Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses' (2005) 26 *Northwestern Journal of International Law & Business* 43

Christiansen E, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 *Colombia Human Rights Law Review* 321

Clapham A, *Human Rights in the Private Sphere* (OUP 1996)

— — *Human Rights Obligations of Non-State Actors* (OUP 2006)

— — 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899

— — *Human Rights and Non-State Actors* (Edward Elgar Publishing 2013)

Clapp J, 'Global Environmental Governance for Corporate Responsibility and Accountability' (2005) 5 *Global Environmental Politics* 23

Clavel S, 'Conflits de Lois: Loi Applicable aux Obligations Non Contractuelles' (2012) 2 *Journal du Droit International Clunet* 684

Clay T, 'Class Actions or Not Class Actions?' [2010] *Recueil Dalloz* 1776

Cobain I, 'Abuse Claims against Peru Police Guarding British Firm Monterrico' *The Guardian* (London, 18 October 2009)

<<http://www.theguardian.com/environment/2009/oct/18/british-mining-firm-peru-controversy>> accessed 30 November 2015

Colpan A, Hikino T and Lincoln J (eds), *The Oxford Handbook of Business Groups* (OUP 2010)

Conac PH, 'Le Groupe de Sociétés' (2013) 7-8 *Revue des Sociétés* 417

Connolly N, 'Corporate Social Responsibility: A Duplicitous Distraction?' (2012) 16 *International Journal of Human Rights* 1228

— — and Kaisershot M, 'Corporate Power and Human Rights' (2015) 19 *International Journal of Human Rights* 663

Coomans F, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749

— — 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

— — and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Cotula L, 'Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses' (2008) 1 *Journal of World Energy Law & Business* 158

Couret A and Dondero B, 'Condamnation d'un Fonds d'Investissement Étranger à Réparer le Préjudice Causé par une Opération de Restructuration' (2012) 35 *La Semaine Juridique Entreprise et Affaires* 1494

Cox G, 'The Trafigura Case and the System of Prior Informed Consent under the Basel Convention – A Broken System?' (2010) 6 *Law, Environment and Development Journal* 263

Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (OUP 1995)

— — 'The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights' in Baderin M and McCorquodale R (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007)

Crawford JR, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012)

Curran VG, 'Globalization, Legal Transnationalization and Crimes against Humanity: The *Lipietz Case*' (2008) 56 *American Journal of Comparative Law* 363

Cutler AC, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP 2003)

Cuzacq N, 'Le Cadre Normative de la RSE, Entre Soft Law et Hard Law' (7th Congrès du RIODD, Nantes, May 2012)

D'Alès T and Terdjman L, 'L'Écran Sociétaire, Rempart Face à la Mise en Cause d'une Société Mère du Fait de sa Filiale' (2014) 47 *La Semaine Juridique Entreprise et Affaires* 1584

D'Aspremont J (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011)

De Brabandere E, 'Non-State Actors, State Centrism and Human Rights Obligations' (2009) 22 *Leiden Journal of International Law* 191

De Cruz P, 'Comparative Law, Functions and Methods', *MPEPIL* (2009)
<<http://opil.ouplaw.com/>> accessed 30 November 2015

De Nerée B, 'Private Enforcement of Competition Law: A Dutch Perspective' (*The In-House Lawyer*, 10 June 2009) <<http://www.inhouselawyer.co.uk/index.php/the-netherlands/7363-private-enforcement-of-competition-law-a-dutch-perspective>> accessed 30 November 2015

De Sadeleer N, Roller G and Dross M, *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law Publishing 2005)

De Schutter O (ed), 'The Accountability of Multinationals for Human Rights Violations in European Law' in Alston P (ed), *Non-State Actors and Human Rights* (OUP 2005)

— — (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006)

— — 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in De Schutter O (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006)

— — 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (UN OHCHR Seminar, Brussels, 3-4 November 2006)

— — 'Corporate Social Responsibility European Style' (2008) 14 *European Law Journal* 203

— — *International Human Rights Law: Cases, Materials, Commentary* (2nd edn, CUP 2014)

— — 'Towards a Legally Binding Instrument on Business and Human Rights' (2015) CRIDHO Working Paper 2015/2

- De Sousa Santos B, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge 1995)
 — — *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn, CUP 2002)
 — — ‘Globalizations’ (2006) 23 *Theory, Culture & Society* 393
 — — and Carlet F, ‘The Movement of Landless Rural Workers in Brazil and their Struggles for Access to Law and Justice’ in Ghai Y and Cottrell J (eds), *Marginalized Communities and Access to Justice* (Routledge 2010)
- Dale J, *Free Burma: Transnational Legal Action and Corporate Accountability* (University of Minnesota Press 2011)
- Daniels S and Martin J, ‘Legal Services for the Poor: Access, Self-Interest, and Pro Bono’ in Rebecca Sandefur (ed), *Access to Justice* (Emerald Jai Press 2009)
- Daoud E and Le Corre C, ‘Arrêt Erika: Marée Verte sur le Droit de la Responsabilité Civile et Pénale des Compagnies Pétrolières’ (2012) 122 *Bulletin Lamy Droit Pénal des Affaires*
 — — ‘À la Recherche d’une Présomption de Responsabilité des Sociétés Mères en Droit Français’ (2012) 4330 *Revue Lamy Droit des Affaires* 63
 — — ‘La Responsabilité Pénale des Personnes Morales en Droit de l’Environnement’ (2013) 44 *Bulletin du Droit de l’Environnement Industriel* 53
- Daoud E and André A, ‘La Responsabilité Pénale des Entreprises Transnationales Françaises: Fiction ou Réalité Juridique?’ [2012] *AJ Pénal* 15
- David R and Brierley J, *Major Legal Systems in the World Today* (3rd edn, Carswell Legal 1985)
- Davies M, *Asking the Law Question* (3rd edn, Lawbook Co 2008)
- Deckert K, ‘Corporate Criminal Liability in France’ in Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011)
- Decocq G, ‘Présomption de Responsabilité de la Société Mère des Infractions Commises par ses Filiales Détenues à 100%’ (2011) 3 *Revue Contrats Concurrence Consommation* 31
- Della Porta D, ‘Social Movement’ (*Oxford Bibliographies*, 2011)
 <<http://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0050.xml>> accessed 30 November 2015
 — — and Diani M, *Social Movements: An Introduction* (2d edn, Blackwell 2006)
- Delmas-Marty M, ‘La Mondialisation du Droit: Chances et Risques’ [1999] *Recueil Dalloz* 43
- Desplanques M, ‘Les Délégations de Pouvoirs : Principes et Actualités’ (2011) 3682 *Revue Lamy Droit des Affaires* 96

Desportes F, 'La Responsabilité Pénale des Personnes Morales' [2002] *JurisClasseur Sociétés* Traité, Fasc. 28-70
— — and Le Gunehec F, *Le Nouveau Droit Pénal. Tome 1: Droit Pénal Général* (Economica 1995)

Deva S, "'Protect, Respect and Remedy": A Critique of the SRSG's Framework for Business and Human Rights' in Buhmann K, Roseberry L and Morsing M (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan 2011)
— — 'Sustainable Development: What Role for the Company Law' (2011) 8 *International & Comparative Corporate Law Journal* 76
— — and Bilchitz D (eds), *Human Rights Obligations for Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)

Dezalay Y and Garth B, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 *Law and Society Review* 27

Dezalay Y and Sugarman D (eds), *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets* (Routledge 1995)

Dhooge LJ, 'The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism' (2003) 35 *Georgetown Journal of International Law* 3

Diani M, 'The Concept of Social Movement' (1992) 40 *The Sociological Review* 1

Dickerson H, 'Best Practices', *MPEPIL* (2010) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Dickinson A, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2010)

Dignam A and Lowry J, *Company Law* (5th edn, OUP 2009)

Dine J, *The Governance of Corporate Groups* (CUP 2005)
— — 'Using Companies to Oppress the Poor' in Dine J and Fagan A (eds), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation* (Edward Elgar 2006)
— — *Companies, International Trade and Human Rights* (CUP 2010)
— — 'Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?' (2012) 3 *Journal of Human Rights and the Environment* 44

Dobson JM, 'Lifting the Veil in Four Countries: The Law of Argentina, England, France and the United States' (1986) 35 *International and Comparative Law Quarterly* 839

- Doh JP and Guay TR, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective' (2006) 43 *Journal of Management Studies* 47
- Doherty B and Doyle T, *Environmentalism, Resistance and Solidarity: The Politics of Friends of the Earth International* (Palgrave Macmillan 2013)
- Donald A and Mottershaw E, 'Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study' (2009) 1 *Journal of Human Rights Practice* 339
- Dondero B, 'Conseil à une Mère: Ne Pas se Mêler des Affaires de sa Filiale...' (2015) 14 *La Semaine Juridique Entreprise et Affaires* 1159
- Donson F, 'Libel Cases and Public Debate – Some Reflections on Whether Europe Should Be Concerned About SLAPPs' (2010) 19 *RECIEL* 83
- Doswald-Beck L, 'Fair Trial, Right to, International Protection', *MPEPIL* (2013) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Dowell K, 'CoA Agrees That Leigh Day Must Reduce Trafigura Success Fee' (*The Lawyer*, 12 October 2011) <<http://www.thelawyer.com/coa-agrees-that-leigh-day-must-reduce-trafigura-success-fee/1009750.article>> accessed 30 November 2015
- Dufresne R, 'The Opacity of Oil: Oil Corporations, Internal Violence and International Law' (2004) 36 *New York University Journal of International Law and Politics* 331
- Dumure-Lambert L, 'Le Co-Emploi: À la Recherche d'un Payeur plus que d'un Employeur' *Huffington Post France* (Paris, 26 July 2013) <http://www.huffingtonpost.fr/laurence-dumure-lambert/le-co-emploi-en-france_b_3657348.html> accessed 30 November 2015
- Dunoff JL, 'Does Globalization Advance Human Rights?' (1999) 25 *Brooklyn Journal of International Law* 125
- Dupouy S, 'La Responsabilisation Environnementale des Groupes de Sociétés par le Grenelle: Enjeux et Perspectives' (2012) 11 *Droit des Sociétés*
- Dupuy PM, Petersmann EU and Francioni F (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009)
- Duruigbo E, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 *Northwestern Journal of International Human Rights* 222
- Dwyer D (ed), *The Civil Procedure Rules Ten Years On* (OUP 2009)

Easterbrook F and Fischel D, 'Limited Liability and the Corporation' (1985) 52 *The University of Chicago Law Review* 89

Eaton JP, 'The Nigerian Tragedy of Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal* 261

Ebbesson J, 'Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework' in Winter G (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (CUP 2006)

— — 'Piercing the State Veil in Pursuit of Environmental Justice' in Ebbesson J and Okowa P (eds), *Environmental Law and Justice in Context* (CUP 2009)

— — 'Access to Justice in Environmental Matters', *MPEPIL* (2009)

<<http://opil.ouplaw.com/>> accessed 30 November 2015

Ebeku K, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12 *RECIEL* 199

Enneking LFH, 'Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases' (2009) 40 *George Washington International Law Review* 903

— — *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing 2012)

— — 'Multinationals and Transparency in Foreign Direct Liability Cases: The Prospects for Obtaining Evidence under the Dutch Civil Procedural Regime on the Production of Exhibits' (2013) 3 *The Dovenschmidt Quarterly* 134

— — 'The Future of Foreign Direct Liability? Exploring the International Relevance of the *Dutch Shell Nigeria Case*' (2014) 10 *Utrecht Law Review* 44

Eslava L, 'Corporate Social Responsibility & Development: A Knot of Disempowerment' (2008) 2 *Oñati Journal of Emergent Socio-Legal Studies* 43

— — and Pahuja S, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America* 195

Fagbohun O, 'The Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of the Dumping of Toxic Waste in Abidjan, Cote d'Ivoire' (2007) 37 *Hong Kong Law Journal* 831

Farrelly P, 'A Chance to Overhaul Libel Laws' *The Guardian* (London, 24 February 2010) <<http://www.guardian.co.uk/commentisfree/2010/feb/24/report-chance-overhaul-laws>> accessed 30 November 2015

- Fatouros AA, 'Problèmes et Méthodes d'une Règlementation des Entreprises Multinationales' (1974) 101 *Journal du Droit International* 495
- Ferrari J, 'La Société Mère Peut-Elle Voir sa Responsabilité Engagée dans le Cadre de la RSE?' (2012) 4332 *Revue Lamy Droit des Affaires* 72
- Fiadjoe A, *Alternative Dispute Resolution: A Developing World Perspective* (Routledge 2004)
- Fillastre M, Kyeremeh A and Watchorn M, 'Commercial Code' (*Legifrance*, 1 July 2013) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015
- Fishman B, 'Binding Corporations to Human Rights Norms through Public Law Settlement' (2006) 81 *New York University Law Review* 1433
- Focarelli C, 'Denial of Justice', *MPEPIL* (2013) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Foley V and Nolan C, 'The Erika Judgement – Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed' (2009) 33 *Tulane Maritime Law Journal* 41
- Fombad CM, 'The Dynamics of Record-Breaking Endemic Corruption and Political Opportunism in Cameroon' in Mukum Mbaku J and Takougang J (eds), *The Leadership Challenge in Africa: Cameroon under Paul Biya* (Africa World Press 2004)
- Foster NHD, 'Company Law Theory - England and France' (2000) 48 *American Journal of Comparative Law* 573
- — 'The Theoretical Background: The Nature of the Actors in Corporate Social Responsibility' in Tully S (ed), *Research Handbook on Corporate Legal Personality* (Edward Elgar Publishing 2005)
- — 'Perception, Language and "Reality" in Corporate Law Theory' (2006) 17 *King's College Law Journal* 299
- Fowler RJ, 'International Environmental Standards for Transnational Corporations' (1995) 25 *Environmental Law* 1
- Francioni F, 'Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin Be Held Responsible?' in Francioni F and Scovazzi T (eds), *International Responsibility for Environmental Harm* (Kluwer 1991)
- — (ed), *Access to Justice as a Human Right* (OUP 2007)
- — 'The Right of Access to Justice under Customary International Law' in Francioni F (ed), *Access to Justice as a Human Right* (OUP 2007)
- — 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *European Journal of International Law* 729

François L, 'Les Affrontements par l'Information entre les Entreprises et la Société Civile: l'Activisme Judiciaire en Question' (2007) 7 *Market Management Revue Internationale des Sciences Commerciales* 65

Freeman B, Pica MB and Camponovo CN, 'New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights' (2001) 24 *Hastings International and Comparative Law Review* 423

Friedman M, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (New York, 13 September 1970)
— — *Capitalism and Freedom* (3rd edn, University of Chicago Press 2002)

Friedrich J, 'Environment, Private Standard-Setting', *MPEPIL* (2009) <<http://opil.ouplaw.com/>> accessed 30 November 2015
— — 'Codes of Conduct', *MPEPIL* (2010) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Frowein JA, 'Obligations Erga Omnes', *MPEPIL* (2008) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Frydman B, 'Coregulation: A Possible Legal Model for Global Governance' in De Schutter B and Pas J (eds), *About Globalization: Views on the Trajectory of Mondialization* (VUB Brussels University Press 2004)
— — 'Comment Penser le Droit Global?' in Chérot JY and Frydman B (eds), *La Science du Droit dans la Globalisation* (Bruylant 2012)
— — and Hennebel L, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' in Kumar Sinha M (ed), *Business and Human Rights* (SAGE 2013)

Frynas JG, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43 *Journal of African Law* 121
— — *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (LIT 2000)
— — 'Corporate and State Responses to Anti-Oil Protests in the Niger Delta' (2001) 100 *African Affairs* 27
— — 'Social and Environmental Litigation against Transnational Firms in Africa' (2004) 42 *Journal of Modern African Studies* 363
— — 'Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention' (2012) 17 *Ecology and Society* 4

Fuchs A, 'Article 26: Public Policy of the Forum' in Huber P (ed), *Rome II Regulation: Pocket Commentary* (Sellier 2011)

Fuchs C, 'Environment, Role of Non-Governmental Organizations', *MPEPIL* (2009) <<http://opil.ouplaw.com/>> accessed 30 November 2015

- Galanter M, 'Law's Elusive Promise: Learning from Bhopal' in Likosky M (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths 2002) — — and Krishnan JK, "'Bread for the Poor": Access to Justice and the Rights of the Needy in India' (2004) 55 *Hastings Law Journal* 789
- Gallois A, 'La Responsabilité Pénale des Personnes Morales: Une Responsabilité à Repenser' [2011] *Bulletin Lamy Droit Pénal des Affaires* 1
- Garapon A, 'French Legal Culture and the Shock of Globalization' (1995) 4 *Social and Legal Studies* 535
- Garcia FJ, 'Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 25 *Brooklyn Journal of International Law* 51
- Gatto A, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar 2011)
- Gauthier T, *Les Dirigeants et les Groupes de Sociétés* (Litec 2000)
- Gearey A, *Globalization and Law: Trade, Rights, War* (Rowman & Littlefield Publishers 2005)
- Gerritsen MT, 'Jurisdiction' in Swart B and Klip A (eds), *International Criminal Law in the Netherlands* (Max-Planck-Institut für Ausländisches und Internationales Strafrecht 1997)
- Gessner V, 'Global Legal Interaction and Legal Cultures' (1994) 7 *Ratio Juris* 132 — —, Hoeland A and Varga C (eds), *European Legal Cultures* (Dartmouth 1996)
- Ghai Y and Cottrell J, 'The Rule of Law and Access to Justice' in Ghai Y and Cottrell J (eds), *Marginalized Communities and Access to Justice* (Routledge 2010)
- Gilbert DU, Rasche A and Waddock S, 'Accountability in a Global Economy: The Emergence of International Accountability Standards' (2011) 21 *Business Ethics Quarterly* 23
- Giliker P, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010)
- Glenn PH, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 *McGill Law Journal* 863
- Goldhaber M, 'Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard' (2013) 3 *UC Irvine Law Review* 127
- Goldsmith J and Posner E, *The Limits of International Law* (OUP 2005)

- Gordon K, 'The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison' (2001) *OECD Working Papers on International Investment* No 2001/5
- Gorski S, 'Individuals in International Law', *MPEPIL* (2013) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Gotanda J, 'Punitive Damages: A Comparative Analysis' (2004) 42 *Columbia Journal of Transnational Law* 391
- Grimonprez B, 'Pour une Responsabilité des Sociétés Mères du Fait de leurs Filiales' [2009] *Revue des Sociétés* 715
 — — 'L'Infraction Environnementale et le Préjudice Moral des Associations' (2011) 8-9 *Environnement et Développement Durable* 22
- Grossman C and Bradlow DD, 'Are We Being Propelled Towards a People-Centered Transnational Legal Order ?' (1993) 9 *American University International Law Review* 1
- Gruning D, 'Civil Code' (*Legifrance*, 1 July 2013)
 <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015
- Guinchard S, Chainais C and Ferrand F, *Procédure Civile: Droit Interne et Droit de l'Union Européenne* (32nd edn, Dalloz 2014)
- Hadden T, *The Control of Corporate Groups* (IALS 1983)
- Habisch A and others, *Corporate Social Responsibility across Europe* (Springer 2005)
- Hafner-Burton EM and Tsutsui K, 'Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most' (2007) 44 *Journal of Peace Research* 407
- Hammerslev O, 'How to Study Danish Judges' in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- Hannigan B, *Company Law* (3rd edn, OUP 2012)
- Hannoun C, *Le Droit et les Groupes de Sociétés* (Librairie Générale de Droit et de Jurisprudence 1991)
 — — 'La Responsabilité Environnementale des Sociétés-Mères' (2009) 6 *Environnement* 33
- Hanqin X, *Transboundary Damage in International Law* (CUP 2003)
- Hansen R, 'Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill' (2008) 26 *Berkeley Journal of International Law*

Haravon M, 'Quel Procès Civil en 2010: Regard Comparé sur l'Accès à la Justice en Angleterre, aux États-Unis et en France' (2010) 62 *Revue Internationale de Droit Comparé* 895

Harding A (ed), *Access to Environmental Justice: A Comparative Study* (Martinus Nijhoff Publishers 2007)

Harrison J, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31 *Impact Assessment and Project Appraisal* 107

Hautefort M, 'Co-Employeur: Le Véritable Employeur Est Celui qui Détient les Pouvoirs' (2012) 314 *Jurisprudence Sociale Lamy*

Henderson T, 'Social Change, Judicial Activism and the Public Interest Lawyer' (2003) 33 *Washington University Journal of Law and Policy* 33

Hendrik Van Rhee C, 'Locus Standi in Dutch Civil Litigation in Comparative Perspective' (2014) Maastricht Faculty of Law Working Paper 2014/03
<<http://ssrn.com/abstract=2376162>> accessed 30 November 2015

Hennebel L, 'L'Affaire Total-Unocal en Birmanie Jugée en Europe et aux États-Unis' (2006) CRIDHO Working Paper 2006/9
<http://cridho.uclouvain.be/en/publications/working_papers.php> accessed 30 November 2015

— — 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' (2009) 32 <<http://ssrn.com/abstract=1922188>> accessed 30 November

Hepple B, 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct' (1999) 20 *Comparative Labour Law and Policy Journal* 347

Herdegen M, 'International Economic Law', *MPEPIL* (2014) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Héron J and Le Bars T, *Droit Judiciaire Privé* (5th edn, Domat 2012)

Hillemanns CF, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 4 *German Law Journal* 1065

Hirsch A and Evans R, 'Lawyers for Claimants in Trafigura Case Seek £105m in Costs' *The Guardian* (London, 10 May 2010)
<<http://www.theguardian.com/world/2010/may/10/trafigura-claimants-lawyers-costs-bill>> accessed 30 November 2015

- Hodges C, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing 2008)
 — — ‘From Class Actions to Collective Redress’ (2009) 28 *Civil Justice Quarterly* 41
 — — ‘Collective Redress: A Breakthrough or a *Damp Squibb?*’ (2014) 37 *Journal of Consumer Policy* 67
- Hodgson J, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing 2005)
- Hoecke MV and Warrington M, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 *International and Comparative Law Quarterly* 495
- Hofstetter K, ‘Parent Responsibility for Subsidiary Corporations: Evaluating European Trends’ (1990) 39 *International and Comparative Law Quarterly* 576
 — — ‘The Ecological Liability of Corporate Groups: Comparing US and European Trends’ in Teubner G, Farmer L and Murphy D (eds), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Wiley 1994)
- Holzer B, *Moralizing the Corporation: Transnational Activism and Corporate Accountability* (Edward Elgar Publishing 2010)
- Holzmeyer C, ‘Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe v. Unocal*’ (2009) 43 *Law & Society Review* 271
- Horovitz S, ‘The Role of Victims’ in Carter L and Pocar F (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar 2013)
- Huisman W and Van Sliedregt E, ‘Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity’ (2010) 8 *Journal of International Criminal Justice* 803
- layton R and Murphy C, ‘The Emergence of the EU Charter of Fundamental Rights in United Kingdom Law’ [2014] *European Human Rights Law Review* 469
- Job E, ‘Ivory Coast Toxic Waste Victims Still Await Payments’ *Voice of America* (Abidjan, 12 November 2015) <<http://www.voanews.com/content/ivory-coast-toxic-waste-victims-still-await-payments/3056111.html>> accessed 30 November 2015
- Ireland P, ‘Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality’ (1996) 17 *Legal History* 40
 — — ‘Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility Limited Liability’ (2010) 34 *Cambridge Journal of Economics* 837

Israel D, 'Bolloré Attaqué en France pour ses Plantations au Cambodge' *Mediapart* (Paris, 28 July 2015)
<<http://www.mediapart.fr/article/offert/00e872ed766ee319161b3513f8f2066d>> accessed 30 November 2015

Jacob H, 'Introduction' in Jacob H and others (eds), *Courts, Law & Politics in Comparative Perspective* (Yale University Press 1996)

Jägers N, 'The Legal Status of the Multinational Corporation under International Law' in Addo MK (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)
— — *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002)
— — 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability' (2011) 29 *Netherlands Quarterly of Human Rights* 159
— — 'Will Transnational Private Regulation Close the Governance Gap?' in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)
— — and Van Der Heiden MJ, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law* 833

Jans JH and Marseille AT, 'The Role of NGOs in Environmental Litigation against Public Authorities: Some Observations on Judicial Review and Access to Court in the Netherlands' (2010) 22 *Journal of Environmental Law* 373

Jesse KD and Koppe V, 'Business Enterprises and the Environment: Corporate Environmental Responsibility' (2013) 4 *The Dovenschmidt Quarterly* 176

Jessup P, *Transnational Law* (Yale University Press 1956)

Joseph S, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171
— — *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004)
— — 'Protracted Lawfare: The Tale of Chevron Texaco in the Amazon' (2012) 3 *Journal of Human Rights and the Environment* 70

Kaleck W and Saage-Maaß M, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8 *Journal of International Criminal Justice* 699

Kamminga MT, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC' in Alston P (ed), *The EU and Human Rights* (OUP 1999)
— — 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2001) 23 *Human Rights Quarterly* 940
— — 'Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel' in Ryngaert C, Molenaar EJ and Nouwen SMH (eds), *What's Wrong with International Law? Liber Amicorum AHA Soons* (Brill Nijhoff 2015)

- — and Zia-Zarifi S, *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000)
- Karavias M, *Corporate Obligations under International Law* (OUP 2013)
- Kay R, ‘The European Convention on Human Rights and the Control of Private Law’ (2005) 5 *European Human Rights Law Review* 466
- Keck M and Sikkink K, *Activists Beyond Borders: Advocacy Networks in International Political* (Cornell University Press 1998)
- Kelly MJ, ‘Prosecuting Corporations for Genocide under International Law’ (2012) 6 *Harvard Law & Policy Review* 339
- — ‘“Never Again”? German Chemical Corporation Complicity in the Kurdish Genocide’ (2013) 31 *Berkeley Journal of International Law* 348
- Kerr M and Cordonier Segger MC, ‘Corporate Social Responsibility: International Strategies and Regimes’ in Cordonier Segger MC and Weeramantry CG (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff Publishers 2005)
- Kessler AD, ‘Limited Liability in Context: Lessons from the French Origins of the American Limited Partnership’ (2003) 32 *Journal of Legal Studies* 511
- Keulen BF and Gritter E, ‘Corporate Criminal Liability in the Netherlands’ in Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011)
- — ‘Corporate Criminal Liability in the Netherlands’ (2010) 14.3 *EJCL*, 3
<<http://www.ejcl.org/143/abs143-9.html>> accessed 30 November 2015
- Khan R, ‘Global Compact’, *MPEPIL* (2011) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Khoury S, ‘Transnational Corporations and the European Court of Human Rights: Reflections on the Indirect and Direct Approaches to Accountability’ (2010) 4 *Sortuz Oñati Journal of Emergent Socio-Legal Studies* 68
- Kings S, ‘Mining Boss Found Liable for Company’s Environment Damage’ *Mail & Guardian* (4 February 2014) <<http://mg.co.za/article/2014-02-04-director-found-liable-for-companys-environment-damage>> accessed 30 November 2015
- Kinley D and Tadaki J, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 *Virginia Journal of International Law* 931

- Kirshner JA, 'Why is the US Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty, and the Alien Tort Statute' (2012) 30 *Berkeley Journal of International Law* 259
- — 'A Call for the EU to Assume Jurisdiction Over Extraterritorial Corporate Human Rights Abuses' (2015) 13 *Northwestern Journal of International Human Rights* 1
- Klip A and Van Der Wilt H, 'Netherlands' Report for the International Association of Penal Law' (2004) 73 *Revue Internationale de Droit Pénal* 1091
- Kløcker Larsen R, 'Foreign Direct Liability Claims in Sweden: Learning from *Arica Victims KB v. Boliden Mineral AB?*' (2014) 83 *Nordic Journal of International Law* 404
- Knox JH, 'A Presumption against Extrajurisdictionality' (2010) 104 *American Journal of International Law* 351
- — 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Mares R (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012)
- Koh HH, 'Transnational Public Law Litigation' (1991) 100 *Yale Law Journal* 2347
- — 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181
- — 'Separating Myth from Reality about Corporate Responsibility Litigation' (2004) 7 *Journal of International Economic Law* 263
- Kokkini-Iatridou D and De Waart PJIM, 'Foreign Investment in Developing Countries: Legal Personality of Multinationals in International Law' (1983) 14 *Netherlands Yearbook of International Law* 87
- Könz P, 'Law and Global Environmental Management: Some Open Issues' in Brown Weiss E (ed), *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press 1992)
- Kopela S, 'Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution: The Erika Case' (2011) 20 *RECIEL* 313
- Koskeniemi M, 'International Legal Theory and Doctrine', *MPEPIL* (2007)
<<http://opil.ouplaw.com/>> accessed 30 November 2015
- Kunda I and Gonçalves De Melo Marinho CM, 'Practical Handbook on European Private International Law' (European Union 2010)
- Künnemann R, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)
- Kvale S, *InterViews: An Introduction to Qualitative Research Interviewing* (Sage Publication 1996)

Le Corre C and Daoud E, 'La Présomption d'Influence Déterminante: L'Imputabilité à la Société Mère des Pratiques Anticoncurrentielles de sa Filiale' (2012) 4334 *Revue Lamy de Droit des Affaires* 83

Le Gunehec C, 'Le Fait Justificatif Tiré de la Notion de Groupe de Sociétés dans le Droit Pénal Français de l'Abus de Biens Sociaux' (1987) 58 *Revue Internationale de Droit Pénal* 117

Lambooy T, Argyrou A and Varner M, 'An Analysis and Practical Application of the Guiding Principles on Providing Remedies with Special Reference to Case Studies Related to Oil Companies' in Bilchitz D and Deva S (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)

Lawson R, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Leader S, 'Three Faces of Justice and the Management of Change' (2000) 63 *The Modern Law Review* 55

Lee I, 'Corporate Criminal Responsibility as Team Member Responsibility' (2011) 31 *Oxford Journal of Legal Studies* 755

Leebron D, 'Limited Liability, Tort Victims, and Creditors' (1991) 91 *Columbia Law Review* 1565

Legendre A (ed), *L'Action Collective ou Action de Groupe: Se Préparer à son Introduction en Droit Français et en Droit Belge* (Larcier 2010)

Legrand P, 'The Impossibility of "Legal Transplants"' (1997) *Maastricht Journal of European and Comparative Law* 111

Leigh D and Hirsch A, 'Paper Prove Trafigura Ship Dumped Toxic Waste in Ivory Coast' *The Guardian* (London, 14 May 2009)
<<http://www.guardian.co.uk/environment/2009/may/13/trafigura-ivory-coast-documents-toxic-waste>> accessed 30 November 2015

Lenaerts K, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375

Lepage C, 'Erika: "Une Avancée Tout à Fait Considérable du Droit de l'Environnement"' (2012) 11 *Environnement*

Letnar Černič J and Van Ho T (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers 2015)

Likosky M (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths 2002)

Lippman M, 'Transnational Corporations and Repressive Regimes: The Ethical Dilemma' (1985) 15 *California Western International Law Journal* 542

Liptak A, 'Foreign Courts Wary of US Punitive Damages' *New York Times* (New York, 26 March 2008)
<http://www.nytimes.com/2008/03/26/us/26punitive.html?pagewanted=all&_r=0> accessed 30 November 2015

Lloyd Muse D, 'Discovery in France and The Hague Convention: The Search for a French Connection' (1989) 64 *New York University Law Review* 1073

Loos M, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union: Country Report The Netherlands' (Civil Consulting 2008)

López C, 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility' in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)

Loughlin M, "What Is Constitutionalisation?" in Dobner P and Loughlin M (eds), *The Twilight of Constitutionalism?* (OUP 2010)

Loussouarn Y, Bourel P, and De Vareilles-Sommières P, *Droit International Privé* (9th edn, Dalloz 2007)

Machuhi E, 'Court Halts Lamu Port Construction' *Business Daily* (28 November 2014)
<<http://www.businessdailyafrica.com/Court-halts-Lamu-port-construction/-/539546/2537434/-/muhff7/-/index.html>> accessed 30 November 2015

Macklem P, 'Indigenous Rights and Multinational Corporations at International Law' (2001) 24 *Hastings International & Comparative Law Review* 475

MacLeod S, 'Corporate Social Responsibility within the European Union Framework' (2005) 23 *Wisconsin International Law Journal* 541

Magnier V and Alleweldt R, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union: Country Report France' (Civic Consulting 2008)

Mak C, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' (2012) *Amsterdam Law School Research No 2012-88*
<<http://ssrn.com/abstract=2126551>> accessed 30 November 2015

Malanczuk P, 'Globalization and the Future Role of Sovereign States' in Weiss F, Denters EMG, De Waart PJIM (eds), *International Economic Law with a Human Face* (Kluwer Law International 1998)

Marboe I and Reinish A, 'Contracts between States and Foreign Private Law Persons', *MPEPIL* (2011) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Martin-Ortega O, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 *Netherlands Quarterly of Human Rights Law* 44

Maassen G and Van Den Bosch F, 'On the Supposed Independence of Two-Tier Boards: Formal Structure and Reality in the Netherlands' (1999) 7 *Corporate Governance: An International Review* 31

Mathey N, 'La Responsabilité Sociale des Entreprises en Matière de Droits de l'Homme' (2010) 3 *Cahiers de Droit de l'Entreprise*

Mattei U and Lena J, 'United States Jurisdiction Over Conflicts Arising Outside of the US: Some Hegemonic Implications' (2001) 24 *Hastings International and Comparative Law Review* 381

McBeth A, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *Yale Human Rights and Development Law Journal* 127
— — *International Economic Actors and Human Rights* (Routledge 2010)

McCahery J, Picciotto S and Scott C, *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation* (Clarendon Press 1995)

McCorquodale R, 'Impact on State Responsibility' in Kamminga MT and Scheinin M (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009)
— — and Simons P, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598

McFarland Sánchez-Moreno M and Higgins T, 'No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia' (2004) 27 *Fordham International Law Journal* 1663

McGoldrick D, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Meeran R, 'The Unveiling of Transnational Corporations: A Direct Approach' in Addo MK (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)

— — ‘Cape Plc: South African Mineworkers’ Quest for Justice’ (2003) 9 *International Journal of Occupational and Environmental Health* 218

— — ‘Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States’ (2011) 3 *City University of Hong Kong Law Review* 1

Mégret F, ‘Globalization’, *MPEPIL* (2009) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Méndez Pinedo E, ‘Access to Justice as Hope in the Dark: In Search for A New Concept in European Law’ (2011) 1 *International Journal of Humanities and Social Sciences* 9

Menkel –Meadow C, ‘The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers’ in Sarat A and Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998)

— — ‘Why and How to Study “Transnational” Law’ (2011) 1 *UC Irvine Law Review* 97

Mercinier E, ‘La Dégénérescence de l’Article 121-2 du Code Pénal’ (2011) 3681 *Revue Lamy Droit des Affaires* 91

Michalowski S (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013)

— — ‘Due Diligence and Complicity: A Relationship in Need of Clarification’ in Deva S and Bilchitz D (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013)

Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP 2011)

Miranda LA, ‘The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law’ (2007) 11 *Lewis & Clark Law Review* 135

Monsma D, ‘Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility’ (2006) 33 *Ecology Law Quarterly* 443

Morgera E, ‘CSR for the International Protection of the Environment: The Impact of UN Policies and Emerging Problems’ in Moreau MA and Francioni F (eds), *The Pluridisciplinary Dimension of Corporate Social Responsibility* (Presses Universitaires d’Aix-Marseille 2007)

— — *Corporate Accountability in International Environmental Law* (OUP 2009)

— — ‘Human Rights Dimensions of Corporate Environmental Accountability’ in Dupuy PM, Petersmann EU and Francioni F (eds), *Human Rights in Investment Law and Arbitration* (OUP 2009)

- Morimoto T, 'Growing Industrialization and Our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad' (2005) 1 Utrecht Law Review 134
- Morse CGJ, 'Not in the Public Interest? *Lubbe v. Cape PLC*' (2002) 37 Texas International Law Journal 541
- Morvan P, 'L'Identification du Co-Employeur' (2013) 46 La Semaine Juridique Social 1438
- Mowbray A, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004)
- Muchlinski P, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 International and Comparative Law Quarterly 1
 — — 'Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review' (2002) 23 Company Lawyer 168
 — — *Multinational Enterprises and the Law* (2nd edn, OUP 2007)
 — — 'The Provision of Private Law Remedies against Multinational Enterprises: a Comparative Law Perspective' (2009) 4 Journal of Comparative Law 148
 — — 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 Cambridge Journal of Economics 915
 — — 'Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights' in Noortmann M and Ryngaert C (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010)
 — — 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 Business Ethics Quarterly 145
 — — 'Beyond the Guiding Principles? Examining New Calls for a Legally Binding Instrument on Business and Human Rights' (*IHRB*, 15 October 2013)
 <<http://www.ihrb.org/commentary/guest/beyond-the-guiding-principles.html>> accessed 30 November 2015
 — — 'Corporations in International Law', *MPEPIL* (2014) <<http://opil.ouplaw.com/>> accessed 30 November 2015
 — —, Ortino F and Schreuer C (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)
 — — and Rouas V, 'Foreign Direct-Liability Litigation: Toward the Transnationalization of Corporate Legal Responsibility' in Blecher L, Kaymar Stafford N and Bellamy G (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association 2014)
- Mujih E, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower 2012)
- Muller M, *Corporate Law in the Netherlands* (3rd edn, Wolters Kluwer 2013)
- Mullerat R (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer law International 2005)

Murphy M and Vives J, 'Perceptions of Justice and the Human Rights Protect, Respect, and Remedy Framework' (2013) 116 *Journal of Business Ethics* 781

Nadelmann EA, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44 *International Organization* 479

Neate R, 'Ivory Coast Minister Quits Over "Missing" Trafigura Money' *The Guardian* (London, 24 May 2012) <<http://www.theguardian.com/world/2012/may/24/ivory-coast-minister-quits-trafigura-money>> accessed 30 November 2015

Nelken D, 'The Meaning of Success in Transnational Legal Transfers' (2001) 19 *Windsor Yearbook of Access to Justice* 349

— — 'Comparative Sociology of Law' in Banakar R and Travers M (eds), *Introduction to Law and Social Theory* (Hart Publishing 2002)

— — 'Using The Concept of Legal Culture' (Bag Lunch Speaker Series, Center for the Study of Law and Society, 2004)

Nesossi E, 'Civil litigation for Violations of International Human Rights Law: The Case of the Falun Gong under the Alien Tort Claims Act of 1783' (2009) 4 *Journal of Comparative Law* 44

Newell P, 'Access to Environmental Justice? Litigating against TNCs in the South' (2001) 32 *IDS Bulletin* 83

Neyret L, 'L'Affaire Erika: Moteur d'Évolution des Responsabilités Civile et Pénale' [2010] *Recueil Dalloz* 2238

Niboyet ML and De Geouffre de la Pradelle G, *Droit International Privé* (LGDJ 2007)

Nicholson M, 'McLibel: A Case Study in English Defamation Law' (2000) 18 *Wisconsin International Law Journal* 1

Nijboer JF, 'The Criminal Justice System' in Chorus J, Gerver PH and Hondius E, *Introduction to Dutch Law* (4th edn, Kluwer Law International 2006)

Nolan A, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 225

Nollkaemper A, 'Public International Law in Transnational Litigation against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands' in Kamminga M and Zia-Zarifi S (eds), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000)

— — 'Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives' in Winter G (ed), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (CUP 2006)

— — ‘The Duality of Direct Effect of International Law’ (2014) 25 *European Journal of International Law* 105

Noortmann M and Ryngaert C (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010)

Nowrot K, ‘New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities’ (ESIL Research Forum on International Law: Contemporary Problems, Geneva, 2005)

Nuyts A, ‘Study on Residual Jurisdiction - Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations’ (Report prepared for the European Commission, 2007)

Nystuen G, Follesdal A and Mestad O (eds), *Human Rights, Corporate Complicity and Disinvestment* (CUP 2011)

O’Boyle M, ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on “Life after Bankovic”’ in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Ong DM, ‘The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives’ (2001) 12 *European Journal of International Law* 685

Orbie J and Babarinde O, ‘The Social Dimension of Globalization and EU Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility’ (2008) 30 *Journal of European Integration* 459

Orrego Vicuña F, ‘Claims, International’, *MPEPIL* (2010) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Osofsky HM, ‘Learning From Environmental Justice: A New Model for International Environmental Rights’ (2005) 24 *Stanford Environmental Law Journal* 71
— — ‘Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria’ (2010) 1 *Journal of Human Rights and the Environment* 189

Palmer VV, ‘From Lerothi to Lando: Some Examples of Comparative Law Methodology’ (2005) 53 *The American Journal of Comparative Law* 261

Pantazopoulos SE, ‘Towards a Coherent Framework of Transnational Corporations’ Responsibility in International Environmental Law’ (2014) 24 *Yearbook of International Environmental Law* 131

Papadopoulos T and Moloney N, ‘EU Company Law’ in Vaughan D, Robertson A and Eleftheriadis P (eds), *Law of the European Union* (OUP 2012)

- Pardo F, *Le Groupe en Droit Pénal* (Lulu.com 2004)
- Pariente M, *Les Groupes de Sociétés* (Litec 1993)
 — — ‘Les Groupes de Sociétés et la Responsabilité Pénale des Personnes Morales’ (1993)
 2 *Revue des Sociétés* 247
- Parkinson JE, *Corporate Power and Responsibility : Issues in the Theory of Company Law* (Clarendon Press 1995)
- Paul JR, ‘Holding Multinational Corporations Responsible under International Law’ (2001)
 24 *Hastings International & Comparative Law Review* 285
- Paulsson J, *Denial of Justice in International Law* (CUP 2005)
- Pauwelyn J, ‘Fragmentation of International Law’, *MPEPIL* (2006)
 <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Pegg S and Zabbey N, ‘Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta’ (2013) 48 *Community Development Journal* 391
- Percival R, ‘Liability for Environmental Harm and Emerging Global Environmental Law’ (2010) 25 *Maryland Journal of International Law* 37
- Perotto J and Mathey N, ‘La Mise en Jeu de la Responsabilité de la Société Mère est-elle une Fatalité? Regards Croisés sur les Groupes de Sociétés et le Risque de Coemploi’ (2014)
 25 *La Semaine Juridique Social* 1262
- Perry A and Anderson M, ‘Access to Environmental Justice in Bangalore: Legal Gateways in Context’ (1996) SOAS Law Department Working Paper No 12
- Perotto J and Mathey N, ‘La Mise en Jeu de la Responsabilité de la Société Mère est-elle une Fatalité? Regards Croisés sur les Groupes de Sociétés et le Risque de Coemploi’ (2014)
 25 *La Semaine Juridique Social* 1262
- Petitjean O, ‘Comment Mettre les Entreprises Multinationales Face à Leurs Responsabilités? L’Action de Sherpa’ (*Observatoire des Multinationales*, 24 March 2014)
 <<http://multinationales.org/Comment-mettre-les-entreprises>> accessed 30 November 2015
- Picciotto S, *Regulating Global Corporate Capitalism* (CUP 2011)
- Pieth M and Ivory R (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer 2011)
- Pillay R, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – The Case of Mauritius* (Routledge 2015)

Pinte L, 'La Responsabilité Sociale des Entreprises: Un Nouvel Enjeu Fiscal' (2012) 9 *Revue de Droit Fiscal* 131

Portmann R, *Legal Personality in International Law* (CUP 2010)

Prihandono I, 'Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries' (2011) 3 *Journal of Law and Conflict Resolution* 89

— — 'Litigating Human Rights-Related Cases against TNCs in Indonesia' (2012) *LAWASIA* 113

— — 'Transnational Corporations and Human Rights Violations in Indonesia' (2013) 14 *Australian Journal of Asian Law* 1

— — and Islam R, 'Political Strategies of TNCs for Corporate Interest in Indonesian Public Interest Litigation: Lessons for Developing Countries Hosting FDIS' (2011) 12 *The Journal of World Investment & Trade* 701

— — and Esti Hayu Dewanty, 'Litigating Cross-Border Environmental Dispute in Indonesian Civil Court: The Montara Case' (2015) 1 *Indonesia Law* 14

Pring G, 'SLAPPs: Strategic Lawsuits against Public Participation' (1989) 7 *Pace Environmental Law Review* 3

Prosansky B, 'Mining Gold in a Conflict Zone: The Context, Ramifications, and Lessons of AngloGold Ashanti's Activities in the Democratic Republic of the Congo' (2007) 5 *Northwestern Journal of International Human Rights* 236

Provine DM, 'Courts in the Political Process in France' in Jacob H and others, *Courts, Law, and Politics in Comparative Perspective* (Yale University Press 1996)

Pushkareva E, 'Environmentally Sound Economic Activity, International Law', *MPEPIL* (2014) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Puvimanasinghe SF, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff Publishers 2007)

Quarta F, 'Recognition and Enforcement of US Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto' (2008) 31 *Hasting International and Comparative Law Review* 753

Rainey B, Wicks E and Ovey C, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, OUP 2014)

Ramasastri A, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability' (2015) 14 *Journal of Human Rights* 237

Raoul-Duval P and Stoyanov M, 'Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU: National Report for France' (Report prepared for the European Commission, 2007)

Rason Spencer QC J, 'Penal Code' (*Legifrance*, 12 October 2005)
<<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015

Ratner SR, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443

Rauxloh RE, 'A Call for the End of Impunity for Multinational Corporations' (2008) 14 *Texas Wesleyan Law Review* 297

Redfield S, 'Searching for Justice: The Use of Forum Necessitatis' (2014) 45 *Georgetown Journal of International Law* 893

Redgwell C, 'Access to Environmental Justice' in Francioni F (ed), *Access to Justice as a Human Right* (OUP 2007)

Reich-Graefe R, 'Changing Paradigms: The Liability of Corporate Groups in Germany' (2005) 37 *Connecticut Law Review* 785

Reydams L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2004)

Rheinstein M, 'Comparative Law: Its Functions, Methods and Usages' (1968) 22 *Arkansas Law Review and Bar Association Journal* 415

Rhode D, *Access to Justice* (OUP 2004)

Riedel E, 'International Covenant on Economic, Social and Cultural Rights (1966)', *MPEPIL* (2011) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Robé JP, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in Teubner G (ed), *Global Law Without a State* (Ashgate 1997)

Roberts S and Palmer M, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2nd edn, CUP 2005)

Roling S and Koenen T, *Human Rights Impact Assessments: A Tool Towards Better Business Accountability* (CSR Europe 2010)

Rontchevsky N, 'Commentaire' (2002) 2 *Revue Internationale de Droit Economique* 523

- Rousseau F, 'La Répartition des Responsabilités dans l'Entreprise' [2010] *Revue de Science Criminelle* 804
- Rubin HJ and Rubin IS, *Qualitative Interviewing: The Art of Hearing Data* (2nd edn, SAGE Publications 2005)
- Rubins N and Stephens-Chu G, 'Introductory Note to AFPS and PLO v Alstom and Veolia (Versailles Ct App)' (2013) 52 *International Legal Materials* 1157
- Rugendyke B (ed), *NGOs as Advocates for Development in a Globalising World* (Routledge 2007)
- Ruggie J, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *The American Journal of International Law* 819
- Rugman AM and Doh JP, *Multinationals and Development* (Yale University Press 2008)
- Ryngaert C, 'Litigating Abuses Committed by Private Military Companies' (2008) 19 *European Journal of International Law* 1035
 — — 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 *International Criminal Law Review* 187
 — — *Jurisdiction in International Law* (2nd edn, OUP 2015)
- Sacerdoti G, 'New International Economic Order (NIEO)', *MPEPIL* (2014)
 <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Sánchez SI, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on ECJ's Approach to Fundamental Rights' (2012) 49 *Common Market Law Review* 1565
- Sandefur RL (ed), *Access to Justice* (Emerald Jai 2009)
- Sands P, *International Environmental Law: Emerging Trends and Implications for Transnational Corporations* (United Nations 1993)
- Sarat A and Scheingold SA (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998)
 — — (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006)
- Scheper C, 'From Naming and Shaming to Knowing and Showing: Human Rights and the Power of Corporate Practice' (2015) 19 *International Journal of Human Rights* 737
- Schreuer C, 'Investments, International Protection', *MPEPIL* (2013)
 <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Schmitthoff C and Wooldridge F (eds), *Groups of Companies* (Sweet and Maxwell 1991)

Schwartz P, 'Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining' in Ebbesson J and Okowa O (eds), *Environmental Law and Justice in Context* (CUP 2009)

Seck SL, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (2008) 46 *Osgoode Hall Law Journal* 565, 601

— — 'Conceptualizing the Home State Duty to Protect Human Rights' in Buhmann K, Roseberry L and Morsing M (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Palgrave Macmillan 2011)

— — 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011) 3 *Trade, Law and Development* 164

Segerlund L, *Making Corporate Social Responsibility a Global Concern: Norm Construction in a Globalizing World* (Ashgate 2010)

Segonds M, 'Frauder l'Article 121-2 du Code Pénal' (2009) 9 *Droit Pénal* 19

Serverin E and Grumbach T, 'Promouvoir la Recevabilité des Actions Délictuelles à l'Égard des Sociétés-Mères des Groupes dans les Contentieux Engagés devant les Conseils de Prud'hommes' [2010] *Revue de Droit du Travail* 529

Shelton D, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria) Case No ACHPR/COMM/A044/1' (2002) 96 *The American Journal of International Law* 937

Sherman JF and Lehr A, 'Human Rights Due Diligence: Is It Too Risky?' (2010) Harvard University Corporate Social Responsibility Initiative Working Paper No 55

Shinsato AL, 'Increasing the Accountability of Transnational Corporations for Environmental Harms: the Petroleum Industry in Nigeria' (2005) 4 *Northwestern Journal of International Human Rights* 186

Siegele L and Ward H, 'Corporate Social Responsibility: A Step Towards Stronger Involvement of Business in MEA Implementation?' (2007) 16 *RECIEL* 135

Simons P, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 *Journal of Human Rights and the Environment* 5

Skinner G and others, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, ECCJ and CORE 2013)

Skogly SI, 'Economic and Social Human Rights, Private Actors and International Obligations' in Addo MK (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999)

Smith A, 'Shell Lied to Dutch Court About Oil Spills in Nigeria, Say Friends of the Earth' *Newsweek* (17 November 2014) <<http://europe.newsweek.com/shell-lied-dutch-court-about-oil-spills-nigeria-say-friends-earth-284900>> accessed 30 November 2015

Smith D, 'Shell Accused of Fuelling Violence in Nigeria by Paying Rival Militant Gangs' *The Guardian* (London, 3 October 2011)
<<http://www.guardian.co.uk/world/2011/oct/03/shell-accused-of-fuelling-nigeria-conflict>> accessed 30 November 2015

Snow D, Soule S, and Kriesi H (eds), *The Blackwell Companion to Social Movements* (Blackwell 2004)

Sornarajah M, *The International Law on Foreign Investment* (3rd edn, CUP 2010)
— — *Resistance and Change in the International Law on Foreign Investment* (CUP 2015)

Ssenyonjo M, 'Non-State Actors and Economic, Social, and Cultural Rights' in Baderin M and McCorquodale R (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007)

Staggenborg S, *Social Movements* (OUP 2011)

Steiner HJ, Vagts DF and Koh HH, *Transnational Legal Problems: Materials and Text* (4th edn, The Foundation Press 1994)

Stephens B, 'Corporate Liability: Enforcing Human Rights through Domestic Litigation' (2001) 24 *Hastings International & Comparative Law Review* 401
— — 'The Curious History of the Alien Tort Statute' (2014) 89 *Notre Dame Law Review* 1467

Sugarman D and Teubner G, *Regulating Corporate Groups in Europe* (Nomos 1990)

Sullivan R, 'The Influence of NGOs on the Normative Framework for Business and Human Rights' in Tully S (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar 2005)

Sun Beale S and Safwat AG, 'What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2005) 8 *Buffalo Criminal Law Review* 89

Sunstein C, 'Social and Economic Rights? Lessons from South Africa' (2001) Chicago John Olin Law & Economic Working Paper No 124 <<http://ssrn.com/abstract=269657>> accessed 30 November 2015

Taekema S (ed), *Understanding Dutch Law* (Boom Juridische Uitgevers 2004)

- Taylor D, 'BP Oil Spill: Colombian Farmers Sue for Negligence' *The Guardian* (London, 11 January 2011) <<http://www.theguardian.com/environment/2011/jan/11/bp-oil-spill-colombian-farmers>> accessed 30 November 2015
- Taylor M, Thompson R, and Ramasastry A, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses' (FAFO 2010)
- Terré F, 'Groupe de Travail sur le Projet Intitulé "Pour une Réforme du Droit de la Responsabilité Civile"' (Cour de Cassation 2012)
 — — and Dominique Fenouillet, *Droit Civil: Les Personnes (Personnalité, Incapacité, Protection)* (8th edn, Dalloz 2012) 263
- Terry J and Shody S, 'Could Canada Become a New Forum for Cases Involving Human Rights Violations Committed Abroad?' (2012) 1 *Commercial Litigation and Arbitration Review* 63
- Teubner G, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012)
- Teune S (ed), *The Transnational Condition: Protest Dynamics in an Entangled Europe* (Berghahn Books 2010)
- Thabane T, 'Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles' (2014) 14 *African Human Rights Law Journal* 43
- Tidjani AM, 'La Justice au Plus Offrant: Les Infortunes du Système Judiciaire en Afrique de l'Ouest (Autour du Cas du Niger)' (2001) 83 *Politique Africaine* 59
- Tolsma H, De Graaf K and Jans J, 'The Rise and Fall of Access to Justice in the Netherlands' (2009) 21 *Journal of Environmental Law* 309
- Tomlinson EA, 'Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking' (1988) 48 *Louisiana Law Review* 1299
- Tomuschat C, 'International Covenant on Civil and Political Rights (1966)', *MPEPIL* (2010) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Trébulle FG, 'Entreprise et Développement Durable (1ère Partie) Juin 2009/Juillet 2010' (2010) 12 *Environnement*
- Trechsel S, *Human Rights in Criminal Proceedings* (OUP 2005)

- Triponel A, 'Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad' in Morris AP and Estreicher S (eds), *Global Labor and Employment Law for the Practicing Lawyer* (Kluwer Law International 2010)
- Tsegaye YA, 'Code of Civil Procedure' (*Legifrance*, 30 September 2005) <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 30 November 2015
- Tully S (ed), *Research Handbook on Corporate Legal Personality* (Edward Elgar Publishing 2005)
- — "'Never Say Never Jurisprudence": Comparative Approaches to Corporate Responsibility under the Law of Torts' in Tully S (ed), *Research Handbook on Corporate Legal Personality* (Edward Elgar Publishing 2005)
- Twining W, *Globalisation and Legal Theory* (CUP 2000)
- Tzeuschler G, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad' (1999) 30 *Columbia Human Rights Law Review* 359
- Utting P, 'Corporate Responsibility and the Movement of Business' (2005) 15 *Development in Practice* 375
- — 'The Struggle for Corporate Accountability' (2008) 39 *Development and Change* 959
- Valguarnera F, 'Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action' (2010) 10 *Global Jurist* 1
- Van Boven T, 'Victims' Rights', *MPEPIL* (2007) <<http://opil.ouplaw.com/>> accessed 30 November 2015
- Van Dam C, 'Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights' (2011) 3 *JETL* 221
- — *European Tort Law* (2nd edn, OUP 2013)
- Van Den Broek B and Enneking L, 'Public Interest Litigation in the Netherlands: A Multidimensional Take on the Promotion of Environmental Interests by Private Parties through the Courts' (2014) 10 *Utrecht Law Review* 77
- Van Den Herik L, 'The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia' (2009) 9 *International Criminal Law Review* 211
- — 'The Dutch Engagement with the Project of International Criminal Justice' (2010) 57 *Netherlands International Law Review* 303
- Van Der Heijden MJ, 'Class Actions/Les Actions Collectives' (2010) 14.3 *EJCL* <<http://www.ejcl.org/143/abs143-18.html>> accessed 30 November 2015

Van Der Plancke V and others, 'Total: Le Viol de la Démocratie en Birmanie et en Belgique' (2005) 12 *La Revue Nouvelle* 34

Van Der Wilt H, 'Genocide v War Crimes in the Van Anraat Appeal' (2008) 6 *Journal of International Criminal Justice* 557

— — 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese Journal of International Law* 43

Van Hooijdonk M and Eijssvoogel PV, *Litigation in the Netherlands: Civil Procedure, Arbitration and Administrative Litigation* (2nd edn, Kluwer Law International 2012)

Van Wingerde K, 'The Limits of Environmental Regulation in a Globalized Economy: Lessons from the *Probo Koala* Case' in Van Erp J and others (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe* (Routledge 2015)

Vandekerckhove K, *Piercing the Corporate Veil* (Kluwer Law International 2007)

Vanhala L, 'Legal Mobilisation' (*Oxford Bibliographies*, 2011)

<<http://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0031.xml>> accessed 30 November 2015

— — 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law & Society Review* 523

Vazquez CM, 'Direct vs Indirect Obligations of Corporations under International Law' (2004) 43 *Columbia Journal of Transnational Law* 927

Verkerk RR, 'Multinational Corporations and Human Rights: Civil Procedure as a Means of Obtaining Transparency' (2013) 3 *The Dovenschmidt Quarterly*

Verschuuren J, 'The Netherlands' in Louis Kotzé and Alexander Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Wolters Kluwer 2009)

Vidal J, *McLibel – Burger Culture on Trial* (Macmillan 1997)

— — 'Shell Accepts Liability for Two Oil Spills in Nigeria' *The Guardian* (London, 3 August 2011) <<http://www.theguardian.com/environment/2011/aug/03/shell-liability-oil-spills-nigeria>> accessed 30 November 2015

— — 'Shell Nigeria Oil Spill '60 Times Bigger Than I Claimed' *The Guardian* (London, 23 April 2012) <<http://www.theguardian.com/environment/2012/apr/23/shell-nigeria-oil-spill-bigger>> accessed 30 November 2015

— — 'Shell Attacked Over Four-Year Delay in Niger Delta Oil Spill Clean-Up' *The Guardian* (London, 23 September 2012)

<<http://www.theguardian.com/environment/2012/sep/23/shell-attacked-niger-oil-spill-clean-up-delay>> accessed 30 November 2015

— — 'Lawyers Leigh Day: Troublemakers Who Are a Thorn in the Side of Multinationals' *The Guardian* (London, 2 August 2015) <<http://www.theguardian.com/global->

development/2015/aug/02/leigh-day-troublemaker-fight-dispossessed-lawyers> accessed 30 November 2015

Vidalon D and Guillaume G, 'French Builder Vinci to Sue Over Claims of Forced Labor in Qatar' *REUTERS* (Paris, 24 March 2015) <<http://www.reuters.com/article/2015/03/24/us-vinci-qatar-labour-conditions-idUSKBN0MK00H20150324>> accessed 30 November 2015

Viñuales JE, *Foreign Investment and the Environment in International Law* (CUP 2012)

Viottolo A, 'Le Co-Emploi ou Comment Rechercher le "Vrai" Employeur dans un Groupe' [2013] *Les Cahiers Lamy du CE*

Vlas P, 'Dutch Private International Law: The 2001 Act Regarding Conflict of Laws on Torts' (2003) 50 *Netherlands International Law Review* 221

Voet S, 'European Collective Redress Developments: A Status Quaestionis' (2014) 4 *International Journal of Procedural Law* 97

Vogel D, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2005)

Vogelaar T, 'Asser Institute Lectures on International Law: Multinational Corporations and International Law' (1980) 27 *Netherlands International Law Review* 69

Wade CEJ, 'Forum Non Conveniens' (1965) 18 *Oklahoma Law Review* 423

Wagner M, 'Non-State Actors', *MPEPIL* (2013) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Wai R, 'The Interlegality of Transnational Private Law' (2008) 71 *Law and Contemporary Problems* 107

Waldman L, 'When Social Movements Bypass the Poor: Asbestos Pollution, International Litigation and Griqua Cultural Identity' (2007) 33 *Journal of Southern African Studies* 577

Walter C, 'Subjects of International Law', *MPEPIL* (2007) <<http://opil.ouplaw.com/>> accessed 30 November 2015

Wambali MKB, 'The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania' (2009) 53 *Journal of African Law* 34

Ward H, 'Foreign Direct Liability: A New Weapon in the Performance Armoury' (The Royal Institute of International Affairs 2000)

— — 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 *Hastings International and Comparative Law Review* 451

- — ‘Towards a New Convention on Corporate Accountability? Some Lessons from the Thor Chemicals and Cape PLC Cases’ [2002] *Yearbook of International Environmental Law* 105
- — ‘Legal Issues in Corporate Citizenship’ (Globalt Ansvar and IIED 2003)
- — ‘The Interface between Globalisation, Corporate Responsibility, and the Legal Profession’ (2004) 1 *University of St Thomas Law Journal* 813
- Warendorf H, Thomas R and Curry-Sumner I, *The Civil Code of the Netherlands* (2nd edn, Wolters Kluwer 2013)
- Warner MA, ‘Globalization and Human Rights: An Economic Model’ (1999) 25 *Brooklyn Journal of International Law* 99
- Watson A, *Legal Transplants* (Scottish Academic Press 1974)
- — ‘Legal Transplants and European Private Law’ (2000) 4(4) *EJCL* <<http://www.ejcl.org/44/art44-2.html>> accessed 30 November 2015
- Webster T, ‘Ambivalence and Activism: Employment Discrimination in China’ (2011) 44 *Vanderbilt Journal of Transnational Law* 643
- Weeramantry C, ‘Human Rights and the Global Marketplace’ (1999) 25 *Brooklyn Journal of International Law* 27
- Weissberg K and Moissinac MC, ‘Piercing the Corporate Veil in France’ (1987) 6 *International Financial Law Review* 33
- Weigend T, ‘*Societas Delinquere Non Potest?* A German Perspective’ (2008) 6 *Journal of International Criminal Justice* 927
- Weissbrodt D, ‘Roles and Responsibilities of Non-State Actors’ in Shelton D (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013)
- — and Kruger M, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 *The American Journal of International Law* 901
- Wells C, *Corporations and Criminal Responsibility* (2nd edn, OUP 2001)
- — ‘Corporate Criminal Responsibility’ in Tully S (ed), *Research Handbook on Corporate Legal Personality* (Edward Elgar Publishing 2005)
- Werro F, ‘Comparative Studies in Private Law: A European Point of View’ in Bussani M and Mattei U (eds), *The Cambridge Companion to Comparative Law* (CUP 2012)
- West Janke B and Licari FX, ‘Enforcing Punitive Damage Awards in France after Fountain Pajot’ (2012) 3 *American Journal of Comparative Law* 775

- Wheeler S, 'Global Production, CSR and Human Rights: the Court of Public Opinion and the Social Licence to Operate' (2015) 19 *International Journal of Human Rights* 757
- Wildhaber L, 'Asser Institute Lectures on International Law: Some Aspects of the Transnational Corporation in International Law' (1980) 27 *Netherlands International Law Review* 79
- Williams J, '*Al Skeini*: A Flawed Interpretation of *Bankovic*' (2005) 23 *Wisconsin International Law Journal* 687
- Winckler A, 'Parent's Liability: New Case Extending the Presumption of Liability of a Parent Company for the Conduct of its Wholly Owned Subsidiary' (2011) 2 *Journal of European Competition Law & Practice* 231
- Wouters J and Ryngaert C, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40 *George Washington International Law Review* 939
- Wouters J and Chané AL, 'Multinational Corporations in International Law' (2013) KU Leuven Working Paper 129
- Wrbka S, Van Uytsel S and Siems M (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (CUP 2012)
- Wyatt D and others, *European Union Law* (5th edn, Hart Publishing 2006)
- Wythes A, 'Investor–State Arbitrations: Can the “Fair and Equitable Treatment” Clause Consider International Human Rights Obligations?' (2010) 23 *Leiden Journal of International Law* 241
- Yap J, 'Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from *Bil'in (Village Council) v Green Park International Ltd*' (2010) 8 *Journal of International Criminal Justice* 631
- Yap PJ and Lau H (eds), *Public Interest Litigation in Asia* (Routledge 2011)
- Yaziji M and Doh JP, *NGOs and Corporations: Conflict and Collaboration* (CUP 2009)
- Zerk JA, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006)
- — 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) Harvard University Corporate Social Responsibility Initiative Working Paper No 59
- — 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (Report prepared for the OHCHR, 2014)

Zia-Zarifi S, 'Suing Multinational Corporations in the US for Violating International Law' (1999) 4 *UCLA Journal of International Law and Foreign Affairs* 81

Zumbansen P, 'The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Firms and States' in Bratspies RM and Miller RA, *Transboundary Harm in International Law* (CUP 2010)

Zweigert K and Kötz H, *An Introduction to Comparative Law* (3rd edn, OUP 1998)

Appendix I

Fieldwork – Research Respondents

Person	Activities	Country/Date of Interview
Lawyer 1	Litigation against MNEs	The Netherlands/2013
Lawyer 2	Litigation against MNEs ; Campaigns for corporate accountability	France/2013
Lawyer 3	Litigation against MNEs	Belgium/2013
Lawyer 4	Litigation against MNEs	Italy/2013
Campaigner 1	Litigation against MNEs; Campaigns for corporate accountability	The Netherlands/2013
Campaigner 2	Litigation against MNEs; Campaigns for corporate accountability	United Kingdom/2013