Paying the Price for Socially Irresponsible Business Practices?

Corporate Liability for Violations of Human Rights and the Environment Abroad

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In recent years, there has been a strong increase in transnational civil liability claims brought against multinationals before home country courts in relation to the detrimental impacts of their activities on people and the planet in host countries. The trend towards these «foreign direct liability cases» originated in the US in the mid-1990s, but has since spread to Europe. It coincides with and augments the already existing socio-political pressure on policymakers, especially following the establishment of the UN Guiding Principles on Business and Human Rights, to come up with regulatory measures aimed at promoting international corporate social responsibility and accountability. Building on the results of a Dutch study into corporate duties of care with respect to international corporate social responsibility, this article discusses the international trend towards these cases from a comparative perspective and links it to the Swiss Responsible Business Initiative.

Immer häufiger werden multinationale Unternehmen in ihrem Sitzstaat für Tätigkeiten belangt, die in anderen Staaten negative Auswirkungen auf die Bevölkerung und Umwelt hatten. Der Trend, eine solche im Ausland verursachte Verantwortlichkeit direkt im Sitzstaat des Unternehmens vor Gericht zu bringen, entstand in den 1990er-Jahren in den USA und hat sich seither auf Europa ausgeweitet. Diese Entwicklung geht nicht nur mit dem bereits existierenden gesellschaftspolitischen Druck auf Entscheidungsträger einher. Insbesondere seit der Verabschiedung der Leitprinzipien zu Wirtschaft und Menschenrechten der UNO erhöht sie diesen Druck auch in Bezug auf die Ausarbeitung von regulatorischen Massnahmen zur Förderung der sozialen Verantwortung und Rechenschaftspflichten von Unternehmen auf internationaler Ebene. Dieser Beitrag, dem eine niederländische Studie zu unternehmerischen Sorgfaltspflichten im Bereich der internationalen gesellschaftlichen Verantwortung von Unternehmen zugrunde liegt, zeigt diesen Trend in sechs europäischen Staaten auf und thematisiert in Bezug auf die Schweiz die sog. Konzernverantwortungsinitiative.

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I. Introduction[1]

Over the past two decades, Western societies around the world have witnessed a growing trend towards transnational civil liability claims brought against multinationals before home country courts in relation to the detrimental impacts of their activities on people and the planet in host countries. These «foreign direct liability cases» are typically initiated by host country citizens who have suffered harm as a result of the activities of internationally operating business enterprises – including those of their foreign subsidiaries and business partners – but are somehow unable to get access to effective remedies locally. In response, they turn to courts in the Western society home countries of the corporate actors involved, often with the help of home country-based NGOs, in search of an adequate level of protection of their interests. These cases coincide with and augment the already existing socio-political pressure on policymakers in these countries, especially following the establishment of the UN Guiding Principles on Business and Human Rights (UNGPs)[2], to come up with regulatory measures aimed at promoting international corporate social responsibility and accountability.

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1 This contribution is partly based on Liesbeth Enneking, Judicial remedies: The issue of applicable law, in: Juan José Alvarez-Rúbio/Katerina Yiannibas (eds.), Human rights in business – Removal of barriers to access to justice in the European Union, London 2017, 38–77 (cit. Enneking 2017); Liesbeth Enneking/François Kristen/Kinanya Pijl/Tjalling Waterbolk/Jessy Emaus/Marjosse Hiel/Anne-Jetske Schaap/Ivo Giesen, Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen, Report of a study by the Utrecht Centre for Accountability and Liability Law (Utrecht University) for the Dutch Ministries of Security & Justice and Foreign Affairs], The Hague 2016 (cit. Enneking et al. 2016); Liesbeth Enneking, The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case, Utrecht Law Review 1/2014, 44–54 (cit. Enneking 2014); Liesbeth Enneking, Foreign direct liability and beyond, The Hague 2012 (cit. Enneking 2012).

2 Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations «Protect, Respect and Remedy» Framework, 21.3.2011, UN Doc. A/HRC/17/31.

This article will discuss the international trend towards foreign direct liability cases from a comparative perspective and will link it to the Swiss Responsible Business Initiative. Chapter II will provide an overview of the development of the trend towards foreign direct liability cases and a characterization of this type of litigation. In chapter III, the legal *status quo* in the Netherlands and five neighbouring countries as regards corporate duties of care in the context of international corporate social responsibility will be further examined. Chapter IV will provide a discussion in which the findings will be used as a basis for reflection on the Swiss Responsible Business Initiative.

II. Foreign Direct Liability and Beyond[3]

Although the particular focus and set-up of foreign direct liability cases tends to vary according to their factual background and the legal context in the country of suit, they typically deal with corporate accountability for violations of written or unwritten norms pertaining to human rights, health and safety, the environment and/or labour issues. Most of the claims are directed at Western society-based parent companies of multinational corporations but relate to violations that have occurred in the course of activities carried out in the host country by or in association with local subsidiaries, business partners and/or sub-contractors.

The trend towards this type of litigation originated in the US, where it found fertile ground due to a combination of circumstances. One of these was the «rediscovery» in the 1980s of the 1789 Alien Tort Statute (ATS)[4], and its subsequent use as a basis for civil claims before US federal courts against multinationals for their involvement in international human rights violations perpetrated outside of the US. In combination with lenient rules on personal jurisdiction, that made it possible to bring such claims also against non-US companies, as well as a plaintiff-friendly litigation culture, this resulted in increasing numbers of claims against a wide range of Western society-based multinationals. Examples include high-profile cases against Shell for its alleged involvement in human rights violations perpetrated by the Nigerian military regime against environmental activists in the mid-1990s[5], and against a group of companies including Ford and IBM for their alleged involvement in the human rights violations perpetrated by the South African apartheid regime[6].

The pursuit of foreign direct liability cases has not remained confined to US federal courts and/or to the ATS as a legal basis. Similar cases have also been brought before US state courts and before courts in other Western countries like the UK, France, the Netherlands, Germany and Switzerland. In the absence of an ATS-equivalent, these claims have been based on other, less exotic legal bases, in particular the tort of negligence. As a consequence, the claims in European foreign direct liability cases tend to revolve around alleged violations of written and unwritten norms pertaining to due care with respect to human rights, health and safety, labour and/or environmental risks inherent in the activities undertaken. Examples include high-profile cases before courts in the UK and in the Netherlands against oil trader Trafigura for its involvement in the Probo Koala waste dumping-incident in the Ivory Coast in 2006[7], and against Shell for a range of oil spill incidents from Shell-operated pipelines in Nigeria[8].

These foreign direct liability cases are perceived by many as a much-needed accountability mechanism for corporate violations of human rights and the environment in developing societies where victims' chances of obtaining (enforceable) remedies are slim. The remedies sought usually comprise damages and/or other forms of relief such as injunctions aimed at preventing further harm, declaratory judgments, disgorgement of profits etc. A key feature of these cases is that they are generally not only aimed at securing redress for harm suffered by past activities, but also at achieving broader, more future-oriented aims. On the one hand, they may provide incentives for the internationally operating business enterprises involved to exercise a higher level of care for the local inhabitants and local environment in their future operations, and to urge their subsidiaries and/or supply chain partners to do the same. On the other hand, they may create transparency and debate in the home countries where they are brought on the detrimental impacts that corporate activities may have on people and the planet abroad.

Although the far majority of foreign direct liability cases have so far been brought before US federal courts

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3 This section is largely based on Enneking 2017 (FN 1), 39–43; Enneking et al. 2016 (FN 1), 75–83; Enneking 2014 (FN 1); Enneking 2012 (FN 1), 77–128.

4 28 United States Code § 1350.

5 See in more detail and with further references Business & Human Rights Resource Centre, Internet: https://business-human-rights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa (last visited 26.7.2017).

6 *Idem,* Internet: https://business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa (last visited 26.7.2017).

7 *Idem,* Internet: https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire (last visited 26.7.2017).

8 *Idem,* Internet: https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria (last visited 26.7.2017).

on the basis of the ATS, the relevance of non-ATS-based claims is increasing. This is linked to the fact that the role of the ATS in this context has gradually subsided over the past decade. The US Supreme Court's decision in the case of *Kiobel v. Royal Dutch Petroleum*[9], which reduced the international scope of the ATS to claims that *«touch and concern the territory of the United States […] with sufficient force»*[10], has to date been the most serious setback in this respect for those seeking to rely on the ATS to hold multinationals (especially non-US ones) accountable for overseas human rights violations. Meanwhile, the rules on personal jurisdiction in US courts have also become stricter, thus (further) reducing the possibilities for foreign direct liability claims before US courts against corporate defendants that are not «essentially at home» in the US[11].

These developments have fostered a growing interest in the legal feasibility of foreign direct liability cases against internationally operating business enterprises before domestic courts in Europe. The numbers of European foreign direct liability claims are rising, as is the number of individual countries where courts have been asked to deal with them. At the same time, the range of claims brought is diversifying, as civil liability claims are more and more often complemented or preceded by criminal liability claims, or by claims with a legal basis from fields such as company law, consumer law, competition law etc. The same is true for the range of internationally operating business enterprises that are confronted with these claims, as the focus is widening from parent company liability for activities carried out locally by subsidiaries to the liability of – for instance – retailers for the harmful consequences of the operations of their local (sub-)contractors, financial service providers for the harmful consequences of projects they have (co-)financed, and certification agencies for the harmful consequences of production processes they have certified.

III. Corporate Duties of Care in the Netherlands and Five Neighbouring Countries[12]

In 2015, a comparative study was conducted by the Utrecht Centre for Accountability and Liability Law at the request of the Dutch Ministries of Security & Justice and Foreign Affairs into the duties of care of Dutch business enterprises operating internationally with respect to international corporate social responsibility. The aim of this study was to establish whether and to what extent Dutch law (more particularly legislation and case law in the fields of company law, tort law and criminal law) is in conformity with the UNGPs, which was a question that had been raised in the 2013 Dutch National Action Plan on Business & Human Rights.[13] The study looked at the legal *status quo* in the Netherlands and in five neighbouring countries: Belgium, France, Germany, Switzerland and the UK. In addition, the study included the results of an empirical study with a limited scope on the influence of legislation and case law in the field of international corporate social responsibility on the national business climate. For this empirical part of the study, open, semi-structured interviews were held in all of the legal systems studied with experts on this issue from various backgrounds (policymaking, business, academic and civil society).

A. General Overview

The study showed that since the early 1990s at least 35 cases dealing with corporate accountability for violations of human rights and environmental standards abroad have been pursued in the six legal systems studied.[14] Similar cases have been reported in a number of other countries that fell outside the scope of this study, including for instance Sweden[15] and Italy[16], and a number of new cases have already been initiated since its publication[17]. This means that the number of cases pursued so far before domestic courts in Europe is likely to be around at least 40 in total, with numbers rising especially in recent years. The

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9 *Kiobel v. Royal Dutch Petroleum,* 133 S. Ct. 1659 (2013).

10 *Idem,* at 1669.

11 *Goodyear Dunlop Tires Operations S.A. v. Brown,* 564 U.S. 915 (2011), 131 S. Ct. 2846, at 2853; *Daimler AG v. Bauman,* 571 U.S. __ (2014), 134 S. Ct. 746 (2014), at 760.

12 This section is largely based on Enneking et al. 2016 (FN 1). See for the full-text version in Dutch and the executive summary in English: Internet: https://www.wodc.nl/onderzoeksdatabase/2531-maatschappelijk-verantwoord-ondernemen-in-het-buitenland.aspx (last visited 26.7.2017).

13 Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights, April 2014, Internet: https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf (last visited 26.7.2017), 28.

14 Enneking et al. 2016 (FN 1), 35–44, 163–164, 190–193, 224–231, 265–275, 315–316, 439–442.

15 See in more detail and with further references Business & Human Rights Resource Centre, Internet: https://business-humanrights.org/en/boliden-lawsuit-re-chile (last visited 26.7.2017).

16 *Idem,* Internet: https://business-humanrights.org/en/eni-lawsuit-re-oil-spill-in-nigeria (last visited 26.7.2017).

17 See for a relatively up-to-date and inclusive overview of relevant cases Business & Human Rights Resource Centre, Internet: https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled (last visited 26.7.2017).

majority of these cases have so far been pursued before English and French courts. The English cases all involved civil liability claims, whereas the majority of the French cases involved criminal liability claims. This difference may at least in part be explained by the fact that in the UK there is a relatively low threshold for the initiation of civil claims, whereas in France the possibilities for civil parties to push on the initiation of criminal investigations on the one hand, and to join criminal procedures with civil claims on the other hand, are relatively broad.[18]

What should be noted is that company law is almost never used as a legal basis for claims in this context. None of the 35 cases found was based primarily on statutory or judge-made grounds for piercing of the corporate veil. This is no doubt a result of the fact that in all of the legal systems studied, courts will only allow veil piercing under very exceptional circumstances, which usually include some sort of abuse of the corporate form and/or two corporate entities that are so closely connected in practice that they are basically one and the same.[19] Veil piercing did play a role as an alternative legal basis in a recent French case pertaining to the unlawful dismissal of Gabonese railway workers. The plaintiffs in this case asserted, among other things, that the French parent company of the Comilog group could be viewed as a «co-employer» of the former employees of its Gabonese subsidiary who had been unlawfully dismissed. This particular legal concept derives from an existing line of case law in the field of French labour law, where former employees of an insolvent subsidiary may try to claim severance pay from the parent company if the employee is or appears to be a subordinate of the parent company, or if the parent company has extensively intervened in the management of the subsidiary.[20] In the *Comilog* case, the claims made on this basis against the parent company were all dismissed; the court did however grant a number of the claims that were made against the subsidiary on other legal grounds.[21]

B. Parent Company Liability

The majority of the civil liability procedures that were identified involved foreign direct liability claims against the parent companies of multinational corporations based in the country of suit in relation to the harmful effects of activities carried out in host countries by their local subsidiaries. It should be stressed that these claims do not represent a form of veil piercing, since they deal with the liability of the parent company for its own actions and omissions on the basis of (an equivalent of) the tort of negligence. Consequently, these claims are typically formulated as a failure on behalf of the parent company to exercise sufficient care towards employees, neighbours and communities in the host country that were at risk of suffering harm as a result of activities carried out locally by a (sub-)subsidiary. The standard of liability in these cases is then connected to whether the parent company could and should have been aware of this risk and whether it could and should have exercised control over the way in which the activities in question were carried out as to prevent this risk from materializing.

It is important to mention here that of the 35 cases identified, only very few have so far led to court verdicts on the merits in which issues of (parent company) liability are fully addressed. Still, courts in various European countries have been willing to at least consider the possibility that the parent company of a corporate group owes a duty of care towards third parties (workers, neighbours, communities) whose environmental, labour, human rights and/or health and safety related interests are negatively affected by the operations of its subsidiaries, and that it may be liable in case of a breach of that duty. This is evidenced for instance by the case of *Chandler v Cape,* an English case of 2012 in which a parent company of a corporate group was held liable, both at first instance and on appeal, for asbestos-related injuries suffered by an employee of one of its subsidiaries, as it was considered to have breached a duty of care owed to the employee.[22] Strictly speaking, this case cannot be characterized as a foreign direct liability case and/or a case dealing with duties of care in the context of international corporate social responsibility since it lacks a transnational element. However, it has proven to be highly influential for cases in that context also outside the UK, not least because the systems of tort law of those host countries that are former British

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18 Enneking et al. 2016 (FN 1), 634–648.

19 *Ibidem*.

20 Enneking et al. 2016 (FN 1), 351–353, 372–373. See also for instance: Karen Vandekerckhove, Piercing the corporate veil, Alphen aan de Rijn 2007, 445–446, 448–449; Karl Hofstetter, Parent responsibility for subsidiary corporations: evaluating European trends, International and Comparative Law Quarterly 3/1990, 576–598, at 586–587.

21 Cour d'Appel de Paris, Arrêt du 10 Septembre 2015, Nos. S 11/05955–S 11/05960 (on file with the author). In more detail Enneking et al. 2016 (FN 1), 351–353, 371–373.

22 *Chandler v Cape plc* [2012] EWCA Civ 525.

colonies (like Nigeria) are derived from the English system of tort law.[23]

The issue of parent company liability was also addressed in the *Dutch Shell Nigeria* case, which is now pending before the Hague Court of Appeal. It involves claims against the Anglo-Dutch parent company Royal Dutch Shell and its Nigerian subsidiary by Nigerian farmers and the Dutch NGO Milieudefensie in relation to damage caused by oil spills in the Ogoniland region of the Niger Delta.[24] In its final ruling in January 2013, the Hague District Court granted one of the claims against the Nigerian subsidiary that related to an abandoned wellhead; according to the court, the subsidiary was liable because it had been negligent in leaving behind the wellhead without adequately securing it, thus making it simple for saboteurs to unscrew its valves.[25] The claims against the parent company were all dismissed, however, as the court found that under the applicable Nigerian tort law a parent company does not in principle have a legal obligation to prevent its subsidiaries from causing harm to third parties except under special circumstances (which the court did not find to exist).[26]

In coming to its conclusion on the issue of parent company liability, the court relied heavily on English tort law, including the aforementioned *Chandler* precedent. It however distinguished the *Dutch Shell Nigeria* case from the *Chandler* case. According to the court, a duty of care towards employees of a subsidiary operating in the same country as the parent is not the same as a duty towards neighbours of oil pipelines that are being operated by a subsidiary in another country. Another factor that the court deemed to be relevant was the fact that the damage – which, on the basis of the available evidence, it assumed to have been caused by sabotage and not faulty maintenance as claimed by the plaintiffs – had not been caused by the subsidiary directly but by third parties (the saboteurs). Finally, the court pointed out that not all of the *Chandler* criteria were met in the case at hand, as it felt that *«the businesses of the parent and subsidiary»* were not *«in a relevant respect the same»*.[27] The question may be raised whether this narrow focus on the (facts of the) *Chandler* case and the criteria set out in the latter is justified. In the end, it seems altogether possible that also under different circumstances parent companies of multinational corporations may owe a duty of care to third parties in host countries that stand to be detrimentally affected by the groups' activities there.[28]

Interestingly, the defendants' assertion that the claims against the parent company constitute an abuse of rights/procedure as they are «evidently without merit» and «merely serve as an anchor» to create jurisdiction over the claims against the subsidiary, has repeatedly been rejected. Both the Hague District Court and the Hague Court of Appeal have in response to this assertion expressly stated that parent company liability is a possible scenario in this type of litigation and also in the case at hand.[29] In a 2015 interlocutory judgment on a number of preliminary issues including the question of jurisdiction, the Court of Appeal, which has not yet dealt with the merits of the case, even went a step further. It stated, *inter alia:*

> Considering the foreseeably serious consequences of oil spills for, among other things, the local environment of a potential spill-site, it cannot be ruled out in advance that the parent company may under such circumstances be expected to take to heart the interest of preventing such spills (or, in other words, that a duty of care exists […]), especially since the parent has prioritized the prevention of environmental damage resulting from the activities of group companies and is to a certain extent actively involved in and exercises control over the operations of those companies, which however does not mean that the absence of such involvement and control would render a violation of that duty of care inconceivable and would rule out the possibility that a culpable disregard of those interests could lead to liability.[30]

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[23] See in more detail, for instance: Enneking et al. 2016 (FN 1), 292–296; Siel Demeyere, Liability of a Mother Company for its Subsidiary in French, Belgian, and English Law, European Review of Private Law 3/2015, 385–413; Loes Lennarts, De zorgplicht van de moedervennootschap jegens werknemers van de dochter naar Engels recht: *«do cases make bad law»?,* in: Bastiaan-Assink et al. (eds.), De toekomst van het ondernemingsrecht, Deventer 2015, 315–329.

[24] In more detail Enneking et al. 2016 (FN 1), 99–102; Enneking 2014 (FN 1).

[25] The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9854 (re oil spills near Ikot Ada Udo), §§ 4.38–4.46.

[26] The Hague District Court, 30 January 2013, ECLI:NL:RBDHA:2013:BY9845 (oil spill near Goi), §§ 4.30–4.39, ECLI:NL:RBDHA:2013:BY9850 (oil spill near Oruma), §§ 4.32–4.41, ECLI:NL:RBDHA:2013:BY9854 (oil spills near Ikot Ada Udo), §§ 4.26–4.34.

[27] The Hague District Court, 30 January 2013, LJN:ECLI:NL:RBDHA:2013:BY9845 (oil spill near Goi), §§ 4.30–4.39, LJN:ECLI:NL:RBDHA:2013:BY9850 (oil spill near Oruma), §§ 4.32–4.41, LJN:ECLI:NL:RBDHA:2013:BY9854, §§ 4.26–4.34 (quote from Chandler v Cape plc [2012] EWCA Civ 525).

[28] Similarly Lennarts (FN 23), 324.

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

[30] The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:2015:3586 (oil spill near Goi), § 3.2, ECLI:NL:GHDHA:2015:3587 (oil spill near Ikot Ada Udo), § 2.2, ECLI:NL:GHDHA:2015:3588 (oil spill near Oruma), § 2.2 (translation by the author).

The court added to this:

> This is not changed by the fact that according to Shell there are no judgments by Nigerian courts in which parent company liability on this basis has been assumed. This does not mean, after all, that Nigerian law by definition does not provide any leads for the assumption under certain (or rather: those particular) circumstances of a (violation of a) duty of care of the parent company, also not with respect to the clean-up of the oil spills and the prevention of further spills.[31]

It will thus be very interesting to see what the court will make of the issue of parent company liability in the *Dutch Shell Nigeria* case when it gets to its decision on the merits of the case. As the court points out in a subsequent consideration, however, Dutch courts will need to exercise restraint when it comes to starting a new line of case law when applying a legal system that is not their own.[32] Still, despite this limitation, it seems that the Hague Court of Appeal is willing to entertain the thought that there may be grounds for parent company liability in this case, more so than the Hague District Court proved to be in its decision on this issue in 2013.[33] The Hague Court of Appeal is currently awaiting the results of a further study by experts into the question whether the oil spills in dispute where caused by faulty maintenance, as claimed by the plaintiffs, or by sabotage, as claimed by the defendants, and will take those into account when reaching a decision on the merits.[34]

C. Opportunities and Limitations

All in all, very little case law exists in the legal systems studied on the duties of care of Europe-based business enterprises operating internationally with respect to people and the planet in host countries. Still, in all of these systems there seem to be possibilities for the development of a line of case law on, for instance, parent company liability in this context, as each system has some sort of equivalent of the English tort of negligence, which has so far proven to provide the most promising avenue for claims.[35] At the same time, most of these legal systems have existing lines of case law on similar issues that may be relevant for cases dealing with international corporate social responsibility. An example is the line of case law that exists in the field of Dutch tort law with respect to duties of care that parent companies may under certain circumstances owe to the creditors of their subsidiaries. There seems to be no reason why this line of case law could not be extended to cases dealing with involuntary rather than voluntary creditors, and with personal injuries or environmental harm rather than financial harm.[36]

In the same vein, it may also be possible to extend existing case law on the tort of negligence and/or parent company liability to claims concerning supply chain liability, particularly where a Western society-based retailer has a strong *de facto* influence, not in a proprietary sense but in a contractual and/or economic sense, over the (harmful) activities of its supply chain partners. An example is the case against the German clothing retailer KiK that is currently pending before the Landgericht Dortmund, in which descendants of the Pakistani employees of one of its main suppliers who died in a factory fire are seeking to hold the German company liable.[37] Furthermore, depending on the circumstances of the case, existing forms of strict(er) liability may also come into play, for instance, liability for the risks inherent in dangerous substances or defective products, or for wrongful acts or omissions by employees, appointees and/or independent contractors in carrying out their tasks or projects.[38]

In Swiss scholarly literature, there has long been speculation about the possibility of extending the provision on vicarious liability of the employer for harm caused by employees or other auxiliaries in the accomplishment of their tasks (art. 55 Code of Obligations) to parent company-subsidiary relationships.[39] Similarly, the now revised

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31 *Ibidem* (translation by the author).

32 *Ibidem.*

33 Similarly: Cees Van Dam, Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case, 14.1.2016, Internet: http://www.ceesvandam.info/default.asp?fileid=643 (last visited 26.7.2017), 5.

34 See for a relatively up-to-date timeline of the case [Dutch language version more up-to-date than English language version]: Internet: milieudefensie.nl/shell-in-nigeria/rechtszaak/belangrijke-momenten-van-de-rechtszaak (last visited 26.7.2017).

35 In more detail Enneking et al. 2016 (FN 1), 634–648. See also, for instance: Demeyere (FN 23); Jennifer Zerk, Corporate liability for gross human rights violations, Towards a fairer and more effective system of domestic law remedies, Report prepared for the Office of the UN High Commissioner for Human Rights (July 2013), Internet: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf (last visited 26.7.2017), 43–48.

36 Similarly: Lennarts (FN 23); Enneking et al. 2016 (FN 1), 174–177; Enneking 2012 (FN 1), 237–238.

37 See the legal opinion on liability in this case which was drafted by law professors from the Essex University Business and Human Rights Project (Internet: https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html [last visited 26.7.2017]).

38 See for a discussion of the potential role of strict liabilities according to Dutch tort law in this context Enneking et al. 2016 (FN 1), 181–190.

39 See already Hofstetter (FN 20), 591. See also, with a focus on human rights and environmental harm: Rolf Weber/Rainer Baisch, Liability of parent companies for human rights violations of subsidiaries, European Business Law Review 5/2016, 669–695; Christine Kaufmann et al., Mise en œuvre des droits humains

French general provision on vicarious liability (art. 1384 Code Civil) has also led to speculation, in view of its broad application in case law, on its potential as a basis for holding parent companies liable for harm caused by their subsidiaries.[40] Moreover, two of the proposals for a revised title on non-contractual obligations in the French Code Civil have included specific provisions on vicarious liability of parent companies for harm caused as a result of the activities of their subsidiaries.[41] Neither of these has made it into the revised title, however, and the provision on vicarious liability has been narrowed down to a number of specific situations that seem to be of limited relevance for the issue under discussion here.[42] Still, the introduction in the French Code Civil of a new chapter on the reparation of ecological harm may open up interesting new possibilities for foreign direct liability cases dealing with environmental harm.[43]

It has to be stressed that any discussion on the availability of potential grounds for liability in the context of international corporate social responsibility in European domestic legal systems is moot if the law applied to the case is that of the host country rather than the home country. It should be noted here that the applicable law will generally determine not only the availability of statutory and case law upon which the victims may base their claims, but also, *inter alia,* the available remedies, levels of damages, rules on prescription and limitation, and – importantly – rules relating to the burden of proof.[44] Within the EU and Switzerland the general rule leads to applicability of the law of the country where the damage has arisen, which in the cases under discussion means host country tort law.[45] Of the various exceptions to the general rule that exist in both systems, the most relevant one in the context of these cases is art. 7 of the Rome II Regulation[46], which does not have a counterpart in Swiss law.[47] This provision allows the victims in transboundary tort cases that relate to environmental harm to choose applicability of the law of the *Handlungsort* (*i.e.*, the country where the activity giving rise to the damage took place) rather than that of the *Erfolgsort* (*i.e.* the country where the damage occurred).[48]

In contrast to the Rome II Regulation's overall tendency towards policy neutrality, the special rule on environmental damage has been inspired by objectives of environmental protection policy in combination with the concern that *«the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries»*.[49] Despite the focus on neighbouring countries in the preparatory works, it seems that this provision may be of significance for future foreign direct liability cases, at least those that involve environmental damage as specified in the Rome II Regulation, provided they can be constructed as transboundary tort claims in which the event that has given rise to the damage in the host country took place in the home country of the corporate defendant. This may be the case for instance if a claim can be made that the home country-based parent company or retailer took decisions, made demands or implemented policies that eventually resulted in environmental damage in the host country, or failed to exercise adequate supervision over the host country activities where it could and should have done so. It has been suggested that such an interpretation is in line with the notion of operator responsibility and the accom-

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en Suisse, Un état des lieux dans le domaine droits de l'homme et économie, Editions Weblaw 2013, Internet: http://www.skmr.ch/frz/domaines/economie/publications/etat-des-lieux.html (last visited 26.7.2017), 43–44; François Membrez, Les remèdes juridiques face aux violations des droits humains et aux atteintes à l'environnement commises par les filiales des entreprises suisses, 2012, Internet: http://www.rechtohnegrenzen.ch/media/medialibrary/2012/03/etude_membrez_def.pdf (last visited 26.7.2017), 31–34.

40 See for instance: Demeyere (FN 23), 396–397.

41 Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droits de la prescription (Articles 2234 à 2281 du Code civil), 22.9.2005, Internet: www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf (last visited 26.7.2017), art. 1360; Rapport Terré sur la Responsabilité civile, Proposition de textes, 2011, Internet: www.demos.fr/chaines-thematiques/banque-assurance/Resource%20Library/Formation%20banque_Rapport%20Terr%E9%20-%20proposition%20de%20textes.pdf (last visited 26.7.2017), art. 7.

42 Art. 1242 Code Civil/FR.

43 Art. 1246 et seq. Code Civil/FR.

44 Compare for instance arts. 15 and 20 (1) Rome II Regulation (FN 46).

45 Compare art. 4 Rome II Regulation (FN 46) and art. 133 (2) Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP ; SR 291). See in more detail: Enneking 2017 (FN 1); Enneking et al. 2016 (FN 1), 151–158, 492–494. See in more detail on Swiss law Gregor Geisser, Ausservertragliche Haftung privat tätiger Unternehmen für «Menschenrechtsverletzungen» bei internationalen Sachverhalten, Zurich 2013, 343–454.

46 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40, 31.7.2007 (Rome II Regulation).

47 See also Geisser (FN 45), 357–359.

48 See in more detail: Enneking 2017 (FN 1), 52–55. The following paragraph is derived from this chapter.

49 Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual Obligations («Rome II»), 22.7.2003, COM(2003) 427 final, Explanatory Memorandum, 19.

panying definition of operator in the EU Environmental Liability Directive[50].[51]

Before even reaching the issue of applicable law, any European domestic court confronted with a foreign direct liability claim will first need to establish whether it has jurisdiction to hear it. On the basis of the Brussels I Regulation (recast)[52] and the Lugano Convention[53], member state courts will have jurisdiction over a claim against a company that is domiciled (*i.e.* that has its headquarters, principal place of business and/or place of incorporation) in that member state (or, under certain circumstances, if it is domiciled in one of the other member states).[54] However, in claims that (also) seek to hold liable the non-European subsidiaries or sub-contractors of Europe-based business enterprises operating internationally, jurisdiction of these same courts is not a given and will have to be determined according to domestic law. Relevant grounds for jurisdiction over these claims include provisions on forum of necessity *(forum necessitatis)* and on connectivity of claims, which exist in one form or another in almost all of the legal systems studied, including Switzerland.[55] It has to be noted, however, that the Swiss provision on co-defendants is of little practical use in this context, as it does not provide a separate basis for jurisdiction over claims against defendants over whom jurisdiction does not already exist.[56]

Examples of cases where European domestic courts have (also) assumed jurisdiction over claims against the foreign subsidiaries of Europe-based business enterprises operating internationally include, *inter alia,* the *Dutch Shell Nigeria* case and the *French Comilog* case. In the former, the Hague District Court found that the claims against the Netherlands-based parent company and those against its Nigerian subsidiary were connected in such a way that a joint consideration was justified for reasons of efficiency[57]; this decision was upheld on appeal[58]. In the latter, the Cour d'appel de Paris, despite its dismissal of the railway workers' claims against the France-based parent company, did assume jurisdiction over those against its Gabonese subsidiary on grounds of *déni de justice.* Relevant circumstances were the fact that the claims had been filed before a local court more than 20 years ago but had not yet been decided on the merits, and the fact that at the time the French procedure was initiated the French parent company held 63 % of the shares in its Gabonese subsidiary, thus establishing a sufficient connection of the claims with the French legal order.[59]

One of the characteristic features of foreign direct liability cases is the inequality of arms between the host country plaintiffs and the corporate defendants. The latter are usually in a much better position with respect to information on group structures, operational practices and relevant legal standards on the one hand, and means to finance these often complex, expensive and drawn-out legal procedures on the other hand. Accordingly, it is the practical and procedural circumstances of the forum country that are in the end the main factor to determine the opportunities and limitations for the pursuit of foreign direct cases in any particular European country. In many countries, these circumstances will pose a significant (or even: prohibitive) threshold for initiating this type of litigation, as is also reflected by the emphasis in the UNGPs on the need for state action to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedies for victims of corporate human rights abuse.[60] The main thresholds in the legal systems studied relate to: (1) the costs of bringing foreign direct liability claims and the availability of expert legal and practical assistance, (2) limited possibilities for bringing collective actions,

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50 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prvention and reedying of nvironmental damage, OJ L 143, 30.4.2004.

51 Carmen Otera García-Castrillón, International Litigation Trends in Environmental Liability: A European Union – United States Comparative Perspective, Journal of Private International Law 3/2011, 551–581, at 571–572. See also Geert Van Calster, European private international law, Oxford 2013, 173–174.

52 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, 20.12.2012 (Brussels I Regulation [recast]).

53 Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commerical matters (Lugano Convention; SR 0.275.12).

54 See arts. 4 (1) and 63 (1) Brussels I Regulation (recast) (FN 52), and arts. 2 (1) and 60 (1) Lugano Convention. See also Enneking et al. 2016 (FN 1), 142–151 and in more detail on Swiss law Geisser (FN 45), 201–212, 244–245.

55 Enneking et al. 2016 (FN 1), 259–516. For Swiss law see arts. 3 and 8a al. 1 IPRG, respectively, and in more detail Geisser (FN 45), 234–250, 262–323.

56 Art. 8a (1) IPRG. In more detail Geisser (FN 45), 234–250.

57 The Hague District Court, 30.12.2009, ECLI:NL:RBSGR:2009:BK8616 (oil spill near Oruma), §§ 3.1–3.8; ECLI:NL:RBSGR:2010:BM1469 (oil spill near Ikot Ada Udo); ECLI:NL:RBSGR:2010:BM1470 (oil spill near Goi). In more detail: Enneking et al. 2016 (FN 1), 147–151; Enneking 2014 (FN 1), 45–47.

58 The Hague Court of Appeal, 18.12.2015, ECLI:NL:GHDHA:2015:3588 (oil spill near Goi), §§ 3.3, 3.9; ECLI:NL:GHDHA:2015:3588 (oil spill near Oruma), §§ 2.3, 2.9; ECLI:NL:GHDHA:2015:3587 (oil spill near Ikot Ada Udo), § 2.3. In more detail: Enneking 2016, 147–151.

59 Cour d'appel de Paris (FN 21), Nos. S 11/05955 and S 11/05959 (on file with the author), 14.

60 Principle 26 UNGPs.

and (3) restrictive rules relating to the collection of evidence.[61]

Compared to the other systems studied, the UK legal system at this point seems most conducive to this type of litigation, which (at least partly) explains why up until now the far majority of (tort law based) European foreign direct liability claims have been pursued there.[62] Features that render English courts a desirable forum for plaintiffs seeking to pursue foreign direct liability claims include the possibility to enter into «no win no fee» arrangements with legal representatives, the availability of collective redress mechanisms such as the group litigation order and the representative action, and a relatively broad obligation to disclose evidence that may be relevant to the opposing party.[63] It is sometimes suggested that high practical and procedural barriers are necessary to prevent a US-style litigation culture (*i.e.,* a legal culture where too many claims are brought too easily), which is presumed to be harmful for a country's business climate. However, according to the respondents who were interviewed for the empirical part of the study, none of the legal systems studied features anything close to a litigation culture.[64] In fact, the opposite is true: in all of those systems, victims seeking access to remedies through the pursuit of this type of litigation tend to face serious practical and legal barriers.[65]

In response to the question whether legislation and case law in the field of international corporate social responsibility can have a detrimental effect on a country's business climate, the far majority of respondents indicated that they did not see any link between the two. Interestingly, there seemed to be more concern about the potential detrimental effect of foreign direct liability claims on the national business climate in countries such as the Netherlands and Switzerland, where only few of these cases have been pursued so far, than in countries such as France and the UK that have seen many more of them. Some of the respondents, including some of the business representatives, noted that foreign direct liability cases may serve to keep business enterprises on the top of their game and to send a message to foreign subsidiaries and sub-contractors that the issue of responsible business conduct is to be taken seriously. However, respondents from the business community also indicated that *ex ante* standard setting is preferable to *ex post* liability, since it is easier to calculate the costs involved. In the end, none of the respondents was able to come up with concrete examples of business enterprises that did or would relocate to another country on account of (the threat of) this kind of proceedings.[66]

Most respondents identified factors such as infrastructure, standard of living, the presence of a highly skilled workforce and a reliable and stable legal system as factors that determine a country's business climate. To the extent that they saw a role for specific legal rules in this context at all, it was mostly rules in the field of tax law that were thought to be relevant. The main message as regards the regulatory burden associated with new rules was that it is not the number or strictness of rules that matters, but rather their consistency and clarity; the clearer and more consistent the rule, the easier it is to calculate the costs associated with compliance with that rule. Some respondents, including respondents from the business sector, suggested that there could even be a positive connection between (more) legislation and case law in the field of international corporate social responsibility and the national business climate, especially where it would level the national playing field, which was seen as at least as important as an international level playing field. Various respondents stated that it would probably be more beneficial for a company to be located in a country that is a forerunner on standards of international corporate social responsibility than in a country that lags behind, since companies from the latter country would be at a disadvantage if higher standards would subsequently also be pushed through at an international level.[67]

IV. Discussion

Courts in Europe are more and more often confronted with transnational liability cases relating to the accountability of internationally operating business enterprises for the detrimental impact of their business activities on people and the planet in host countries. These cases occupy an increasingly prominent position in the broader socio-political and academic debates in Europe on business and human rights, international corporate social responsibility, and transnational business regulation. Apart from their legal feasibility, many questions remain as to the ac-

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61 See in more detail: Enneking 2017 (FN 1), 65–74; Enneking et al. 2016 (FN 1), 196–217, 259–516; Enneking 2012 (FN 1), 187–202, 252–265. See in more detail on these (and some other relevant) issues in Switzerland Geisser (FN 45), 325–341.

62 Compare Enneking et al. 2016 (FN 1), 439–442.

63 See in more detail: Enneking et al. 2016 (FN 1), 299–301; Zerk (FN 35), 194–202.

64 See for instance: Human Rights Council, Improving accountability and access to remedies for victims of business-related human rights abuse, Report of the United Nations High Commissioner on Human Rights, 10.5.2016, A/HRC/32/19.

65 In more detail: Enneking et al. 2016 (FN 1), 299–301.

66 *Idem,* 648–652.

67 *Idem,* 562–588.

tual impact of this type of litigation on corporate policies and practices as well as on the situation in the host countries where they originate. What seems to be clear, however, is that in the «smart mix» of regulatory instruments that is now – following the UNGPs – being propagated by policymakers in many European countries in this context, these cases play an indispensable role as a necessary «big stick» aimed at providing corporate laggards on issues of human rights and environmental responsibility with an incentive to do better, and bringing them more in line with corporate leaders in the field. At the same time and in line with the UNGPs' third pillar, they are also an important vehicle for judicial remedies for host country victims of corporate human rights (and environmental) abuse who do not have access to remedies locally.

The cases described here typically deal with the liability of Western society-based business enterprises, that operate internationally, for activities that have been carried out elsewhere by local subsidiaries or sub-contractors. Still, these cases do not represent a form of veil piercing but instead are generally based on open norms from the field of tort law with respect to proper societal conduct and due care. They thus reflect contemporary societal notions about the responsibilities of companies to prevent foreseeable risks of human rights or environmental harm resulting from business activities within their sphere of influence from materializing. On account of the rapid increase in due diligence requirements and reporting obligations in this field following the adoption of the UNGPs – including statutory norms (e.g. the UK Modern Slavery Act, the French law on *devoir de vigilance,* the EU non-financial reporting directive), international soft law norms (e.g. the OECD Guidelines, the UN Global Compact) and self-imposed norms (e.g. the Dutch sectoral covenants on international corporate social responsibility, certification schemes, corporate codes of conduct) – the possibilities for companies to legitimately claim they could not have foreseen (serious) risks of people and planet-related harm are becoming more and more limited.

Legal developments relating to the issue of corporate accountability for violations of human rights and environmental standards abroad are currently taking place in various European countries, including Belgium, France, Germany, the Netherlands, the UK and Switzerland. The Swiss Responsible Business Initiative is one of these developments. The legal status quo it seeks to establish, at least as far as the issue of corporate liability goes, is not very different from that which already exists in Switzerland and in the other European countries discussed here on the basis of international standards and general principles of civil liability law. Furthermore, the French law on *devoir de vigilance*[68], although different in set-up and ambit, features objectives and wording that are very similar to the Swiss Initiative. Due to strong international political pressure by French policymakers following the introduction of this law, it is likely that similar instruments will eventually be adopted by neighbouring countries and/or at the EU level. This process is accelerated by the increasingly forceful admonitions to states by international organizations and treaty bodies that they should impose obligations on companies to exercise human rights due diligence and lower barriers for victims of corporate human rights abuse who seek access to remedies before home country courts.[69]

What is interesting about the Initiative is that it would create a measure of legal certainty with regard to what is expected of Swiss companies when it comes to preventing corporate activities from detrimentally impacting people and the planet elsewhere and the legal consequences of not living up to that expectation. Particularly interesting in this respect is the fact that it would introduce a due diligence defense to fend off liability, meaning that the liability risk faced by companies that have their due diligence procedures in order would be substantially reduced. By thus helping to ensure that forerunners are not put at a competitive disadvantage vis-à-vis their less conscientious competitors, it would also contribute to a more level national playing field for Swiss companies in this respect. Furthermore, it would be a logical extension of the Swiss Federal Act on Private Security Services Provided Abroad, which entered into force in September 2015[70], and of the suggestions made in Swiss scholarly literature on the potential role of vicarious liability in the context of the civil liability of corporate groups. At the same time, it would keep the Swiss legal *status quo* in line with the one in other European countries like Belgium, France, Germany, the Netherlands and the UK, where legislative proposals and new cases dealing with issues of international corporate social responsibility are being introduced at an accelerating pace. As such, it is a timely and natural corollary of the developments in the fields of international corporate social responsibility as well as business and human rights that are taking place in Western societies around the world.

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68 See *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

69 See most recently: Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, 23.6.2017, E/C.12/GC/24.

70 See Federal Act of 27 September 2013 on Private Security Services provided Abroad (PSSA; SR 935.41).