HUMAN RIGHTS IN EUROPEAN BUSINESS

A PRACTICAL HANDBOOK FOR CIVIL SOCIETY ORGANISATIONS AND HUMAN RIGHTS DEFENDERS

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1. INTRODUCTION

This handbook is written as a rough overview of the main procedural and substantive problems that can arise when you file a claim in European courts in connection with human rights violations caused outside EU territory by the activities of companies linked to EU Member States. The handbook is based on a selection of legal problems and paperwork hurdles we have chosen to help you identify the main obstacles in setting up a claim with a reasonable expectation of success and the possible solutions to those obstacles.

The cases in this handbook usually concern situations of human rights violations taking place in countries on the fringes of the global economy and containing two decisive elements. First, the victims are usually in an extremely vulnerable situation, a combination of a highly fragile socio-economic situation and extremely faint possibilities of institutional action. Second, the legal systems involved are ineffective at protecting the victims, because there is corruption, because the government's powers are weak, and because the countries depend on the investments made by the very companies that are ultimately responsible for the human rights violations.

That is why, when the victims cannot get redress in the place where the rights violation happened, they have to find other avenues outside their own country. It is then when this handbook should prove useful. Outside the country where the rights were violated, there is a series of venues offering non-judicial solutions. You will read about this in Section 2.

Sometimes non-judicial avenues look unpromising or turn out to be no good at obtaining proper compensation for human rights violations committed directly or indirectly in the course of business by transnational companies. Then cross-border litigation in the courts of Member States to which the companies are somehow connected may prove to be a good solution, although of course the difficulties involved are far from negligible. That is why it is useful to have a road map that covers the ground from the occurrence of the damage to the end of liability proceedings, stopping at each point on the way to weigh up the difficulties and opportunities you will find. That is what Section 3 is about.

Of course, when you look at these characteristics, you have to take into consideration both the practical aspects (like funding for the proceedings) and aspects of substantive law (like the clauses that give claimants access to the various procedural systems), which are inevitably more easily grasped by specialists. In this sense, this handbook is intended as a diagnostic tool and a strategic guide to facilitate legal advice for the victims of abuses due to transnational companies' activities in the global South, with a view to possible litigation in the parent company's home jurisdictional system.

The people this handbook is written for are therefore not so much the victims themselves as the legal professionals of the countries where these kinds of human rights abuses are more likely to happen and the non-government organisations that support or defend the victims. The handbook's approach is that the victims are usually in a vulnerable situation, that their vulnerability includes their understanding of the rudiments for demanding liability from the parties responsible for the damage and that furthermore the victims at all events need legal advice in order to get what they want.

The explanations given here are therefore written for the people who provide this service on the front line, giving them clues and yardsticks they can use to assess what cross-border litigation and non-judicial remedies have the potential to be plausible and successful. This handbook isn't written for an academic public, and it doesn't provide legal first aid for the victims. It is a practical handbook for professionals and activists who have a certain amount of legal knowledge, to help them design their strategies for defending and protecting the affected communities. The handbook also contains a short glossary giving concise descriptions of some basic concepts.

We are assuming that transnational civil litigation is just one of several options. What we aim to do is explore its possibilities and limitations, so those who are in a position to advise and help victims can do their job as effectively as possible. In short, we're not recommending transnational civil litigation no matter what the circumstances; we're providing clear, basic, overall information to try and help organisations and professionals clarify their potential strategies on the ground.

To narrow down the field of analysis the handbook covers, we have to start with the fact that litigation against a company based in a European Union Member State takes place in that Member State's jurisdiction. There is no pan-European jurisdiction with the power to hear litigation on business and human rights. The European Union currently has 28 members, which are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

As said before, the next thing we look at is the fundamental elements for tracing out a road map for suing in European courts (using the examples of the countries mentioned above) for compensation for damages caused in third countries by transnational companies domiciled in Europe due to direct or indirect violations of human rights. We go over the various stages in proceedings, from the time you take the first decision to the considerations you should bear in mind should you win and require enforcement.

We want to draw the clearest and yet fullest possible map of the possibilities and pitfalls this kind of litigation poses for potential victims, so we can help the organisations and professionals who are helping the victims to take the right decisions in the light of both the possible compensations and the significant difficulties such proceedings involve. At all events, remember that laws change. For that reason, you are advised to check for amendments of the laws we discuss here before you build any strategies aimed at future legislation.

It is not our intention to particularly advise anybody to engage in this kind of litigation. We just want to help you build your strategy with all the facts you need to decide. This includes, to begin with, the options available domestically through judicial and non-judicial redress mechanisms. We don't talk about specific national mechanisms; those depend on each country's social reality and legislation. But you can also opt for other international non-judicial avenues or choose litigation in the parent company's home country or some country that offers suitable pathways for lawsuits on business and human rights.

Lastly, before you decide to enter into international civil litigation in matters of human rights against a big company, take into account the potential impact on the people involved in the claim, from the standpoint of their personal safety and from the standpoint of the damage that their image and their rights might sustain in their home country as a direct consequence of the suit. Also it is important the psychological wear and tear usually caused by lawsuits, which may turn out to be lengthy and expensive.

Man in polluted water in Boto, Nigeria. Source: Milieudefensie. Friends of the Earth Netherlands.

2. NON JUDICIAL MECHANISMS

2.1. How to Read this Section

This section of the handbook gives you an overview of a series of private and public non-judicial grievance mechanisms that are available to potential and actual victims of alleged human rights abuses attributed to multinationals.

In accordance with the incremental approach underlying the handbook, the section is designed to provide basic information for individuals and representatives of civil society organisations who are defending public/community interests (human rights, labour standards, indigenous communities' rights, environmental protection, etc.) and consider themselves or the communities they represent to be victims of human rights-related abuses committed by companies.

This section aims primarily at increasing the **awareness and knowledge** of individuals and/or the representatives of affected communities that are considering taking action for redress and therefore need specific, contextual, practical information on the avenues and mechanisms at their disposal.

Before going straight to court, however, think carefully about strategies you might use to de-escalate and de-legalise the issues, especially in the early stages of potential conflicts. In this context, non-judicial avenues such as grievance mechanisms might be worthwhile for you to explore.

What are grievance mechanisms?

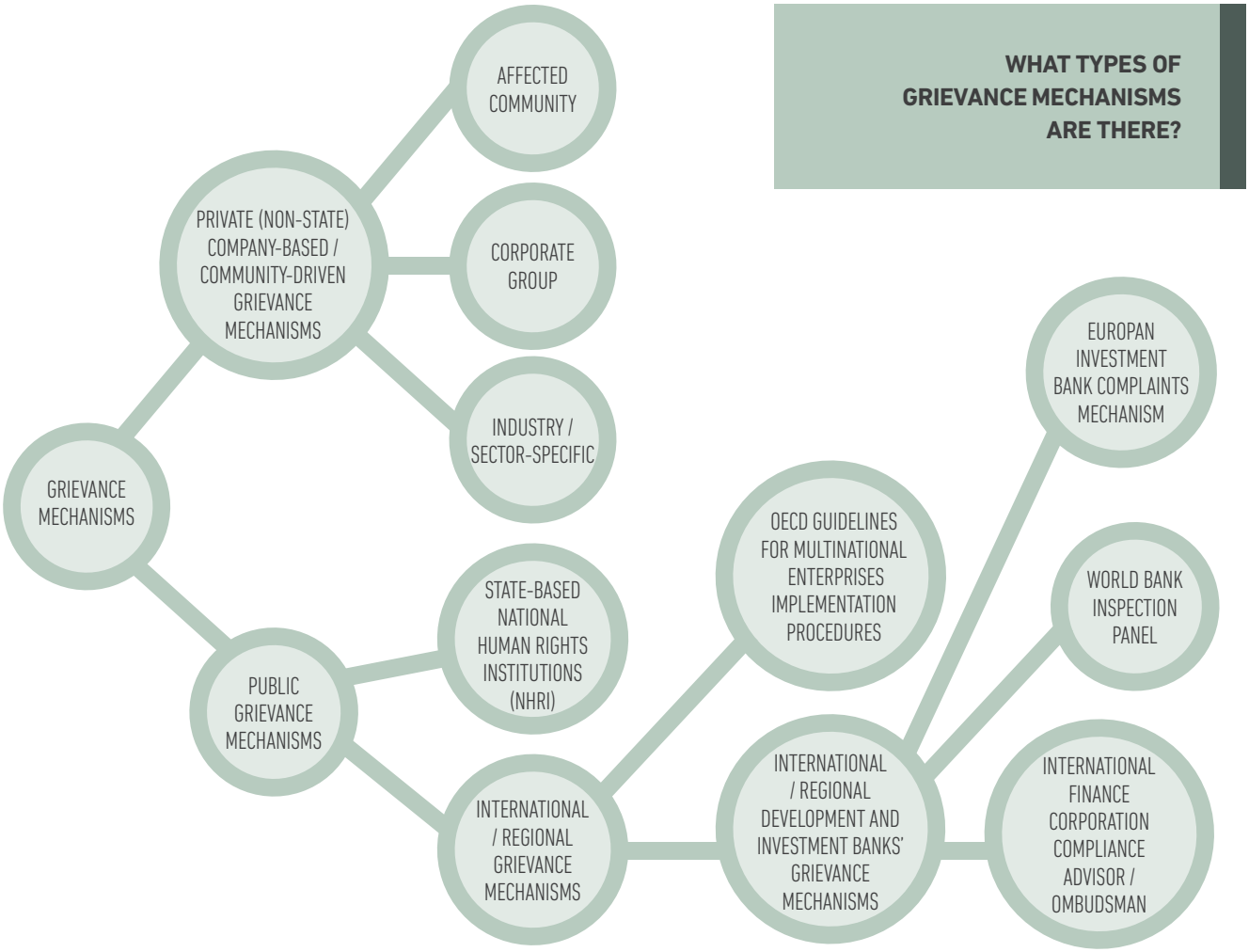
Grievance mechanisms are non-judicial procedures that are formalised through law or otherwise, through which affected individuals and communities can seek remedy for alleged corporate abuses in the fields of labour standards, human rights at large and health and environmental protection/safety standards.

As opposed to highly formalised judicial mechanisms, grievance mechanisms are based on a multi-stakeholder approach designed to seek collective remediation through investigation, fact-finding, conciliation and, where appropriate, reparation. What these mechanisms have in common is that they are based on mediation and require the willingness of all the actors involved, notably the business actor, to engage in the process.

In accordance with the **2011 UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,** any non-judicial mechanism needs to fulfil a series of requirements in order to meet the minimum standard for an effective remedy. In order to meet these criteria, mechanisms have to be

- *legitimate,*
- *accessible,*
- *predictable,*
- *equitable,*
- *transparent,*
- *rights-compatible and*
- *a source of continuous learning.*

WHAT TYPES OF GRIEVANCE MECHANISMS ARE THERE?



WHAT ARE THEY GOOD FOR?

- The non-adversarial, multi-stakeholder approach that underlies grievance mechanisms is thought to contribute to the establishment of a mutually respectful dialogue leading to the negotiated, conciliatory settlement of conflicts and ideally to remediation that is satisfactory to all.
- Grievance mechanisms are therefore good for tackling early-stage, low-intensity, less grave instances of corporate human rights abuses
- Grievance mechanisms are also useful for de-escalating early-stage conflicts.
- Grievance mechanisms are generally much less costly than litigation.
- More generally, when all stakeholders involved (complainants and company) show a positive, proactive attitude and commitment to reaching an agreement on adequate solutions, it helps generate mutual trust and increases the prospects for actual reception of the complainants' claims. In the long run, such an attitude also pays off should the conflict escalate and involve litigation later on.

WHAT CAN YOU EXPECT FROM GRIEVANCE MECHANISMS?

- In a *best-case scenario*, grievance mechanisms lead to a compromise settlement. Even if your initial claims are not met 100%, you may nevertheless reach a satisfactory deal in a relatively timely, cost-effective manner.
- In a *worst-case scenario*, grievance mechanisms reach no solution and leave the door open for litigation. At this stage, a positive, consistent attitude by complainants throughout the non-judicial procedure adds greatly to the credibility of any claims they raise in court.

WHAT SHOULD YOU NOT EXPECT FROM THEM?

- Claimants that seek remediation through grievance mechanisms should not expect moral or legal condemnation of the companies responsible for human rights abuses. Keep in mind that grievance mechanisms depend on the good will of all the actors involved, especially the business actor. You might seek legal condemnation from the courts, if that is what you want.
- Rather, grievance mechanisms are there to uphold a given set of legally non-binding corporate social responsibility standards (like the UN Global Compact, the OECD Guidelines for Multinational Enterprises or sectoral/individual codes of conduct) in a specific case. Only national human rights institutions or the European Ombudsman can assess claims according to legally binding human rights, in order to further remediation through a conciliatory approach.

Aitik copper mine, operated by Boliden; Gallivare, Sweden. Source: Wikicommons.

Contents of this section

In the following sub-sections, the handbook presents a general overview of the potential of **company-based** and **community-driven grievance mechanisms (2.2.)** and **national human rights institutions (2.3.)** for seeking effective redress.
In addition, they provide contextual and practical guidance on a series of key international grievance mechanisms in the EU context. These include:

- The **OECD Guidelines for Multinational Enterprises and their Implementation Procedures (2.4.);**
- The **European Investment Bank Complaints Mechanism (2.5.);** and
- The **World Bank Inspection Panel and the International Finance Corporation Compliance Advisor/Ombudsman (2.6.).**

USEFUL LINKS

ACCESS – Supporting effective problem solving for company-community conflicts (http://accessfacility.org/)

Human Rights & Grievance Mechanisms – Supporting you in seeking remedy for corporate misconduct (http://grievancemechanisms.org/)

2.2. Company-based Grievance Mechanisms and Community-driven Grievance Mechanisms

Non-state actors may establish grievance mechanisms. Multinationals especially have occasionally put such procedures in place as part of their corporate social responsibility policies. In fact, the **2011 UN Guiding Principles on Business and Human Rights** encourage companies to establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. According to the **2011. UN Guiding Principles on Business and Human Rights**, company-based grievance mechanisms need not only meet the set of seven criteria mentioned above in order to comply with minimum international standards of effective remedy; in addition, these mechanisms rely also on stakeholder ***engagement and dialogue*** as an eighth criterion of effective remedy.

Company-based mechanisms, whether business-specific or sector-specific, vary significantly from one to another, depending on various factors. Therefore, it is very difficult to provide a simple, accurate overview of their procedural features and their potential outcomes. In very general terms, however, in accordance with the eight criteria established in the **2011 UN Guiding Principles on Business and Human Rights**, company-based grievance mechanisms should have the following features:

Trigger or whistle-blowing mechanism	Companies are encouraged to actively provide clearly understandable information on the existence and operation of the way the grievance mechanism can be called upon (e.g., hotline, e-mail, postal address, etc.).
Applicable standards	Companies ought to provide clear indications as to the type of complaints that can be addressed at the grievance mechanism and the standards applied under their corporate social responsibility policy. In particular, companies are strongly encouraged to assess any complaints about their possible human rights impact.
Procedure	Companies are also encouraged to set up clear procedural rules with well-defined timeframes.
Operational structure	Companies should also set up operational structures to deal specifically with the company-based grievance mechanism, at the local and/or at the central level, with clearly defined mandates and functions.
Centralised record of complaints	Companies ought to establish a centralised record of complaints in order to undertake regular monitoring and assessments of the grievance mechanism's performance and integrate key lessons.
Engagement and dialogue	Companies should commit to engagement and dialogue as their main corporate approach for addressing and resolving grievances.

This, however, is the ideal world. As a matter of fact, for a series of reasons company-based grievance mechanisms so far have fallen short of transparency standards. Also, company-based grievance mechanisms are part of a relatively novel phenomenon. The few indicative performance assessments that have been run so far reveal that existing company-based grievance mechanisms still lag behind in almost all eight criteria for effective remedy established in the UN Guiding Principles.

Advice

Even so, if you are considering individual or community action to seek remedy for corporate abuses having an impact on the enjoyment of human rights, you would be well advised to do some preliminary research on whether there is a company-based grievance mechanism you can try and what the potential benefit might be. The insight you get from the effort may prove valuable in building a reasonable, effective strategy for putting your claims forward successfully.

Examples

For examples and accurate discussion of the operation of company-based grievance mechanisms, see e.g.

- Caroline Rees, Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned, CSR Initiative, Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2011. Available at: http://www.hks.harvard.edu/
- Barbara Linder, Karin Lukas, Astrid Steinkellner, *The Right to Remedy*, Ludwig Boltzmann Institute of Human Rights, 2013. Available at: http://bim.lbg.ac.at/

Useful tools and information

Finding reliable information on what company-based grievance mechanisms there are and how they work is not always easy. You can find the fullest, most up-to-date database on grievance mechanisms generally and company-based mechanisms specifically at ***ACCESS – Supporting effective problem solving for company-community conflicts*** (**http://accessfacility.org/**).
In addition to a vast quantity of documentary resources, there you will find clear, relevant information on the following items:

- **Companies and/or industries that have their own grievance mechanism,** with an overview of each mechanism's main operational features (who can access it, how it works, potential outcomes, monitoring and enforcement, legislative references and contact details).
- **A case-story library** with a search engine that lets you single out case reports by countries and/or industry sectors.
- A **list of dialogue facilitators** from all over the world that are introduced as professionals experienced at using consensus-based processes to help communities, companies and governments resolve disputes by engaging constructively to find their way to rights-compatible, interest-based solutions.

RECENT DEVELOPMENTS

Company-based grievance mechanisms are often criticised for providing inadequate remedies and using procedures that are not perceived as legitimate by victims of corporate abuses. Therefore, a group of NGOs led by EarthRights International is developing a model for a **community-driven operational grievance mechanism**, which ought to be designed by affected populations to meet their needs and expectations in a less-biased forum.

SOURCE: http://www.earthrights.org/

2.3. National Human Rights Institutions

Countries ruled as liberal parliamentary democracies are generally home to ***national human rights institutions (NHRIs)***. These are **independent bodies established under public law** with the **specific mandate to protect and promote respect for all human rights,** regardless of their civil, political, social, cultural or economic nature.
According to the **UN Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights** (UN General Assembly Resolution 48/134, 20 December 1993), credible, effective NHRIs:

- are established under primary law or the constitution,
- feature a broad mandate to promote and protect human rights,
- have formal and functional independence,
- are plural and represent all aspects of society,
- are granted adequate resources and financial autonomy,
- have freedom to address any human rights issue that arises,
- annually report on the national human rights situation and
- cooperate with national and international actors.

NHRIs are often portrayed as **bridges** that liaise (1) **civil society with the state** (since NHRIs cooperate with a wide range of civil society organisations and resonate the HR situation in the country) and (2) **the national arena with international arenas** (since NHRIs have close ties with and report regularly to regional and international human rights bodies).

NHRIs have formed a worldwide association, the **International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC - nhri.ohchr.org)**, which has recently been renamed "the **Global Alliance of National Human Rights Institutions**". NHRIs in the European context, moreover, have come together to form the **European Network of National Human Rights Institutions (ENNHRI - ennhri.org).**

■ NHRIs are therefore of fundamental importance in any strategy to hold multinational enterprises accountable for alleged human rights abuses, especially when the targeted enterprises hold strong connections (headquarters, centre of administration, etc.) with a given country.

■ Due to their institutional status of independence, **NHRIs are in a strong position to provide for independent investigation, monitoring and mediation.** While NHRIs are still being explored to their full potential in transnational company-community conflicts, their ties to the regional and international arena may also prove to be of great utility in this regard.

■ After the ***2010 ICC Edinburgh Declaration,*** NHRIs worldwide are increasingly engaging in **exchanges of experiences and best practices** in establishing **synergies with regional grievance mechanisms** regarding the impact of corporate activities on human rights. In particular:

- In 2012 the OECD and the ICC signed a memorandum of understanding on experience sharing and capacity building amongst NHRIs and National Contact Points in charge of dealing with complaints under the specific instance procedures of the OECD Guidelines for Multinational Enterprises (See chapter 2.4.).
- If complainants have already referred a case to the European Investment Bank's Complaints Mechanism and are not satisfied with the response, the case may be further referred to the European Ombudsman (See chapter 2.5.).

These examples just might illustrate the importance of considering whether it is worthwhile strategy-wise to bring strong NHRIs into complaints brought before an international or domestic public or private grievance mechanism for alleged human rights abuses related with corporate activities of multinational enterprises.

■ **Modalities and practical issues** regarding the ways to inform specific NHRIs about instances **vary from country to country.**

■ You can find a list of NHRIs that are members of the ENNHRI, with up-to-date website links, at **http://ennhri.org/List-of-members.**

REFERENCES

International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), recently renamed as the *Global Alliance of National Human Rights Institutions*
http://nhri.ohchr.org/EN/Pages/default.aspx

European Network of National Human Rights Institutions (ENNHRI)
http://ennhri.org

UN Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (UN General Assembly Res. 48/134, 20 December 1993)
http://www.un.org/

ICC Edinburgh Declaration (10 October 2010)
http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Edinburgh_Declaration_ENG.pdf

OECD-ICC Memorandum of Understanding (7 November 2012)
http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/OECD_ICC_MoU_Eng.pdf

2.4. The OECD Guidelines for Multinational Enterprises and their Implementation Procedures

The Organisation for Economic Co-operation and Development (OECD) is an international organisation established in 1961, which features amongst its 34 members the world's most developed countries, as well as a series of emerging countries. It provides a forum for inter-governmental cooperation on a range of economic, social and environmental problems of common concern, by sharing experiences, monitoring, conducting analyses and setting standards. In this way, the OECD seeks to promote policies with the stated purpose of improving the economic and social well-being of peoples around the world.

In the context of the OECD's 50th anniversary, the organisation's 34 Member States (plus 12 adhering countries) reissued the **Declaration on International Investment and Multinational Enterprises (25 May 2011, the original version dating back to 1976)**, which contains the latest, up-to-date version of the ***OECD Guidelines for Multinational Enterprises.*** This up-dated version takes the UN Guiding Principles into account.

As the document itself states, the Guidelines consist in a series of legally non-binding and non-enforceable government recommendations for multinational enterprises.

These recommendations provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Corporate compliance with these recommendations is thought to contribute to multinationals' respect for the internationally recognised human rights of individuals and local populations affected by their activities. In this way, the OECD Guidelines are portrayed as contributing to economic, social and environmental progress in the countries where multinationals do business. The recommendations in the OECD Guidelines are grouped into chapters that cover a series of issue areas, such as:

- *transparency (disclosure),*
- *human rights,*
- *employment and industrial relations,*
- *environment,*
- *bribery prevention,*
- *consumer interests,*
- *science and technology,*
- *competition and*
- *taxation.*

These principles and standards have been complemented with a series of additional, sector-specific due diligence frameworks (See the references at the end of this section).

The OECD Guidelines for Multinational Enterprises also include soft, non-judicial, non-adversarial **implementation procedures** that enable adhering governments to promote compliance with the Guidelines' principles, standards and good practices. These implementation procedures are dealt with through a network of **OECD National Contact Points (NCPs)** in each adhering country. The contact points operate under the overarching guidance of the **OECD's Investment Committee.**

The ***specific instance procedure*** for notifying **OECD NCPs** of alleged violations is currently the most significant international grievance

Source: http://oecdinsights.org/

mechanism available to potential victims of human rights abuses committed by multinational enterprises. Through the specific instance procedure, victims can claim accountability and seek redress through the authorities of the company's home state.

AIM AND PURPOSE OF OECD NCPS UNDER THE IMPLEMENTATION PROCEDURES:

OECD Guidelines for Multinational Enterprises, Part II (Implementation Procedures). Section C:
[OECD National Contact Points] will offer a forum for discussion and assist the business community, worker's organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.

SPECIFIC INSTANCE PROCEDURE

OECD Guidelines for Multinational Enterprises, Part II (Implementation Procedures). Section C:

1. Initial Assessment

OECD NCP makes an initial assessment of whether the issues raised merit further examination and respond to the parties involved.

2. Further Examination

Where the issues raised merit further examination, the OECD NCP offers good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:

a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and relevant experts;

b) consult the NCP in the other country or countries concerned;

c) seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;

d) the NCP offers, and with the agreement of the parties involved, facilitates access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.

3. Conclusion of the procedure

At the conclusion of the procedures and after consultation with the parties involved, make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information, by issuing:

a) a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision;

b) a report when the parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto;

c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the *Guidelines* as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached. The NCP will notify the results of its specific instance procedures to the Committee in a timely manner.

The effectiveness of this mechanism in providing redress to victims of corporate abuses was appraised as recently as in 2015. In an OECD Watch sponsored report it was concluded that:

"The 2011 update to the Guidelines delivered important changes to their scope and content, but did not include changes to ensure the effective functioning of NCPs nor their ability to facilitate access to remedy. NCPs have the potential to serve as a valuable tool in promoting responsible business conduct and ensuring access to remedy, but they are currently not meeting that potential." (Caitlin Daniel et al., *Remedy Remains Rare. An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct,* OECD Watch, 2015).

After all, what this criticism suggests is that much of the OECD Guidelines effectiveness in providing redress depends on the work and commitment of individual NCPs in the different adhering countries. Some perform better than others. Therefore, when considering bringing a complaint before a given NCP, prior research on its previous work and "case-law" is advised. What follows is an example of a successful complaint:

The Vedanta case in Orissa, India

FACTS

This case concerned a project for an open-cast bauxite mine on the upper reaches of the Niyamgiri Hills in Orissa, India. The project was expected to impact hugely on the environment and the livelihood of the local communities, destroying an important wildlife habitat and threatening the traditional way of life of the Dongria Kondh tribe's communities, for whom these mountains are sacred.
Vedanta Resources is a UK-registered mining company, operating directly and through subsidiaries in India, Zambia and Australia. In this specific case, at least two Indian subsidiaries were involved: Sterlite Industries India Limited (SIIL), of which Vedanta owned 59.9% of the shares, and Vedanta Aluminium Limited (VAL), 70.5% of which was owned directly by Vedanta and 29.5%, by SIIL. The bauxite mine project was led by SIIL and VAL in a joint venture with the state-owned Orissa Mining Corporation Limited (OMC). Eventually, the Indian Supreme Court denied clearance for the project on a series of environmental, social and religious grounds.
Of interest here is the intervention of the OECD National Contact Point of the United Kingdom as a consequence of a complaint issued by Survival International in defence of the indigenous tribes inhabiting and worshiping the Niyamgiri Hills. It is difficult to assess the precise impact the specific instance procedure at the UK OECD NCP had on the 2013 ruling of the Indian Supreme Court. Nevertheless, in combination with a series of other factors, the clear Final Statement by the UK NCP in the Vedanta case presumably helped provide strong contextual evidence that the Indian Supreme Court took into consideration for its final 2013 ruling.

LEGAL HIGHLIGHT AND OUTCOME

19 December 2008 – Survival International brought the case to the attention of the OECD National Contact Point in the UK, claiming that Sterlite's operations did not comply with the OECD Guidelines for Multinational Enterprises. The complaint was based on the alleged non-compliance by Vedanta and its subsidiaries with the following OECD guidelines (UK NCP for the OECD Guidelines for Multinational Enterprises. Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Survival International and Vedanta Resources plc. 27 March 2009. URN: 09/806):

- *II.2 Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.*
- *II.7 Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.*
- *V.2b Engage in adequate and timely communication and consultation with the communities directly affected by*

the environmental, health and safety policies of the enterprise and by their implementation.

27 March 2009 – After initial assessment, the UK NCP accepted Survival's complaint for further consideration.

April 2009 – Vedanta refused the UK NCP's offer of conciliation/mediation, so the specific instance procedure moved on to the full examination of the complaint.

25 September 2009 – Final Statement of the UK NCP, which concluded *inter alia*:

– *"The UK NCP could not find any record of the views of the Dongria Kondh about the construction of the bauxite mine in the Niyamgiri Hills ever having been collected and/or taken into consideration by the company." The consultations made in 2002 and 2003 were only about the refinery project. Moreover, "[T]he Supreme Court of India did not rule (nor was it asked to rule) on the need to consult local indigenous communities."*

– Vedanta did not comply with Chapter V(2)(b) of the Guidelines. The environmental impact assessment carried out by the Central Empowered Committee and SIIL demonstrated that the mining project would affect the home of the local tribe. It showed that *"Vedanta has failed to put in place an adequate and timely consultation mechanism to engage fully the Dongria Kondh about the potential environmental and health and safety impact of the construction of the mine on them."*

– The company failed to act consistently with Chapter II(7) of the Guidelines, because it did not develop an effective self-regulatory practice to foster a relationship of confidence and mutual trust between the company and the local tribe (pt. 66). In any case Vedanta did not make an *"indigenous (or human) rights impact assessment".*

- Vedanta behaved inconsistently with Chapter II(2) of the Guidelines. *"It failed to engage the Dongria Kondh in adequate and timely consultations on the impact . . . on their recognised rights and freedoms . . . and it did not take any other measures to consider the impact of the construction of the mine on those rights and freedoms, or to balance the impact against the need to promote the success of the company"* (pt. 67). Nor did the company respect various international human rights instruments.
- Finally, the UK NCP gave some recommendations to Vedanta Resources to help the company bring its practices into line with the OECD Guidelines. This largely involved engaging with the Dongria Kondh so that they could guarantee their traditional livelihood and finding alternative arrangements for the affected families (recommendation 1). The company was also advised to include human rights impact assessment in its project management, paying particular attention to creating an effective consultation process for the public concerned.

Useful information and advice

- **You can find up-to-date case statistics at:**
  - **Database of specific instances under the implementation procedures of the OECD Guidelines for Multinational Enterprises http://mneguidelines.oecd.org/database/**
  - **OECDWatch.org - http://www.oecdwatch.org/**
- **How do you go about preparing a complaint?**
  - *Specific instance procedures* are dealt with by NCPs in each country adhering to the OECD Guidelines. Therefore, the **formal requirements for submitting complaints may vary slightly from one country to another.** Do some research and check the specific formal requirements set out by the NCPs you are targeting. For an **overview of OECD NCPs**, see: **http://mneguidelines.oecd.org/ncps.**
  - **By way of example,** here are link to the website of the UK's OECD NCP providing practical advice on submitting complaints and an example of a complaint form (https://www.gov.uk/).

Dongria Kondh protest against Vedanta Resources, Niyamgiri, India. Source: Survival International.

- For an **illustrative example** of the actual potential of the specific instance procedure under the OECD Guidelines, have a look into the design of the very interesting, multi-stakeholder, cutting-edge procedure followed by the OECD NCP of the Netherlands: http://www.oecdguidelines.nl/.

REFERENCES

The Organisation for Economic Co-operation and Development
http://www.oecd.org

The OECD Guidelines for Multinational Enterprises
http://mneguidelines.oecd.org/text/

Overview of OECD National Contact Points
http://mneguidelines.oecd.org/ncps/

OECD-FAO Guidance for Responsible Agricultural Supply Chains
http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm

OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector
http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
https://www.oecd.org/fr/daf/inv/mne/Guide-OCDE-Devoir-Diligence-Minerais-%20Edition3.pdf

On Survival International and their support for the Dongria tribe in Orissa, India
http://www.survivalinternational.org/

OECD Watch Report
Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, *Remedy Remains Rare. An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct* (OECD Watch 2015). http://www.oecdwatch.org/publications-en/Publication_4201/@@download/fullfile/Remedy%20Remains%20Rare.pdf

2.5. The European Investment Bank Complaints Mechanism

The European Investment Bank (EIB) was created in 1958 as a financial mechanism for the newly established European Communities. It defines itself as the European Union's bank and has become over time the largest multilateral borrower and lender in terms of volume. It provides financial support for investment projects that further EU policy objectives. Therefore, most of its activity is centred in Europe. A series of EIB-funded projects, however, also support EU external and development policies. After the 2008 financial crisis, the EIB has significantly increased its activity as a counter-cyclical mechanism for EU institutions and Member States to compensate for diminishing investments.

The EIB features a corporate responsibility policy and governance structure of its own, which includes an accountability framework. After the Memorandum of Understanding signed in 2008, the accountability framework is institutionally linked to the European Ombudsman. The main feature of this framework is the EIB Complaints Mechanism, which is open to **any member of the public** and operates according to a two-tier procedure containing:

(1) an **internal** stage handled by the EIB Complaints Mechanism Division and, should the Complaints Mechanism fail to find a satisfactory solution,
(2) an **external** stage handled by the European Ombudsman, which may investigate the EIB for maladministration.

As a matter of principle, complaints are handled **confidentially**. However, complainants may waive this privilege, in which case the issue is dealt with publicly.

Complainants may bring to the attention of the Complaints Mechanism **any activity of the EIB group that they consider has been carried out in a wrong, unfair or unlawful way.** The EIB Complaints Mechanism Division then has to make a decision on the admissibility of the complaint. If the complaint is found to be admissible, the Complaints Mechanism has to address the complaint by performing functions of **mediation** or **investigation** or both, depending on each case.

The EIB commits to concluding the procedure within 40 working days of acknowledgement of receipt of the complaint, except for particularly complicated cases, when the period may be extended by an additional 100 working days.

Conclusions and any recommendations for corrective measures and/or improvements to existing EIB policies and practices are notified to the complainant in the EIB Complaints Mechanism Conclusions Report.

Useful information and advice

The EIB's institutional website features an exhaustive, user-friendly overview of the Complaints Mechanism that provides access to relevant statutes, terms of reference, procedural guidance, clear and concise guidance for lodging complaints, FAQs and information on the procedure's stages and outcomes.

- **Statutes, terms of reference and procedural guidance**
  The following link provides you with the **basic framework of rules** governing the EIB Complaints Mechanism. At the end of the booklet, you will also find the **EIB's complaint form (Annex II).**
  EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (2012)
  http://www.eib.org

- **What type of activities of the EIB group are subject to complaint?**
  - Project preparation processes.
  - The social and environmental impacts of a project.
  - Arrangements for involvement of affected communities, minorities and vulnerable groups.
  - Project implementation.
  - Access to information.
  - Procurement procedures.
  - Human resources issues.
  - Customer relations.
  - Any other aspect of the planning, implementation or impact of EIB projects.

European Investment Bank. EIB Group's headquarters in Luxembourg - Partial view of East building © EIB 2010.

- **Who can lodge a complaint?**
  Individuals, organisations or corporations affected by EIB activities can complain. Complainants do not need to be directly affected by the EIB decision, action or omission and are not required to identify the applicable rule, regulation or policy that may have been breached.

FURTHER PRACTICAL ADVICE:

WWW.

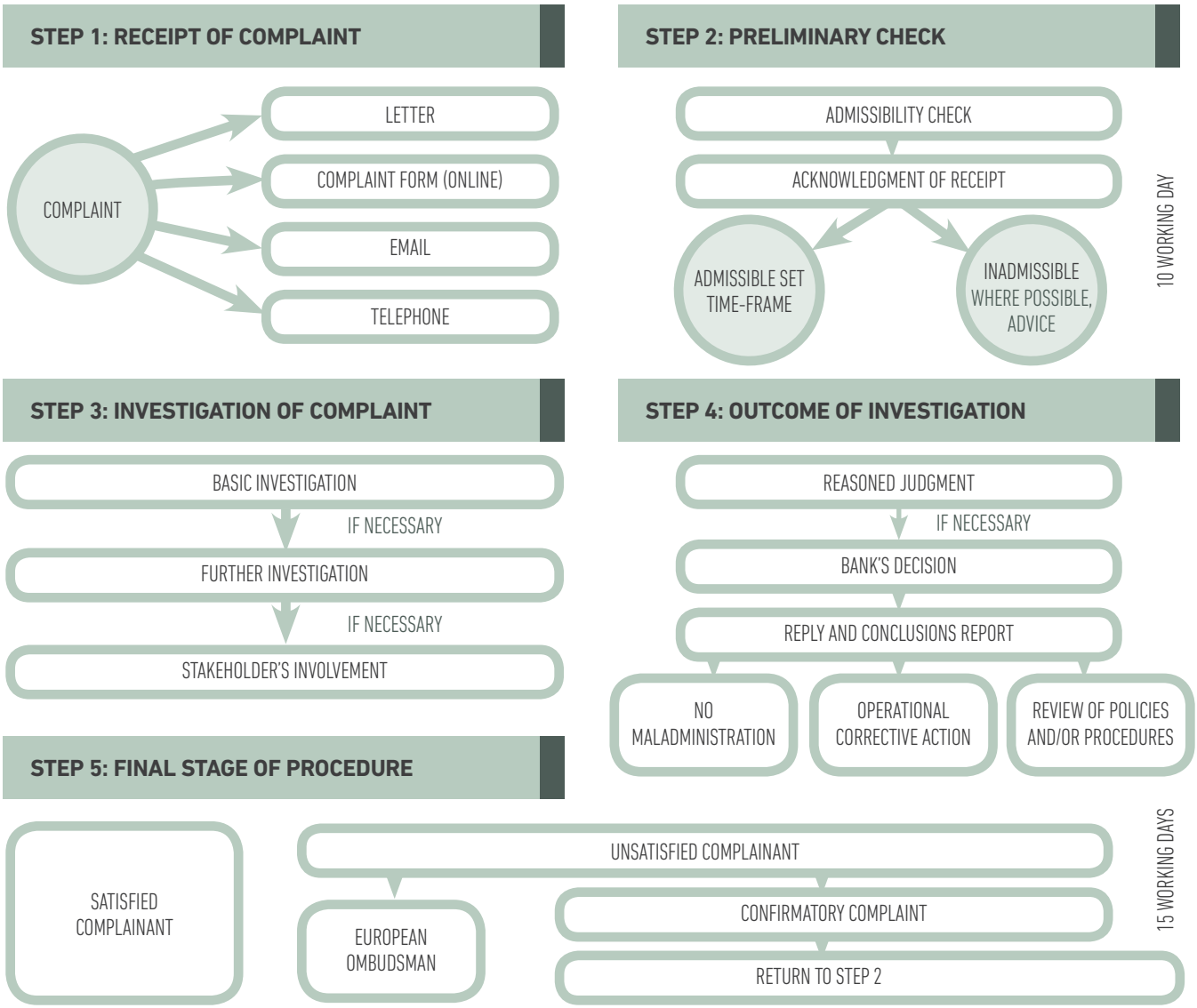
- **Complaints Admissibility Check and Registration**
- **Criteria for Standard or Extended Procedure**
- **Initial Assessment Stage**
- **Investigation**
- **Mediation**
- **Consultation**
- **Response to the Complainants**
- **At What Stage of the EIB Project Cycle are Complaints Admissible?**

http://www.eib.org/

BREAKDOWN OF COMPLAINTS BY TYPE:

Breakdown of Admissible Complaints (EIB-CM)	2012	%	2013	%	2014	%
Environmental/Social/Developmental Impacts (E)	14	32	12	22	11	25
Governance (G)	7	16	11	20	15	35
Procurement-related Complaints (P)	19	43	23	42	12	28
Access to Information (A)	1	2	3	5	2	5
Human Resources (H)	2	5	6	11	3	7
Customer Relations (C)	1	2	0	0	0	0
Total	**44**	100	**66**	100	**43**	100

Source: European Investment Bank, *Complaints Mechanism Activity Report 2014* (2015), p. 11 (http://www.eib.org/attachments/general/reports/complaints_mechanism_annual_report_2015_en.pdf)



STEP 3 to 4: 40 working days (+100 working days in complex cases)

Source: FLOWChart of the procedure of the EIB complaints mechanism: http://www.eib.org

Renewable Energy Sector Ireland - Complaint SG/G/2014/02

The following text is taken from the Conclusions Report of the EIB Complaints Mechanism in a case concerning the renewable energy sector in Ireland (http://www.eib.org).

FACTS

On 18 September 2014, Mr. David Malone on behalf of Environmental Action Alliance lodged a complaint with the EIB Complaints Mechanism (EIB-CM) concerning EIB financing in the Renewable Energy sector in Ireland.

In his complaint, the complainant alleged that Ireland's National Renewable Energy Plan (NREAP) has never been subject to a legally required process of Strategic Environmental Assessment (SEA) prior to its adoption. Therefore, the complainant took the view that the NREAP had been adopted in breach of EU national law and in breach of the Aarhus Convention.

As a result of the alleged lack of SEA on the NREAP, the complainant considered that by financing projects in the renewable energy sector in Ireland, the EIB is in breach of the EU environmental law and its own standards. The complainant also alleged that the EIB had not carried out a proper assessment of the NREAP and he therefore took the view that the EIB does not conduct proper assessment, in line with the EIB social and environmental handbook and EIB requirements, of projects financed in this sector.

LEGAL HIGHLIGHT AND OUTCOME

Findings and Conclusions
With regard to the alleged non-compliance of the NREAP with EU and national environmental law resulting from the alleged failure to conduct an SEA and non-compliance with the Aarhus Convention: From the allegations, it appears that the complainant assumes that the EIB has the duty to analyse the environmental mitigation measures, the alternatives and costs of the NREAP. In this regard it is important to recall that the NREAP is a national plan issued by the national competent authorities, as required by the Article 4 of Directive 2009/28/EC on renewable energy, to be submitted to the European Commission. Therefore, it is important to emphasise that the NREAP is not a concrete project per se that should undergo the EIB appraisal procedure as inferred by the complainant. However, within the framework of EIB financed projects, the EIB may review an SEA for projects resulting from programs or plans when the SEA process is applicable.

Within the framework of the complaints lodged with the European Commission, the EIB-CM takes note of the European Commission's interpretation of the provisions of Directives 2001/42/EC and 2009/28/EC with regard to the NREAP and the SEA. In this context, the European Commission considered that the need for an SEA depended on the specific content of each plan and that due to the general character of the Irish NREAP, the SEA could be carried out at the later stages of implementation when setting the framework for future development consent of projects. Moreover, considering the role of the European Commission as the Guardian of the Treaties, the EIB-CM takes note of the fact that although the complainant had raised his concerns with the European Commission, the latter concluded that there were no grounds to initiate an infringement procedure under article 258 of the Treaty on the Functioning of the European Union (TFEU).

With regard to the findings of the ACCC referred by the complainant, the EIB-CM observes that the ACCC findings emphasise on the European Commission's lack of legislative framework to implement article 7 of the Convention with respect of the adoption of the NREAP by Member states. In addition, the ACCC took the view that the European Commission failed to monitor the implementation of article 7 of the Convention in the adoption of Ireland's NREAP. In this context, the EIB-CM takes note that the ACCC is conducting a follow-up on the steps taken by the European Commission, which will inform the ACCC on a regular basis.

In this regard, it is important to highlight that the EIB-CM is not competent to investigate complaints concerning International organisations, Community institutions and bodies and national authorities.

With regard to the alleged EIB's failure to ensure compliance of the EIB financed projects in the renewable Energy sector with the applicable laws and lack of economic appraisal, from the review carried out by the EIB-CM it appears that the EIB financing in the renewable energy sector is no exception to the EIB applicable standards and procedures when conducting its appraisal and due diligence ensuring the compliance of the projects with the applicable laws and standards. The EIB-CM failed to find evidence of the alleged lack of assessment and evaluation for the projects in the contested sector in relation to the allegations made.

In light of the findings above and based on the information available, the EIB-CM concludes that the Complainant's allegations in relation to the EIB financing in the Renewable Energy Sector are not grounded.

Recommendation:

Taking into consideration the information provided by the complainant regarding the ongoing court proceedings at the national level concerning the legitimacy of the NREAP, the EIB-CM recommends the EIB services to follow-up on the developments of the national court proceedings with the European Commission and the competent national authorities with a view to assessing possible impacts, if any, of eventual court decisions on the EIB operations in the sector.

REFERENCES

The EIB – Corporate Responsibility Policy and Governance Structure
http://www.eib.org/about/cr/index.htm

The EIB Complaints Mechanism
http://www.eib.org/about/accountability/complaints/index.htm

Database of Complaints Mechanism Cases
http://www.eib.org/about/accountability/complaints/cases/index.htm

2.6. World Bank Inspection Panel and International Finance Corporation Compliance Advisor/Ombudsman

The World Bank is an international institution that belongs to the United Nations system and provides financial as well as technical assistance to developing countries. Since the establishment of the mother organisation, the International Bank for Reconstruction and Development, back in 1944, this international institution has grown into what is nowadays known as the World Bank Group. It includes five institutions:

- the original **International Bank for Reconstruction and Development (IBRD)**, which lends to governments of middle- and low-income countries;
- the **International Development Association (IDA)**, which provides interest-free loans to governments of the poorest countries;
- the **International Finance Corporation (IFC)**, which seeks to support sustainable economic growth in developing countries by financing and mobilising investment in the private sector;
- the **Multilateral Investment Guarantee Agency (MIGA)**, which also seeks to promote foreign direct investment in developing countries by offering political risk insurance to investors and lenders; and, finally,
- the **International Centre for Settlement of Investment Disputes (ICSID)**, which provides the institutional infrastructure for conciliation and arbitration of investment disputes.

Many of the activities of the World Bank are carried out on the basis of a series of *soft law* instruments, the most significant ones being the World Bank's **operational policies and procedures.** While the operational policies determine the way in which the World Bank's management conduct operations, the procedures establish formal standards for the implementation of the World Bank's policies. Under these soft law instruments, the World Bank's management is accountable to the governments of the member states of the institutions of the World Bank Group, but not to affected populations. The activities of the International Finance Corporation and the Multilateral Investment Guarantee Agency, in turn, are governed by, *inter alia*, their **Policy on Social and Environmental Sustainability** and their **Performance Standards on Social and Environmental Sustainability.**

Due to the impact of their respective policies and projects on local communities and on the environment, both the World Bank and the International Finance Corporation have established **complaint mechanisms** as a response to pervasive requests from private parties for accountability. These mechanisms are open to private parties and non-state actors wishing to hold these international institutions responsible for their policies and actions. These accountability mechanisms are:

1. the **World Bank Inspection Panel** and
2. the International Finance Corporation's **Compliance Advisor/Ombudsman**.

Note this important difference between the two mechanisms: The supervisory powers (jurisdiction) of the World Bank Inspection Panel are limited to the conformity of any project funded in whole or in part by the IBRD or the IDA with the World Bank's operational policies and procedures. However, remember that these projects provide development loans directly to governments. Therefore, **the World Bank Inspection Panel is NOT a suitable mechanism for holding private businesses directly accountable** for potential human rights abuses.

If you nevertheless consider using this mechanism, you will find general guidelines on how to file a request for inspection with the World Bank Inspection Panel at the institution's web page, as well as more-specific, detailed information on past and ongoing complaints.

The shortcomings of the World Bank Inspection Panel's supervisory powers with respect to the IFC and the MIGA led to the establishment of the Compliance Advisor/Ombudsman (CAO) in 1999.

According to the **CAO's Operational Guidelines**, its mandate is *"to assist IFC and MIGA in addressing complaints by people affected by IMC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective and constructive, and to enhance the social and environmental outcomes of IFC/MIGA projects (or projects in which those organizations play a role)."*

The CAO is designed as an independent, impartial institution that plays three distinctive roles:

- **Dispute resolution role**→ It aims at resolving issues with the affected person or group through dialogue, mediation, and settlement.
- **Compliance**→ It audits the IFC's and/or MIGA's performance to assess whether it is compliant with their social and environmental policy and performance standards.
- **Advisor role**→ It advises the president and management of IFC and MIGA in addressing specific issues and reviewing social and environmental policies and performance standards.

Assessment procedure in the role of Ombudsman

There are three eligibility criteria for complaints:
- the complaint relates to an IFC/ MIGA project,
- the complaint raises social and environmental issues and
- the complaint is filed by an individual and/ or community directly affected by the project or is filed by their representative(s).

Keep in mind that the CAO does not assess cases involving fraud or corruption. If the CAO considers a complaint to be eligible, CAO specialists assess the conflict, the contending views on the issue and available alternative solutions with a view to furthering a settlement.

Stakeholders' identities and information are kept confidential if so requested.

If CAO specialists determine that a collaborative solution is not possible, the case is transferred to CAO Compliance for appraisal.

Procedure in the role of Compliance Watchdog

In this phase, the CAO initially appraises whether the complaint raises substantive concerns regarding a project's social or environmental performance.

If so, an independent panel of experts is convened for an investigation and in-depth audit of the project's compliance with the *Policy* and the *Performance Standards on Social and Environmental Sustainability.*

Whenever IFC/MIGA is found to be non-compliant, the CAO keeps the audit open and monitors the situation until actions are taken to ensure that the project is back into compliance.

Example of how the CAO operates

PERU/YANACOCHA-03/CAJAMARCA

Complaint - *The Yanacocha Gold Mine began operations in the department of Cajamarca in 1993. Yanacocha, the largest gold mine in South America, comprised of six open-pit mines, four leach pads and three processing facilities. In June 2000, a contractor to Minera Yanacocha spilled 151 kg of elemental mercury along a 41 km stretch of road between the mine site and the town of Choropampa. A number of local people, unaware of the nature of the chemical, were exposed and subsequently experienced adverse health effects.*

In March 2006, 30 canal users jointly lodged a complaint with CAO requesting assistance in obtaining information about the current and potential impact of mining activities on the water quantity in the canals, rivers and streams surrounding the project. The petition expressed satisfaction with the collaborative process undertaken by the Mesa and CAO in relation to water management and an interest in extending these efforts through an independent mechanism such as CAO.

CAO Action - *In May 2006, CAO conducted a site visit to liaise with canal users and mine representatives in order to gauge the parties' willingness to work collaboratively on strategies for sharing information concerning water quantity. The petitioners agreed that their concerns in relation to water quantity ought to be addressed within the confines of a facilitated meeting. This forum was intended to be conducive to a fluid exchange of information and open discussion.*

In July 2006, CAO Ombudsman facilitated an information sharing workshop with the petitioners and mine representatives. Although the initial petition to CAO requested an independent water quantity study, CAO sought first to understand the canal users' specific concerns, and to solicit from Yanacocha a comprehensive list of all the available water quantity studies and information. With this information, CAO encouraged the parties to work together to determine what studies were necessary, if any, and whether the existing studies sufficiently addressed the canal users' concerns. In the Exit Report, completed in September 2006, CAO recommended that Yanaococha honor its commitment to distribute relevant documentation to canal users and ensure it is accessible to all interested parties.

Status - *In July 2006, CAO concluded its involvement in the petition brought by the canal users, however remained engaged with the parties in relation to water quantity issues. The complaint was closed in August 2006.*

Source: http://www.cao-ombudsman.org/

REFERENCES

World Bank
http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx

CAO Ombudsman
http://www.cao-ombudsman.org

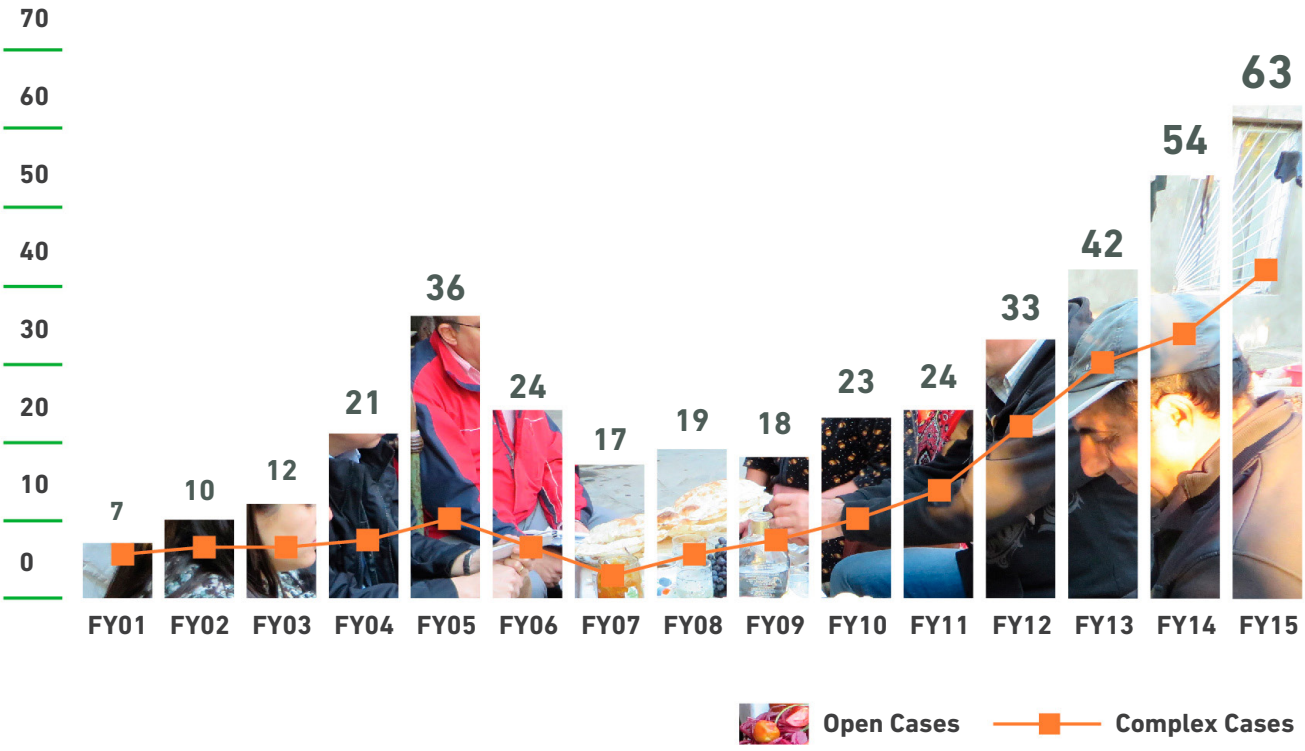
USEFUL ADVICE:

More-detailed information on the specific procedure can be found in the **CAO Operational Guidelines:**
http://www.cao-ombudsman.org
Amongst other items, this website also contains a model letter of complaint to the IFC CAO

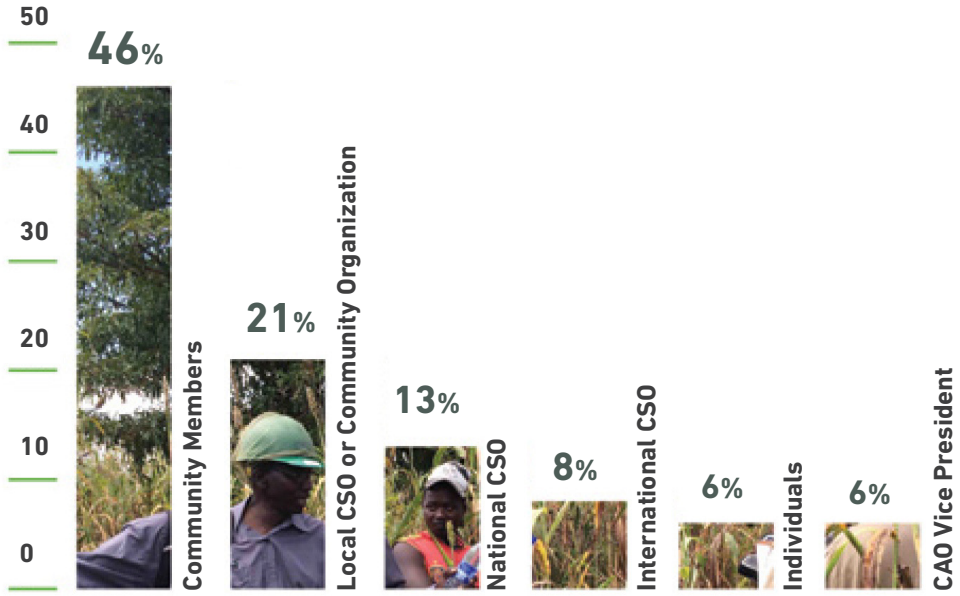
SIGNIFICANT STATISTICAL DATA ON THE OPERATION OF THE IFC CAO:

(CAO Annual Report 2015, pp. 6-7: http://www.cao-ombudsman.org):

GROWTH IN VOLUME AND COMPLEXITY OF CAO CASES



PROFILE OF CAO COMPLAINANTS/CASES INITIATED



3. JUDICIAL MECHANISMS

3.1. General Ideas About Possible Judicial Avenues

In theory there are several judicial avenues you can take if you know business has violated human rights; human rights are protected as legal interests under various international treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the United Nations' International Human Rights Covenants of 1966. In practical, effective terms, however, demanding liability is no simple matter. There are alternative dispute resolution (ADR) mechanisms, and there is international civil litigation, which is generally seen as an alternative or complement to other kinds of litigation, like administrative litigation and criminal litigation.

Bear in mind that it's hard to demand liability directly from companies under public international law. For instance, the International Criminal Court in The Hague and the European Court of Human Rights have no jurisdiction over what businesses do. In 2011 the United Nations did adopt the *Guiding Principles on Business and Human Rights* (A/HRC/RES/17/31). Another major development took place in June 2014 when the United Nations Human Rights Council passed a resolution supported by various countries with a view to preparing a future international treaty on business and human rights, and an intergovernmental group of experts was created with the ambitious goal of creating a binding instrument on the subject (You can find updated information on this at http://www.ohchr.org. The EU has also been paying attention to this sphere in recent years in response to a rise in confirmed cases now that we are part of a globalised society. Community institutions have devoted themselves to fostering the *Guiding Principles* through "A Renewed EU Strategy 2011-14 for Corporate Social Responsibility" (COM (2011) 681 final), which you can find at http://ec.europa.eu.

There are non-compulsory guidelines as well, such as those issued by the ILO and the OECD, whose objective is to reconcile business activity with respect for human rights. The Council of Europe recently adopted a recommendation in matters of business and human rights that aims to implement guidelines in line with the guidelines given in the *Guiding Principles,* for the Member States bound by them (You can find information on the subject at http://www.coe.int. In practice, due to the restrictions in the field of public international law, when a real case arises it is important for you to consider which option is best. Analyse the numerous circumstances surrounding the case to decide if your best course of action is to pursue different avenues (like filing both civil and criminal action) at the same time.

CRIMINAL PROCEEDINGS

Some cases of serious human rights violations classify as international crimes under the Rome Statute of the International Criminal Court. These are cases of genocide, crimes against humanity, war crimes and the crime of aggression. The liability of, say, a business executive as an individual is one thing, though; the liability of a company is another. The International Criminal Court has no jurisdiction over companies.

The laws of many countries do not refer to enterprises as having criminal liability in their capacity as legal persons, although most EU Member States do. The finer points even state that parent companies can be held liable in connection with the acts of their subsidiaries, which is a valuable handhold in cases involving complex corporate structures where you have to resort to constructs of corporate law to figure out which entity is really liable for an unlawful event. The relationships amongst corporate entities play a major role in claims that a subsidiary has performed activities that violate human rights, in allusions to the parent company's duty of care and in work to pin down the exact degree of each entity's participation in certain actions. In criminal proceedings, it is also important to establish the extent to which a company has perpetrated or been accessory to a crime in which other perpetrators or accessories (for instance, state actors) may have participated as well. You need to ascertain, for example, if a company has earned profits because it has had certain products manufactured under working conditions comparable to slavery, taking into consideration the extent of the entity's knowledge of events.

Speaking from the viewpoint of comparative law, some sort of official action is usually necessary to get criminal action going. The official stimulus normally comes from the *public prosecutor,* who may be able to use a certain amount of discretion. The public prosecutor's involvement may bring politically based obstacles into the picture, which pose no mean problem in cases with a heavy media and economic impact. If you compare civil proceedings and criminal proceedings, you will find that each offers certain advantages and differences for victims in terms of things like how the defendant is treated, what system of penalties applies and what shape redress mechanisms can take. Looked at from the stance of comparative law, the system of evidence for criminal proceedings is more demanding than that used in civil proceedings, and the standard of defendant protection reaches higher in criminal proceedings. A positive point in criminal proceedings against companies is that the company's liability is separated from the liability of the individuals who are connected to the company's actions; the reported disadvantages, though, include slowness and the high cost of criminal proceedings in many jurisdictions.

One potentially interesting channel is to invoke universal jurisdiction, that is, to take criminal action in a country's courts for crimes committed without any apparent connection to that country. Numerous countries have legislation that allows their courts to claim universal jurisdiction over extremely severe crimes of international impact, including war crimes and crimes against humanity. Nevertheless, in many countries universal jurisdiction is subject to conditions or restrictions. Significant restrictions have been placed on the exercise of universal jurisdiction in various EU Member States as well (for example, Belgium, or more recently Spain, through Organic Law 1/2014 of 13 March amending Organic Law 6/1985 of 1 July on the Judiciary).

Both domestic and EU environmental laws stipulate diverse measures for EU Member States concerning pollution evaluation, the impact of pollution on the environment and the possibilities of access to justice in the event of environmental crimes. You can see a summary of environmental rules at http://eur-lex.europa.eu/summary/chapter/environment.html?root_default=SUM_1_CODED%3D20&locale=en.

Criminal legislation against corruption can prove important as well, to guarantee effectively the enjoyment of human rights in the context of corporate activities.

* For a case of criminal proceedings for human rights violations committed by business, we need go no farther than the notorious **Bhopal case**. The case is named for the city of Bhopal, India, where in December 1984 some highly toxic chemical compounds leaked from a pesticide factory managed by Union Carbide India Ltd (UCIL), a subsidiary of Union Carbide Corporation (UCC), headquartered in the United States. This unleashed a disaster of monstrous proportions, as thousands of people died or were severely injured as a consequence of exposure to the toxic cloud. Although at first a number of arrests was made, and various serious crimes under Indian criminal law were committed, the criminal proceedings are still ongoing today. In addition, the number of victims has kept rising over the years, and the subsequent purchase of UCC by Dow Chemical has complicated the matter of claiming damages and exacting liability even further, according to groups of the people affected. International civil action has also been taken on this case in US courts. You can find up-to-date information at http://business-humanrights.org/en/union-carbidedow-lawsuit-re-bhopal.

* We might also allude to the controversy about the dumping of toxic industrial waste in August 2006 in Côte d'Ivoire, allegedly by a local firm contracted by **Trafigura** to eliminate the waste. Trafigura is headquartered in London and denies any liability. It says it trusted the firm it hired for waste management to act diligently. Amnesty International and other entities have repeatedly urged UK authorities to carry out a criminal investigation into the case, in response to the Environment Agency's refusal to do so, despite the admission that a serious crime could have been committed. The difficulty of exacting criminal liability in this case is due to the fact that the damage happened outside British territory. On this case, see https://www.amnesty.org/es/latest/news/2015/07/trafigura-toxic-disaster-shows-the-uk-needs-to-get-tough-on-corporate-crime/.

ADMINISTRATIVE PROCEEDINGS

One particularly important area for corporate watchdogs to monitor is that of the authorisations and permits companies require to start out and conduct normal business. The requirements are set by each country or sometimes by sub-national or even local authorities. They tend to vary depending on the kind of business each company is in. Failure by the company to meet requirements at the start of business or during the company's career usually creates opportunities for reporting the company to the competent administrative authorities. But bear in mind that the standards countries set for the many and various business areas are quite different, and the fact that a company meets current legal requirements is no guarantee that its activities cannot lead to human rights violations.

The possibility of administrative penalties for environmental protection infringements has seen especially strong development in recent decades, and it is important to distinguish between administrative violations and unlawful acts that qualify as environmental crimes. At first you might think that, if environmentally unfriendly action can be considered an administrative offence, it is not being taken very seriously, but some of the fines can be extremely heavy.

European Union law upholds the "polluter pays" rule. The EU Member States have been encouraged to adopt a set of administrative rules of varying scope, depending on the way such things are regulated in each country (e.g., the rules may be national, sub-national or local), but all the rules are supposed to focus on preventing offending conduct and providing redress. Bear in mind that, while administrative rules of this sort are mainly oriented toward ***fining,*** they may have other effects, such as forcing offenders to close their facilities or restore environmental conditions.

INTERNATIONAL CIVIL LITIGATION

Traditionally, civil action linked to human rights violations due to acts committed by business is based on US judicial practice in connection with the Alien Tort Statute or the Alien Tort Claims Act, an instrument on whose basis federal courts were affirmed to hold jurisdiction to try civil liability claims lodged by foreign plaintiffs concerning events clashing with international law. After repeated attempts to use case law to delimit the scope of this legislative foundation, on 17 April 2013, the US Supreme Court introduced in the *Kiobel* case a "presumption against extraterritoriality", which restricts the law's operation in connection with human rights violations outside US territory, a point that can be rebutted if there are sufficient connections. In its opinion of 14 January 2014 in the *Daimler v Bauman* case, the Supreme Court went at length into the requirement of closeness for trying cases of this sort in the United States. Other possibilities apart from the Alien Tort Statute have been explored as well in US practice, such as international civil litigation in state courts.

Before choosing which avenue of redress to pursue for human rights abuse victims, run a careful analysis of the advantages and drawbacks the various mechanisms would have in your particular case. Sometimes you can work along several avenues at the same time.

In recent years interest has grown in the possibility of exercising civil action in such cases at the courts where the ***harmful acts*** take place, in view of the many problems in gaining access to justice and the subsequent obstacles for enforcing decisions in the country where a multinational's parent company is located (On this point, see cases arranged according to the location where suit was filed at http://business-humanrights.org/en/corporate-legal-accountability*).* In addition, specialised legal practitioners have found that Canada may have some courts that are receptive to this type of litigation nowadays, and there is a demand for the courts of the EU Member States, where human rights violation claims against businesses are still few, to be configured to entertain such cases. And let's not overlook the fact that private international law in the EU has proved less than sensitive in facilitating the exercise of action of this type.

Transnational human rights claims may look like an alternative that is sometimes effective, although out-of-court settlements are frequent in some places, like the United States. Even so, if you file a transnational human rights claim, that means you need to overcome a minefield of obstacles. The top two difficulties are pinning down which court holds jurisdiction and picking out which entity is responsible from the snarls of the corporate tangle. There are other procedural complications as well, like access to legal aid, international cooperation amongst authorities and the international efficacy of decisions outside a specific framework such as the EU's internal perimeter.

WHAT ARE SOME OF THE TOP COMMON OBSTACLES BLOCKING CLAIMS FOR DAMAGES IN THE INTERESTS OF THE VICTIMS OF HUMAN RIGHTS VIOLATIONS COMMITTED BY BUSINESS?

- ✓ Choosing the best non-judicial or judicial mechanism for the case, as an alternative or supplementary measure.
- ✓ Learning if you qualify for legal aid.
- ✓ Ascertaining if class actions can be arranged.
- ✓ Identifying the exact entity you mean to hold liable within the framework of the complex structure of a multinational.
- ✓ Getting a court to decide that it holds jurisdiction first of all to hear your civil or criminal litigation with cross-border elements, so it will handle the case.
- ✓ Overcoming the multiple procedural complications that may arise, such as complications in submitting evidence and lengthy delays in proceedings.
- ✓ Having decisions enforced once the court has ruled in your favour.

REFERENCES

"Final Report: International Civil Litigation for Human Rights Violations" in the context of the *Sofia Conference (2012) - International Civil Litigation and the Interests of the Public,* prepared by the International Law Association, available at http://www.ila-hq.org

"Injustice Incorporated: Corporate Abuses and the Human Right to Remedy", 2014 report by Amnesty International, available at https://www.amnesty.org

"Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union", prepared by Dr. Daniel Augenstein and the University of Edinburg, available at http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf.

Strike and marches protesting against the consequences of the mercury spill by Minera Yanacocha, a subsidiary of Newmont Mining Corporation, in Choropampa, Cajamarca, Peru, in June 2000 (May 2009). Source: "El Maletero", Red Verde Cajamarca.

3.2. International Civil Litigation in Cases of Human Rights Violations Committed by Businesses: An Overall View

Civil action is a possibility you may use as an alternative or supplement to other avenues. Whether civil action is the right way to go depends on the circumstances of your particular case. The effectiveness of civil action is strongly contingent on your choosing the right court to file the claim in and thoroughly weighing the possibilities that the court's decision will eventually be applied, supposing it is in your favour.

The first step is to identify the court with authority to preside over your case. Once you've overcome this first obstacle, which involves a great many difficulties, you have to address issues concerning which law is applicable. In other words, you have to establish which country's law will bear upon your claims. And once the international civil proceedings have ended, if the court has ruled for the victims, it will be no simple thing to have the decision enforced, particularly outside the European Union.

SINGLING OUT THE INSTRUMENTS APPLICABLE TO A GIVEN CASE:

One of the stickiest jobs involved in filing civil action in these cases is identifying the specific legislative instrument that is applicable to your case. You have to take into account the hierarchy of sources and the fields each instrument covers. There are quite a few multilateral international conventions on international civil liability stemming from environmental damage. These conventions take preference over the EU instruments of private international law discussed below. The jurisdiction rules of these international conventions take priority when the damage or incident occurs in a country that is a party to the instrument. The law applicable to the merits of the case is determined according to the laws of the country where the competent court is located.

CLAIMS AGAINST A COMPANY THAT HAS A COMPLEX STRUCTURE OF RELATIONSHIPS WITH OTHER COMPANIES

As we stress several times throughout this guide, transnational human rights claims face a lot of obstacles, including the fact that they are pitted against entities that may be enmeshed in complex corporate structures. Therefore, in the course of the various phases of civil proceedings, you must examine the relations amongst the members of the corporate group as regards the position of the defendant. You will find a number of commercial law theories useful in achieving this goal, like piercing the corporate veil. The extreme complexity of a corporate organisation, for example in the case of multinationals, can make it hard or even impossible to assign liability to a specific entity. In addition, in certain cases satisfaction of due diligence obligations and

duty of care by the parent company with respect to dependent companies may be an issue. Consider also the possibility of taking action simultaneously against more than one company as co-defendants; European private international law on jurisdiction in related actions helps there. Stay alert to the risk of attempts to connect certain business activities that violate human rights with the privileges inherent in governments' immunity from the civil jurisdiction, in cases of public companies or companies fulfilling public functions.

THE IMPORTANT POINT OF LEGAL STANDING AND THE POSSIBILITY OF CLASS ACTIONS:

Ask yourself if the victims can opt for class actions, which are typical in US practice. Class actions are inadvisable if, for instance, the participating victims differ seriously on the question of the compensation they seek. After the adoption of Regulation 1215/2012 of 12 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, known as the Recast Brussels Regulation, the possibility of initiating class actions when there are multiple claimants still depends on the law of the country of litigation (the law of the forum). Some EU Member States allow this possibility (frequently limited to highly specific realms such as consumer affairs, investments and competition law), but it is being extrapolated to other fields (in Germany, Spain, Finland and the United Kingdom). Other Member States do not envisage class actions. There is not much judicial practice concerning the exercise of class actions in international civil litigation for human rights abuses in European Union Member States, so you won't find a uniform EU response. In June 2013 the European Commission proposed a series of non-binding common principles about how to set up collective redress mechanisms. The jurisdiction specifically stated for tort matters in the Recast Regulation system (article 7.2) allows action to be taken by entities such as NGOs and associations supporting the victims of human rights abuses by businesses.

HANDLING THE MAJOR ASPECTS INVOLVED IN SETTLING THESE MATTERS FROM THE STANDPOINT OF SOURCE INTERACTION:

As we said before, identifying the legislative instrument that applies to your particular case is paramount. Under private international law, the first thing to do is determine the court with jurisdiction to hear the action. The success of your suit depends largely on this point. The problem is that frequently legislative instruments do not offer attractive forums for this sort of international civil litigation, despite the extreme sensitivity of the subject.

A. First, to establish international jurisdiction from the EU standpoint, look at the Brussels I Regulation (Recast). It is applicable since 10 January 2015. The system it outlines replaces the system set by its predecessor, the Brussels I Regulation. In the reform as finally adopted, EU legislators chose not to extend jurisdiction to defendants domiciled in third countries, though they may do so in future. Nor did the legislators who revised the Brussels I Regulation include criteria that favour the victims (such as the victim's habitual residence or the location of the defendant company's assets or business), the jurisdiction of necessity (*forum necessitatis*) or any flexible formulae for referral of jurisdiction (*forum non conveniens*).

For the present, victims may go to the court indicated by the general rule of jurisdiction based on the domicile of the defendant (article

4, Recast Regulation). This is where you have to face the difficulty of sophisticated corporate edifices in cases of transnational enterprises. You will need to investigate how to make a concrete liability claim in the face of the web of corporate relations between a parent company and its subsidiaries. Alternatively, the Recast Regulation (article 7.2) offers a forum in matters relating to tort where jurisdiction is conferred, according to repeated case law of the Court of Justice of the European Union, to the court for the place where all damages occurred or some damages appeared. There are other jurisdiction criteria in the Recast Regulation that allow the courts of Member States to be given international jurisdiction to hear cases of this type. Those criteria are discussed later in this section.

Should you file suit in courts in Member States against companies domiciled in Switzerland, Norway or Iceland, bear in mind that there is a regulation parallel to the system described in the Recast Regulation, or rather, in the regulation prior to the Recast Regulation, in the revised 2007 version of the Lugano Convention, taking into consideration the compatibility clause in article 73.1 of the Recast Regulation.

When the rules envisaged in instruments originating in the European Union or international conventions are not applied, the residual criteria state that international jurisdiction belongs to the domestic or regional systems of the Member States (This point too is discussed later in this section of the handbook). This sometimes enables you to exercise action when the company is domiciled in a third country. Looked at in terms of comparative law, the domestic legislations of the Member States contain rules similar to those of the Recast Regulation system, rules based on the location of the forum for the defendant's domicile, the place where the damage happened and limited possibilities for autonomy. In addition, the laws of some Member States, like France, Belgium and the Netherlands, expressly uphold the jurisdiction of necessity (*forum necessitatis*) to avoid cases of denial of justice and to guarantee effective judicial protection as outlined in article 6 of the *European Convention on Human Rights (ECHR).* Under the laws of some countries (Belgium, France, Luxembourg), what operates is something known as *exorbitant jurisdiction*, which is applicable according to the defendant's nationality; in other countries international jurisdiction is attributed according to the presence of the defendant's assets in the country (Germany, Scotland) or connections inherent in Anglo-Saxon practice, such as "tag jurisdiction" (which has to do with whose territory the defendant is served in) and "doing-business jurisdiction" (which is related with detecting significant activities at a certain location). Also in common-law countries, you may find corrective measures that provide extra flexibility, like *forum non conveniens*, which allows jurisdiction to be passed to a court that is regarded as closer to the matter to be tried, though this cannot be applied in the European Union.

The first and fundamental obstacle in this type of international civil litigation is identifying the competent court. Once you overcome that obstacle, the next thing is to identify the applicable law, one that can decide on the merits of the case and allow a judgment to be given that, if enforced, can effectively compensate the victims.

B. You have established which authority has jurisdiction to hear the case. Now to locate the substantive law that will bear upon the victims' claims through the conflict-of-law rules. In the case of Member States, apply the Rome I Regulation (Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations) if the case is related to an employment contract. When claiming non-contractual liability (which is frequently the case), use the Rome II Regulation (Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations). Rome II contains a general procedure for finding the applicable law and affords the possibility of a limited choice of law; choosing the law, like choosing the jurisdiction, is something you will not often see in the kinds of cases we are dealing with. Rome II also contains particular terms regulating certain types of cases, such as environmental crimes, intellectual property

Some real-life examples

- British courts heard the case of ***Lubbe v Cape plc*** instead of declining jurisdiction, as the defendant had asked, because it was the courts' understanding that in South Africa, where the subsidiaries were located, the commitment to effective judicial protection would not be satisfied. We can deduce from this case that jurisdiction was conferred under article 2 of the 1968 Brussels Convention, which is the predecessor of and basis of interpretation for the old Brussels I Regulation and the Brussels I Regulation (Recast).
- In the case brought against **IBM** by representatives of the Roma ethnic group in connection with technological support for the Nazi regime, the attribution of jurisdiction was based on the performance of business activity in Switzerland, without evidence of the presence of permanent establishments in Switzerland. Ultimately the case was dismissed due to the statute of limitations (*BGE 131 III 153 = Pra. 94 (2005), Nr. 150*).
- There are few practical cases featuring similar circumstances in the Member States. Dutch courts held jurisdiction in action filed in the Netherlands against the Nigerian subsidiary of Shell and their Dutch parent company in what were popularly known as **the *Dutch Shell cases***. The attribution of jurisdiction was founded on article 7 of the Dutch Code of Civil Procedure, which allows a foreign subsidiary to be tried in Dutch jurisdiction by virtue of its connection with its Dutch parent company if there is sufficient connection between the claims. A ruling on the merits of the case is expected in 2016 or early 2017.
- In British case law, the referral of jurisdiction known as forum non conveniens has sometimes been accepted and sometimes been rejected to avoid a denial of justice **(Connelly, Lubbe and Sithole)**.
- A claim was recently lodged in German court demanding redress from the **KiK** textile firm domiciled in a town near Dortmund in connection with civil liability for worker deaths and injuries caused in September 2012 by a fire in the local factory in Pakistan that provided KiK with products. The action was exercised on the basis of the general rule that attributes jurisdiction to the court for the domicile of the defendant in Germany under the Recast Regulation. The non-contractual liability claim refers to the Rome II Regulation. For updated information on the case, see http://www.ecchr.eu.

infringements and defective products (For signatory Member States, what prevails in matters of defective products is the Convention on the Law Applicable to Products Liability done at The Hague in 1973). Be warned of the importance of the instrument's rules of application, which leaves nuclear damage (which is regulated in certain international conventions) and infringements of rights relating to personality (in whose respect the conflict-of-law rules of domestic legislations continue to be applied) outside the scope of Rome II. As a consequence, depending on which court has jurisdiction, some very different legislations may apply; exploration of these possibilities is known as ***forum shopping.***

C. Lastly, as mentioned before, it is very important to bear in mind that even if the court finds in favour of the victims, that does not guarantee that enforcement will follow, e.g., that the reparations stated in the judgment will actually be forthcoming. In intra-Community dealings, the Recast Regulation facilities enforcement under the rule of mutual trust, thus minimising the cases where one Member State refuses to enforce a judgment given in another Member State. However, there are other conventions you will need to use to facilitate the recognition and enforcement of judgments given in this context. Some are multilateral (2007 Lugano Convention); some are bilateral. To try and avoid what are known as ***limping relationships*** (situations in which decisions

obtained in other countries cannot be enforced), your last resort is the domestic legislation of the various countries, which tends to be more restrictive in its criteria. The Hague Conference on International Private Law is running a project, the Judgments Project, to draw up a multilateral international convention establishing recognition and enforcement rules. Such a convention would help avoid one of the most conflictive elements in successfully concluding this type of litigation.

WHAT ARE THE MOST SIGNIFICANT PROBLEMS IN APPLYING THE DIVERSE LEGISLATIVE INSTRUMENTS AVAILABLE IN THE EU MEMBER STATES TO INTERNATIONAL CIVIL LITIGATION FOR HUMAN RIGHTS VIOLATIONS BY BUSINESS?

- ✓ Identifying the particular legislative instrument that applies is a ticklish business. You need to have a thorough understanding of how legislative sources interact with one another.
- ✓ You must deal with serious issues involving the position the victims and the defendant companies occupy. For example, you must weigh up whether class action is an option and what position the company holds within a multinational corporate fabric.
- ✓ It is tricky to work out which particular entity within the complex multinational corporate configuration should be charged with liability.
- ✓ The forums anticipated in the Brussels I Regulation (Recast) are not always well suited to this type of international civil litigation, despite the regulation's reform.
- ✓ Nor, generally speaking, are the domestic rules and regulations of the Member States especially well prepared for dealing with this type of litigation.
- ✓ In some topical cases, such as violations of rights relating to personality, the amount of compensation granted may vary widely depending on the applicable law, because there are no common conflict-of-law rules in the Rome II Regulation.
- ✓ Once a court of a Member State rules in your favour, having that ruling enforced outside EU territory is more problematic than amongst Member States.

REFERENCES

Regulation 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 (OJ L 351/1 of 20 December 2012).

Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177 of 4 July 2008).

Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to contractual obligations, OJ L 199 of 31 July 2007).

"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":
http://ec.europa.eu/civiljustice

European Center for Constitutional and Human Rights:
http://www.ecchr.eu

3.3. Who's Responsible? The Question of Parent Companies and Their Subsidiaries

Multinational or transnational enterprises are economic agents generally led by a parent company that not only does business in its home country (generally in the **global North**), but also operates in other countries through subsidiaries or subcontractors. These subsidiaries or subcontractors are sometimes directly responsible for human rights violations and environmental degradation in their host countries (frequently countries in the **global South**). Right now there are about 50,000 multinationals with 450,000 subsidiaries around the world. According to Fortune's database, approximately 159 of the world's 500 biggest multinationals have their parent companies in Europe.

MULTINATIONAL ENTERPRISE

According to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the term "multinational company" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration. This means enterprises that own or control production facilities, distribution facilities, service facilities or other facilities outside the country where their headquarters are located, and it includes enterprises of public, private or mixed ownership.

Eric Dooh from Goi. Farmer and plaintiff against Shell.
Source: Milieudefensie. Friends of the Earth Netherlands.

The Structure of a Multinational

PARENT COMPANY

A parent company controls directly or indirectly one or more other companies. It may own shares in companies that it has organised or shares that it has bought in companies organised by others. Its headquarters or registered offices are located in a country referred to as its "home country", where all decisions about the entire corporate group's activities are taken. In most cases, but not always, the home country is in the global North, and the subordinate companies operate under the direct or indirect economic, financial or administrative control exercised from there. Lately, however, parent companies are more and more often to be found in countries like China, South Korea, Brazil, South Africa and Russia.

SUBSIDIARY

Companies expand their business through subsidiaries, subcontracting other companies or making foreign investments. Subsidiaries are companies whose decisions depend directly on another enterprise, their parent company. Subsidiaries' liability is limited by the amount of their capital, and their legal personality is separate from that of their parent company.

Multinational enterprises are not considered subject to public international law, so they are not liable for breaches of international human rights treaties. A multinational is an agent that has been organised through fulfilment of the legal requirements set by some country, which then recognises the multinational as a legal person in all its acts, a legal person able to hold rights and duties. The creation of a company involves the birth of a legal person that is distinct and independent from its shareholders. When a company is said to have "legal personality", it means the company has its own commercial name and domicile and the legal capacity to enter into contracts and conduct its own legal relations. Its liability for alleged human rights violations and environmental damage operates mainly at the domestic level, in the local courts for the place where the company operates and the harmful acts take place.

Human rights violations and environmental degradation as a consequence of the activities of business groups have spawned a multitude of legal proceedings. However, in the EU there are plenty of obstacles to suing a parent company together with a subsidiary domiciled in a third country for damage ocurred in the host country. One difficulty arises when companies are made up of complex networks of differentiated legal entities strategically located throughout the world. Their corporate structure and organisation then make it tricky to hold the parent company liable for the acts of its subordinate enterprises. So, ultimately any liability and any losses have to be shouldered by the individual subsidiaries and paid for from their assets.

Each subsidiary of a multinational has:

-Limited legal liability.

-Separate legal personality.

Both characteristics are stipulated in corporate law and are intended to foster investment and economic growth. When applied to multinational enterprises, their result is that the legal personality of one company belonging to a corporate group and the legal personality of another company belonging to the same corporate group are different.

Limited legal liability and separate legal personality are two of the biggest obstacles for victims who seek to hold parent companies accountable for human rights abuses committed by their subsidiaries abroad.

In many countries, the actions of a subsidiary cannot be attributed to the parent company in cases of civil liability. Recommendation CM/Rec(2016)3 on human rights and business stresses that limited legal liability and separate legal personality are two of the biggest obstacles for victims who seek to hold parent companies accountable for human rights abuses committed by their subsidiaries abroad. These doctrines shield the parent company from any actions for liability stemming from what their subsidiaries are doing, including human rights abuses. This, despite the fact that the parent company has the technological and financial resources to prevent and repair the damage, since it usually fully controls its subsidiary's decisions.

To overcome these obstacles, Recommendation CM/Rec(2016)3 on human rights and business suggests that the Member States of the Council of Europe should allow their domestic courts to exercise jurisdiction in cases against parent companies domiciled in their jurisdiction and against subsidiaries domiciled in another jurisdiction when the claims are closely related, as in the case of Akpan v Shell. In that case, the

Dutch court declared that it held jurisdiction to hear the claim for damages due to oil spillage against both the parent company, Royal Dutch Shell, registered in the United Kingdom and headquartered in the Netherlands, and its subsidiary domiciled in Nigeria. The claims filed by the affected persons were held to be connected because the defendants were the same and the facts were the same.

Lack of transparency in subsidiary ownership or control poses some major challenges in gathering evidence. In the case of civil litigation, the plaintiff must present the necessary evidence to prove that the actions or omissions of the parent company resulted in the abuse committed by its subsidiary in the host country.

The plaintiff must present the necessary evidence to prove that the actions or omissions of the parent company resulted in the abuse committed by its subsidiary in the host country.

LIMITED LIABILITY

The doctrine of limited liability holds that a company's shareholders cannot be considered liable for the company's debts beyond the sum they have invested. This doctrine applies in the relationship between parent companies and their subsidiaries, too. That is to say, parent companies and their subsidiaries have to be handled separately in legal proceedings, and that poses a challenge in civil claims for human rights violations against parent companies for acts committed by their subsidiaries, since the doctrine of limited liability applies regardless of the gravity of the damage or the economic profit the parent company is receiving from the subsidiary's operations.

SEPARATE LEGAL PERSONALITY

The legal personality of a parent company is different from the legal personality of each of its subsidiaries, even if the subsidiaries belong to and are controlled by the parent company. That is to say, share ownership or the mere ability to control a subsidiary's activities is not enough to make the parent company accountable for its subsidiary's acts.

The House of Lords' decision on *Salomon v Salomon & Co Ltd*, in the United Kingdom, was the first judgment to draw a clear legal line between shareholders and companies. It confirmed that the legal person was utterly separate and distinct. However, this differentiation must not be used fraudulently; that would constitute an abuse of separate legal personality.

Piercing the Corporate Veil

By ***"piercing the corporate veil"*** (also known as "lifting the corporate veil"), a court can hold a parent company responsible for the acts or omissions of the companies subordinate to it, provided that there is proof of a close relationship between the parent company and its subordinate companies. For instance, if they have roughly the same people on their boards of directors, if they share common policies or if they take decisions jointly.

Piercing the corporate veil originated in Anglo-Saxon law, but the concept has been embraced and further developed by the legislation of various countries, many of which are EU Member States. It is mainly an exceptional legal strategy used under certain circumstances and for certain purposes to correct and penalise acts in which the limitation of corporate liability has been used fraudulently. It is also applied in cases where companies are trying to evade their obligations, get or perpetuate a monopoly or commit crimes. Therefore, it is applied only in cases where there is proof that legal personhood is being used abusively or fraudulently. To correct fraudulent acts by a company, courts can break through the walls that define compartmentalised limited liability and separate legal personality.

Chandler v Cape plc
England

FACTS

David Chandler, a former employee of Cape Building Products Limited, filed a claim against his employer's parent company, Cape plc, in English courts after being diagnosed with asbestosis in 2007, due to having worked for Cape plc's subsidiary from 1956 to 1962; the subsidiary no longer existed when the claim was filed. The claimant alleged that the parent company had failed to discharge its duty of care with respect to the health and safety of the employees of its subsidiaries.

HIGHLIGHTS IN CONNECTION WITH PARENT COMPANY LIABILITY

In this case, the English court asserted that the parent company did have a duty of care based on three conditions:

1) the damage was foreseeable;
2) there was sufficient proximity between parties;
3) and it was fair, just and reasonable for a duty of care to exist.

In the first place, it was determined that the parent company and its subsidiary were in essentially the same business. So, the parent company had or should have had better knowledge of health and safety issues than its subsidiary. The court therefore concluded that the parent company knew or should have realised that working conditions at the subsidiary were unsafe, and it should have foreseen the risk of damages. It was also found that the parent company had sufficient control over the subsidiary, since it had taken health and safety actions applicable to all employees of the corporate group, including its subsidiaries' employees, thus creating proximity between the claimant and the company. Lastly, the fact that asbestos exposure is recognised as a major health risk provided fair, reasonable justification for imposing the duty of care.

The company appealed. Without having technically pierced the corporate veil, the Court of Appeal ruled that the company was liable, not for failing to assume control over its subsidiaries' activities, but for failing in its duty of care with respect to the claimant. This decision stated that there was a duty of care on the part of a parent company in connection with the occupational health and safety of the employees of its subsidiaries, which suggests that the parent company of a corporate group can be liable for negligent acts committed against people who are injured by its subsidiaries' activities. The significant thing about this case is that it opened the door to action against parent companies for violation of the fundamental rights of the employees of their subsidiaries.

Reference: Chandler v Cape plc [2012] EWCA Civ 525.

There is no general European rule about piercing the corporate veil in tort cases. Most legislations in EU Member States only envisage piercing the corporate veil under exceptional circumstances. The concept therefore is essentially based on case law, since there is no general legislation enacting it. Its application depends on the courts, who use it on a case-by-case basis to avoid abuse of otherwise-impenetrable corporate structures.

Unlike civil law, EU competition law allows the corporate veil to be pierced pretty easily, at least for passing along fines. In the Judgment of the Court of Justice of the European Union of 8 May 2013 (case C-508/11 P), having to do with the application of article 101 of the Treaty on the Functioning of the European Union, it was determined that a subsidiary's behaviour can be attributed to its parent company, even if the two companies are separate legal

Lubbe v Cape plc
England/South Africa, 1997-2000

FACTS

In February 1997, in the English courts, five South-African miners claimed damages for personal injury caused by occupational exposure to asbestos fibres. Their claims were filed against the parent company, Cape plc, for failing to control its subsidiaries' local operations, since Cape plc did not take the proper measures to reduce the consequences of asbestos exposure to a safe level.

HIGHLIGHTS IN CONNECTION WITH PARENT COMPANY LIABILITY

In this case, it was alleged that the parent company domiciled in England was liable for the actions of its South-African subsidiary, in which the parent company held a significant economic interest and whose shares the parent company completely controlled. The claimants alleged that the parent company acted negligently and failed in its duty of care, resulting in serious consequences (asbestosis and lung cancer) for employees and the population living near the mine. In this case the House of Lords stated a parent company has the obligation of a duty of care to prevent damage by any subsidiary of the corporate group.

Reference: Lubbe et al v Cape plc [2000] UKHL 41.

persons, particularly when the subsidiary does not independently chart its own conduct on the market, but instead essentially follows the instructions given it by its parent company. The economic, organisational and legal ties between the two legal entities have to be taken into account. Once such ties have been demonstrated to exist, the Court of Justice of the EU has declared repeatedly that the Commission can fine the parent compnay without having to establish that it participated directly in the infringement. Therefore, when a parent company owns all or almost all of a subsidiary that has infringed EU competition law, it is presumed that the parent company effectively exercises a decisive influence over its subsidiary.

PIERCING THE CORPORATE VEIL

While it is true that, as a general rule, a parent company is an entity distinct and separate from its subsidiaries, some countries' laws recognise that the existence of an independent legal entity cannot be considered an absolute principle. Therefore, under certain exceptional circumstances, a parent company can be held responsible when separate legal personality is used abusively to avoid liability, commit illicit acts (such as fraud) and/or when the subsidiary is declared bankrupt. Piercing the veil is a way to try and get past the legal personality barrier and lay the legal consequences of a subsidiary's acts directly at the feet of its parent company.

In many EU Member States, corporate law acknowledges the practice of piercing the corporate veil. It allows the victims of abuse by European companies direct legal recourse against the shareholders or directors of the companies involved. In order for this type of liability to apply, the parent company must exercise effective direct or indirect control over or direct or coordinate the subsidiary's activities. Mere share ownership or the mere possibility of controlling the subsidiary is not enough.

Piercing the corporate Veil in Spain
Judgment of 28 May 1984

Spanish courts have lifted the corporate veil in various cases to curb and stop the use of companies for illicit purposes and the abusive use of corporate structures.

FACTS
Uto Ibérica, S.A., filed a claim for damages to a number of apartments due to water damage after a water main burst in Palma de Mallorca in June 1977. The city had hired a company, Empresa Municipal de Aguas y Alcantarillado, S.A., to provide the city's public water service.

HIGHLIGHTS IN CONNECTION WITH PARENT COMPANY LIABILITY
At first, Uto Ibérica, S.A., claimed compensation from the city of Palma de Mallorca. The city alleged that it had no standing to be sued and the claim should have been lodged directly against the company. Although in this case the city's allegation was quite proper, the Supreme Court established for the first time the requirements for piercing the corporate veil in Spain:
- a conflict between legal certainty and justice,
- fairness and adherence to the rule of *bona fides* and
- evasion of the law.

Based on these requirements, Spanish case law has defined a few circumstances under which the corporate veil can be pierced:
- abuse of legal forms or use to evade the law,
- identity of persons or spheres of action, or confusion of assets (Identity, or identicalness, is evidenced by a joint or shared scheme of management, interests and profits),
- effective external control or management,
- undercapitalisation or decapitalisation and
- any other circumstance showing that the company's creation was plotted to evade the law or abuse a right.

Reference: Spanish Supreme Court, judgment of 28 May 1984, Civil Division (RJ 1984/2800).

Nowadays the scope of veil piercing is limited to civil litigation, since the process is mainly applied in infringements of corporate law. However, it does form a basis for recognising the oneness of a parent company and its subsidiaries.

BEAR IN MIND THAT

- ✓ Most transnational enterprises do business in third countries through subsidiaries, whose capital belongs all or partly to the parent transnational enterprise.
- ✓ For legal purposes, each subsidiary has an identity different from that of its parent company, so it i hard to sue a parent company from the EU for damage caused by its subsidiaries in third countries.
- ✓ As there are no overarching EU laws on the subject, the law in most EU member countries only envisages piercing the corporate veil (that is, attributing liability to the parent company for damage caused by its subsidiaries) under exceptional circumstances.
- ✓ Proving that the parent company knew exactly what its subsidiary was doing and effectively exercised control over the subsidiary is fundamental.

3.4. Which Is the Right Court? (I) International Jurisdiction: The General Rule of Jurisdiction under the Recast Brussels I Regulation

To file a claim in a court of an EU Member State against business for alleged human rights violations, the first thing to do is identify the court that has jurisdiction in the case. "Jurisdiction normally refers to the right and power to administer justice within a clearly defined territory. This includes the powers of a state's courts to hear cases concerning persons, property or events and the powers of physical interference, such as the arrest of persons or the seizure of property." In **international litigation** containing a foreign element– a defendant (subsidiary) domiciled abroad, a claimant (victim) domiciled abroad or events (damage, i.e., human rights violations) that happened in a third country– **international jurisdiction** is the ability of the courts of a given country to hear the case.

At the European level, harmonized private international law sets the rules of international jurisdiction to delimit which international and cross-border cases the courts of EU Member States can hear. The regulation currently determining international jurisdiction in disputes containing foreign elements in civil and commercial matters is Regulation (EU) No. 1215/2012 (Recast), or "the Brussels I Regulation (Recast)". Ever since this regulation started applying on 10 January 2015, it has been compulsory and directly applicable for any action taken in the courts of Member States, provided that the necessary conditions for its application are met. This is regardless of factors like the nationality of the parties, the nature of the court, the type of action (individual lawsuits or class actions) and the nature of the proceeding (declaratory action, enforcement proceedings, special procedures, etc.).

SPHERE OF PERSONAL APPLICATION

The rules of international jurisdiction under the Brussels I Regulation (Recast) apply to all cases sufficiently connected with the EU, and the defendant's domicile in a Member State is a general connecting factor, with some exceptions.

On the contrary, the cases in which the defendant is domiciled in a third country are deemed as not connected with the EU, so that the rules on international jurisdiction of each of the Member States need to be consulted in order to know whether their courts have jurisdiction over such cases, or not.

The Brussels I Regulation (Recast) applies throughout the territory of all EU Member States. For related cases against enterprises domiciled in Switzerland, Norway or Iceland in Member State courts, the Lugano Convention of 2007 applies.

In the context of business and human rights, these are the most frequent instances where a court of an EU Member State may have jurisdiction to hear cases of human rights violations committed in third countries:

- When the defendant company is domiciled in the jurisdiction of the court of a Member State, no matter what its nationality (article 4).

- In non-contractual liability cases, in the jurisdiction of the court of the Member State where the harmful event occurred or may occur (article 7.2).

- When a criminal court of a Member State is competent to adjudicate civil claims arising out of a criminal offence (article 7.3).

- Where there is more than one defendant. For instance, in cases of claims against the parent company and its subsidiary, you are allowed to sue them together in one proceeding at the court for the domicile of either of the defendants, provided that there is a link between the claims and there is a risk of irreconcilable judgments (article 8.1).

- When the parties expressly or tacitly agree which court has jurisdiction (articles 25 and 26). The general rule is to attribute jurisdiction to the court where the defendant's domicile is located. This general rules operates independently of the matter at issue in the lawsuit, unless it is one of the matters on the list of exclusive jurisdictions and proceeding types (enforcement proceedings, declaratory action, etc.). The general rule of jurisdiction given in article 4.1 of the Brussels I Regulation (Recast) specifies that, no matter what their nationality, natural or legal persons can be sued in the courts of the Member States.

Therefore, the Member State's courts generally have international jurisdiction to hear claims concerning business and human rights when the company concerned is domiciled in any EU Member State. Often EU Member States' courts have no jurisdiction over a subsidiary when the subsidiary is domiciled in a third country and the human rights violations occur in that third country, because the **corporate veil is not pierced.**

The ***domicile*** of a company is the place where the company has: a) its statutory seat, according to its articles of association, b) its

Example:

If a company has its administrative headquarters in Italy but its main place of business in France, under article 63 of the Brussels I Regulation (Recast) the company is domiciled in both Member States. Therefore, under article 4 of the Brussels I Regulation (Recast), Italian courts and French courts alike can hear any cases of conflicts concerning the company's activities.

JURISDICTION FOR THE DOMICILE OF THE DEFENDANT

Article 4, Brussels I Regulation (Recast)

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Example:

If the defendant is a company domiciled in Colombia and is a subsidiary of a company whose main place of business is in Spain, people affected by the activities of the Colombian subsidiary cannot always file action in Spanish courts under article 4 of the Brussels I Regulation (Recast). It initially makes no difference if the parent company is domiciled in a Member State, because article 4 treats each legal person in the corporate group as a separate defendant.

Akpan v Shell
The Netherlands/Nigeria, 2008 to present

FACTS

In May 2008 the NGO Milieudefensie and four Nigerian farmers filed a claim against Royal Dutch Shell plc, a parent company domiciled in the Netherlands, and against Shell's Nigerian subsidiary, Shell Petroleum Development Company, at the District Court of The Hague. The claimants alleged damage due to oil spillage between 2004 and 2007 in the villages of Oruma, Goi and Ikot Ada Udo. The consequences of the spillage were felt in fishponds and plantations of raffia palm, rubber, mango and mahogany. The injury to the environment resulted in loss of income, property damage and injuries to health, amongst other serious consequences for farmers.

HIGHLIGHTS IN CONNECTION WITH JURISDICTION

The defendants alleged that the parent company never checked whether its Nigerian subsidiary was upholding oil-drilling standards. This omission is the reason why the spillage happened or was not stopped in time. The Dutch court declared that it had jurisdiction to hear the case against the parent company on the basis of Regulation (EC) No 44/2001, which was then in force. Article 2 (currently article 4) states that persons domiciled in a Member State must be sued in the court of said Member State, and article 60 (now article 63) holds that a compnay is domiciled at the place stated in its articles of association as its head office. In the case of Royal Dutch Shell plc, this is The Hague. Besides, Article 7 of the Dutch Code of Civil Procedure (in matters of plurality of defendants) allowed Dutch courts to hear the case again the subsidiary (due to the close connection of the case with the parent company).

Reference: Judgment 30 January 2013, District Court of The Hague, c. C/09/337050/ HA ZA 09-1580, Friday Alfred Akpan & Milieudefensie, c. Royal Dutch Shell plc & Shell Petroleum Development Company of Nigeria.

central administration or c) its principal place of business (article 63). This three-pronged criterion expands the possibilities of taking legal action against enterprises in various EU Member States. Under article 4 of the Brussels I Regulation (Recast), when an enterprise has its corporate statutory, administrative seat or main place of business in different EU Member States, claimants may choose to file action in any of those Member States.

The rule in article 4 of the Recast Regulation is of utmost importance for cases of business and human rights, because the Brussels I Regulation (Recast) is usually applied in lawsuits against those companies that are domiciled in the EU. If a company fails to meet any of the criteria of the substantive notion of the domicile of legal persons, no court in any Member State has jurisdiction based on article 4.

In this sense, Recommendation CM/Rec(2016)3 on human rights and business has acknowledged that the Member States of the Council of Europe must apply the legislative or non-legislative measures necessary to ensure that their national courts have jurisdiction over civil claims against enterprises domiciled in their jurisdiction concerning human rights violations committed in third countries.

France is one of the EU Member States that has already taken steps related with the liability of parent enterprises domiciled in the country's territory for lack of due diligence in the operations of their subsidiaries abroad. The French Senate is now discussing a bill that would force French multinationals to supervise their subsidiaries abroad and to develop due diligence mechanisms ensuring that their suppliers respect human rights. A company domiciled in France that fails to respect these provisions will incur administrative or civil liability.

Q&A v KiK
Germany/Pakistan, 2012 to present

FACTS

In September 2012 a fire at the Ali Enterprises textile factory in Pakistan left 260 people dead and 32 injured. In March 2015 the survivors and the victims' relatives filed for compensation with the Regional Court of Dortmund against the German firm KiK, with headquarters in Bönen. In January 2013 KiK signed a compensation agreement according to which an initial compensation was to be delivered to the victims, but the company has put off paying time and again.

HIGHLIGHTS IN CONNECTION WITH JURISDICTION

The claimants allege that the German company KiK was the main client of Ali Enterprises, since KiK regularly bought 70% of the factory's textile production. This enabled the company to become a major textile firm in Pakistan. The jurisdiction of the German court is therefore based on the general jurisdiction of the domicile of the defendant in Germany, as provided for in article 4 of Regulation (EU) No 1215/2012. If the court admits the lawsuit, it will be the first civil case of its type in Germany. For now KiK has responded to the claim. The victims' attorneys are now preparing to present their comments, and the first hearing of the case is expected to take place in 2016.

Reference: https://business-humanrights.org/en/kik

Arica Victims KB v Boliden Mineral AB
Sweden/Chile, 2013 to present

FACTS

Between 1984 and 1985, the Swedish firm Boliden shipped around 20,000 tons of smelter sludge from its arsenic plant in Rönnskär, Sweden, to Arica, Chile. The waste was sold to a Chilean company, Promel, for processing. However, it was left unprocessed and entirely unprotected until 1998 at an industrial site near which housing developments were built. As a consequence, the neighbouring population has suffered serious illnesses, including cancer, miscarriages, skin problems and respiratory diseases due to overly high levels of arsenic in their blood.

HIGHLIGHTS

In September 2013 the Arica Victims KB association sued Boliden at the court for Skellefteå, Västerbotten County, Sweden. The lawsuit claimed that Chilean citizens in the Arica region had had health problems as a result of Boliden smelter sludge dumping. The plaintiffs sued for 90 million Swedish kronor in damages. Boliden filed its defence on 20 January 2014, denying the claim in its entirety. The case still continues in Sweden.

Reference: https://business-humanrights.org/en/boliden-lawsuit-re-chile

Dominic Liswaniso Lungowe & Others v. Vedanta Resources Plc and Konkola Copper Mines Plc: United Kingdom, 2015 to present

Recently, on 27 May 2016, a UK High Court judge accepted jurisdiction in action filed by 1,826 inhabitants of several villages in Zambia for environmental pollution in connection with the possible liability of UK mining company Vedanta Resources Plc and its Zambian subsidiary, Konkola Copper Mines (KCM). The judge did so based primarily on the defendant's domicile under the Recast Brussels I Regulation, rejecting the defendants' argument that the case should be tried in Zambia and reasserting the applicability of the Recast Regulation in such cases (as the ECJ did earlier in Owusu v. Jackson). The judge did not require all the co-defendants to be domiciled in EU Member States, which would have been a restrictive interpretation of the requirements set article 8 of the Recast Regulation for multiple-defendant cases. In the decision, the judge argued that proceedings could not be taken in Zambian courts to any practical result, given the circumstances of the legal system and the persons affected.

Reference: Neutral Citation Number: [2016] EWHC 975 (TCC). Case No: HT-2015-000292 In the High Court of Justice; Queen's Bench Division; Technology and Construction Court. Date: 27 May 2016.

BEAR IN MIND THAT

- ✓ International jurisdiction is the ability of the courts of a given country to hear a case in which damage was done in a different country or in which the victims or the parties that caused the damage are nationals of a different country.
- ✓ Correctly identifying which country has a court with jurisdiction is fundamental.
- ✓ The basic rule in the EU is Regulation (EU) No 1215/2012 - the Brussels I Regulation (Recast) -, which applies since 10 January 2015.
- ✓ When neither the Brussels I Regulation (Recast) nor an international convention are applicable, there is the possibility to search for other ways through the laws of the different Member States (residual jurisdiction).

3.5. Which Is the Right Court? (II) International Jurisdiction: Special Jurisdictions

Special jurisdictions are alternatives to the jurisdiction for the defendant's domicile. They give the claimant the option to sue in the courts for the defendant's domicile or, alternatively, in the courts of another Member State designated by the rule of special jurisdiction by reason of the matter concerned, provided that the matter is not one of those listed in the catalogue of exclusive jurisdictions and the parties have not agreed on any particular jurisdiction. Generally speaking, the claimant has the additional possibility of filing action in a court different from the court of the Member State where the defendant is domiciled.

JURISDICTION IN MATTERS OF NON-CONTRACTUAL LIABILITY

Article 7.2, Brussels I Regulation (Recast)

A person domiciled in a Member State may be sued in another Member State:
2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur . . . .

Non-contractual obligations or non-contractual damage arises outside a contractual relationship and outside a pre-existing legal relationship of a personal, family or in-rem nature. For example, many of the activities companies engage in have negative effects on the environment that directly or indirectly affect people and/or their property. Water and air pollution caused by an oil company's drilling activities sometimes directly harms the health of the people exposed to the pollution. The victims in this example can file action for non-contractual liability to obtain redress or compensation for the damages. Therefore, this rule of jurisdiction is very important in the context of business and human rights.

According to the Brussels I Regulation (Recast), in matters of non-contractual damage, the claimant can recourse to the court of the Member State in whose territory the harmful event happened or may happen (article 7.2). The Court of Justice of the European Union ruled in its Judgment of 30 November 1976 (Case 21/1976) that the *place where the harmful event occurred* covers both the territory of the country *where the event giving rise to the damage occurred* and the territory of the country where the *harmful result* takes place. In this case, the claims were based on damage ocurred to a Dutch plantation belonging to Bier B.V. because of pollutants released by Mines de Potasse d'Alsace, headquartered in France. Therefore, the event giving rise to the damage took place in France, and the harmful result, in the Netherlands. The ruling establishes that the claimant has the dual option of filing action with the courts where the causal event took place or the court for the place where the damage occurred. In the case of *damage at multiple locations,* the courts of each country where damage occurred also have jurisdiction, but only to hear cases for the damage that

occurred in their own territory. For example, in the case of a libellous publication distributed in various countries, the claimant may choose between filing action with the court for the place where the publisher or distributor has its establishment (place of the causal event) or filing action with the courts for the places where the publication was published or distributed (place of the harmful result). Besides, recent CJEU case law has introduced an additional possibility in cases of violations of personality rights. The victim can also bring an action in respect of all the damage before the courts of the Member State where his or her main centre of interests is located (see CJEU, Judgment of the Court (Grand Chamber) of 25 October 2011 [Joined cases C-509/09 and C-161/10]).

The main problem of this jurisdiction scheme is identifying the location of the causal event leading to the damage and the place where the damage is found, appears, arises or occurs, especially when all the circumstances of the case are confined to third countries. Accordingly, in cases of human rights violations by businesses it is hard to prove that the event causing damage in a third country is a decision or negligent act by the parent company with respect to its subsidiaries' operations in third countries. Access to information about corporate groups is one of the obstacles the victims face in proving that damages occurring in a third country are the consequence of a lack of due diligence by the parent company. The usefulness of this jurisdiction is therefore tricky in cases of human rights violations by subsidiaries.

Example:

When a decision taken by a board of directors in a Member State that is not the company's official legal headquarters causes damage in another Member State, the claimant can seek redress in the courts of the place where the decision was taken or in the courts of the place where the damage occurred.

PURSUING CIVIL REMEDIES THROUGH CRIMINAL JURISDICTION

Article 7.3, Brussels I Regulation (Recast)

A person domiciled in a Member State may be sued in another Member State:
3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings in the court seised of those proceedings, to the extent that the court has jurisdiction under its own law to entertain civil proceedings . . . .

Human rights violations committed in third countries by the subsidiaries of European companies may also constitute crimes. If so, you may be able to activate the jurisdiction of EU Member States by commencing criminal proceedings. In some jurisdictions civil action for damages can be tried jointly with criminal proceedings. Article 7.3 of the Brussels I Regulation (Recast) states that the court hearing the criminal proceedings has jurisdiction to hear the civil proceedings as well, if the court's domestic law allows it to. The legislation of some Member States does in fact give criminal courts the jurisdiction to settle civil claims stemming from a crime.

Member State	Legislation on the Joinder of Civil and Criminal Action
Spain	**Article 109, Penal Code** 1. Perpetration of an act described by law as a felony or misdemeanour shall entail, pursuant to the provisions contained in the laws, the obligation to repair the damages and losses caused thereby. 2. In all cases the injured party may opt to sue for civil liability in the civil jurisdiction.
France	**Article 2, Code of Criminal Procedure** Civil action for redress for damage caused by a crime, a felony or a misdemeanour is the right of all persons who have personally and directly sustained the damage caused by such violation. Waiver of civil action cannot stop or suspend the exercise of public action, with the exception of the cases in article 6.3.
Sweden	**Chapter 22, Private claims in consequence of offences, Section 1, Code of Criminal Procedure** An action against the suspect or a third person for a private claim in consequence of an offence may be conducted in conjunction with the prosecution of the offence. When the private claim is not entertained in conjunction with the prosecution, an action shall be instituted in the manner prescribed for civil actions.
Croatia	**Article 133, Code of Criminal Procedure** (1) A claim for indemnification arising out of the commission of a criminal offence shall be considered in criminal proceedings upon the motion of authorised persons, provided that this does not considerably delay proceedings. (2) The claim for indemnification may consist of a demand for the compensation of damages, recovery of an object or the annulment of a certain legal transaction.

Amesys Case
France/Libya, 2011

FACTS

In August 2011 it was revealed that since 2007 Amesys, a French company and a subsidiary of the French Groupe Bull company, had provided the Libyan regime with a system for the mass monitoring and interception of Internet communications known as Eagle. With the Eagle system and the company's aid and advice on how to use it, the Gaddafi regime spied on the population's Internet communications and thus identified opponents. This was followed by the arbitrary arrest of many people who were subjected to torture and inhumane, degrading treatment.

LEGAL HIGHLIGHTS

In October 2011 the Human Rights League (LDH) and the International Federation for Human Rights (FIDH) filed a complaint with the Court of First Instance against Amesys, accusing it of alleged complicity in grave human rights violations. While the public prosecutor opposed commencing investigations into the case on the grounds that the alleged facts could not be classified as criminal acts, the investigating judge issued a different opinion supporting the commencement of an investigation to determine precisely what liability Amesys might bear as an accomplice of the Gaddafi government. On 15 January 2013 the Paris Court of Appeal finally admitted the claim, referring the case to the judicial unit specialising in war crimes, crimes against humanity and genocide. In May 2013 five victims who had been arrested and tortured in Libya filed for damages, so the judge ordered an evaluation of the civil damages. This case is still pending a decision.

Reference: https://business-humanrights.org/en/

Unlike jurisdiction in civil and commercial matters, criminal court jurisdiction is not regulated by any EU regulations. Therefore, criminal court jurisdiction is determined by the domestic rules of each Member State. So, when a Member State allows civil action to be tried jointly with criminal action, you may find it to be to your advantage to establish that that Member State's domestic courts hold the jurisdiction to hear cases of unlawful acts taking place in a third country.

JURISDICTION THROUGH RELATED ACTIONS

Article 8, Brussels I Regulation (Recast)

A person domiciled in a Member State may also be sued:
1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings . . .

The CJEU has set two conditions for applying this article in cases against companies:
1. the claim against the parent company must not be intended exclusively to bring the case of the foreign subsidiary into European jurisdiction and
2. there must be a prior relationship amongst the defendants.

Reference: CJEU Judgment C-145/10, Eva-Maria Painer v Standard VerlagsGmbH et al.; C-616/10, Solvay SA v Honeywell Fluorine Products Europe BV et al.

Article 8 of the Brussels I Regulation (Recast) grants Member State courts international jurisdiction over cases against persons domiciled in a Member State by reason of related actions. Article 8.1 contains a specific provision for cases in which there is more than one defendant, which allows the claimant to file its action against all the defendants in the same proceedings at a court of a Member State where one of the defendants has its domicile, provided that the claims are closely related with one another. In other words, when it is felt that processing these claims and deciding on them at the same time is more expedient, because it will avoid contradictory judgments, which could arise if the matters are judged separately. Therefore, under article 8, any court for a place where one of the defendants is domiciled has jurisdiction to hear a claim against all the defendants.

Example:

One company domiciled in Portugal and another company domiciled in Finland are the several debtors of a company domiciled in Germany. As they have not fulfilled their payment obligation, which they should have done in Germany, the creditor company sues them. Under article 8.1 the claimant can sue in any court where one of the defendants is domiciled (Portugal or Finland), and that court hears the entire case.

We should stress that, in order for article 8.1 to apply, all the defendants have to be domiciled in a Member State. If one of the defendants in a claim with multiple defendants is not domiciled in a Member State, a court cannot be attributed jurisdiction to hear the claim. In the cases we look at in this study, the subsidiary is generally domiciled in a third country, so article 8.1 is not applicable.

PROROGATION OF JURISDICTION

Notwithstanding the general space-related application criterion (defendant's domicile) in the Brussels I Regulation (Recast), the parties have the option of tacitly or expressly conferring jurisdiction exclusively and solely to a court of an EU Member State. They can

Example:

A company domiciled in France and a company domiciled in Belgium agree to take any litigation to the courts of Germany. Consequently, neither French courts nor Belgian courts have jurisdiction to hear their case unless the litigation falls under exclusive jurisdiction, because the jurisdiction they have agreed to prevails over the jurisdiction for the domicile of the defendant.

do this by means of an agreement designating the court they have chosen to hear litigation, without the need for either of the parties to be domiciled in a Member State (article 25, Brussels I Regulation (Recast)) or by means of the defendant's entering an appearance at a court in a Member State (article 26, Brussels I Regulation (Recast)).

That is to say, express prorogation occurs when the persons affected by industrial activities in a third country negotiate and reach an agreement with the company that a court of an EU Member State has jurisdiction.

Furthermore, certain acts in civil proceedings denote the parties' willingness to submit to the courts of a certain country. Tacit prorogation therefore grants jurisdiction to a court of a Member State when, first, the defendant files the claim with the court and, second, the company, regardless of its domicile, enters an appearance in the proceedings with the purpose of neither contesting nor refusing to accept the jurisdiction. Tacit submission like this is possible only in connection with international lawsuits covered by the Brussels I Regulation (Recast). Prorogation of jurisdiction is unlikely, however, in litigation against multinationals. We have yet to find a case in which a company has voluntarily agreed that jurisdiction belongs to a court of an EU Member State instead of the courts of the host country, given the higher probability of the company's being declared liable in the EU.

REFUSAL OF INTERNATIONAL JURISDICTION

LIMITS STEMMING FROM PUBLIC INTERNATIONAL LAW

International case law has set certain limits on domestic court jurisdiction, which restrict victims' ability to gain access to judicial redress mechanisms. The main doctrines restricting court jurisdiction are:

a) The immunity of sovereign states,
b) Act of state immunity, and
c) Political question doctrine and international comity doctrine.

The main effects of these doctrines so far has been to free the defendant from liability or to disqualify courts from hearing certain claims. The most often seen restrictions in matters of business and human rights are the immunity of a sovereign state and act of state immunity. These doctrines are purposefully constructed to restrict the jurisdiction of domestic courts in litigation directly involving states.

When a company acts as a state's agent, it can benefit from immunity as regards civil liability for damage caused by its activities. This is an obstacle in cases of human rights violations committed by companies when the host country plays a part in the unlawful conduct. Some cases against companies have been rejected by virtue of this doctrine, since the acts at issue are considered acts of state; this restricts the jurisdiction of domestic courts.

It may also happen that the obligations assumed by the state under international human rights protection agreements are not regarded as extending to enterprises implicated in the violation of human rights when working at the behest of the state.

LIMITS STEMMING FROM DOMESTIC LAW: FORUM NON CONVENIENS

The courts of EU Member States cannot decline to exercise international jurisdiction for any reason other than the reasons given in the Brussels I Regulation (Recast). This was firmly established in the case law of the Court of Justice of the EU in the *Owusu v Jackson* case in connection with the non-applicability of the doctrine of *forum non conveniens,* which would permit a court to decline to exercise international jurisdiction because it has considered, at the defendant's request, that there is an alternative court that is better suited to hear the case, generally the court for the place where the events occurred.

Forum non conveniens is a doctrine of Anglo-Saxon origin and is not included in the Brussels I Regulation (Recast), so, even when your case

Case of the Jerusalem Light Rail Project (Alstom and Veolia) France/Israel, 2007-2011

FACTS

In 2000 the government of Israel approved a plan for the construction and operation of the first light rail line to connect West and East Jerusalem. The project consisted in a thirty-year operating concession. On 17 July 2005 the Israeli government signed a contract with CityPass, a consortium of the Israeli companies Harel Insurance & Finance (20%), Polar Investments (17.5%) and Israel Infrastructure Fund (10%), which financed the project, plus the Israeli firm Ashtrom (27.5%) and the French firm Alstom (20%), which were in charge of planning and executing the engineering work needed to build the system, and lastly the French company Veolia Transportation (5%), which was in charge of supervising the work and making sure the system met the required operational standards. Construction began in 2006, and the first line went into operation in 2010. The project was expected to cover the needs of approximately 200,000 Jewish colonists residing inside and around the illegal settlements in the Palestine territory occupied by Israel (Har Hatzofim, French Hill, Pisgat Zeev, Ne've Ya'akov, Ramot, Atarot), thus strengthening the annexation of East Jerusalem, which has been repeatedly and explicitly condemned by the UN Security Council and General Assembly.

LEGAL HIGHLIGHTS

The situation spurred the Association France-Palestine Solidarité (AFPS) and the Palestine Liberation Organisation (PLO) to try and have the contract annulled on the basis that it was unlawful and to stop the activities being carried out by the companies under the agreement. In February 2007 both institutions filed two claims against Veolia Transport and Alstom with the Court of First Instance of Nanterre, France, alleging that the contract was contrary to the public policy of France and therefore null under articles 6, 1131 and 1133 of the French Civil Code. They moreover argued violations of international law and domestic law, since the contract contravened the Fourth Geneva Convention of 1949. Resolution 465 of the United Nations Organisation's Security Council of 1 March 1980 was particularly mentioned. On 15 April 2009 the court admitted the AFPS's claim and declared that it held subjective and territorial jurisdiction over the case on the basis of article 6.1 of the European Convention on Human Rights, which recognises the right to an independent, impartial tribunal, and it expressed its desire to guarantee free access to justice for the claimants despite the fact that the companies alleged that the French court did not have jurisdiction and that the claims were inadmissible due to the immunity of the state of Israel. On this point, the court said that the immunity of the state of Israel could not be accepted as an argument, because the state of Israel was not a party to proceedings, in addition to the fact that Israel cannot claim sovereign statehood in all cases. The court also pointed out that the headquarters of the companies lay on French soil.

JUDGMENT

In November 2009 Alstom filed an appeal against the court's decision. In December of the same year the Versailles Court of Appeal confirmed the decision of the court of first instance, emphasising that it did have jurisdiction to hear the case. In February 2010 Alstom filed an appeal against this decision, particularly as regards the jurisdiction of French courts, with the French High Court of Justice (Cour de Cassation). In February 2011 the court rejected the appeal. In May 2011 the Nanterre court judged the case and rejected the claimants' arguments for annulling the contract signed by the French companies. The AFPS and the PLO appealed. Nevertheless, the Court of Appeal considered that the international agreements in question create obligations between states and could not be used to hold two private enterprises liable. The court ordered the AFPS and the PLO to pay €30,000 to each of the three companies to cover their expenses during the trial.

Reference: http://civiccoalition-jerusalem.org/

is more closely related with another Member State or a third country, it cannot be invoked this doctrine. That is to say, a court does not have the discretionary power to gauge whether it does or does not have international jurisdiction.

In circumstances where the Brussels I Regulation (Recast) does not apply, courts have the power to decline to exercise jurisdiction at their discretion at the request of the defendant if it is shown that there is an suitable alternative

forum that is adequate to hear the case due to proximity to the event, particularly in common-law Member States. Some symbolic cases have been rejected in first instance with the invocation of this doctrine in the context of business and human rights in English courts (See *Connelly v RTZ Corporation Plc* [1998] AC 854 (HL) 872; and *Lubbe v Cape PLC* [2000] 4 All ER 268 (HL) 277). Nevertheless, since the *Owusu* case, there have been no more decisions by English courts applying this doctrine in cases related with companies domiciled in England for damages in third countries.

BEAR IN MIND THAT

- ✓ Special jurisdictions allow the claimant to file action with a court of a Member State other than the Member State where the defendant is domiciled.
- ✓ In the European Union, the courts of Member States cannot decline to exercise international jurisdiction on grounds not included in the Brussels I Regulation (Recast), such as *forum non conveniens*.

REFERENCES

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.
http://eur-lex.europa.eu/homepage.htm

European Judicial Network in civil and commercial matters.
http://ec.europa.eu/justice/civil/index_en.htm

Graffiti in Cerro Chuno, Arica, Chile. Source: Environmental Defender Law Center.

3.6. Which Is the Right Court? (III) International Jurisdiction: Residual Jurisdiction

When EU Member State courts cannot claim international jurisdiction under the Brussels I Regulation (Recast), they may turn out to be competent anyway under their country's own domestic law, if no international conventions are applicable. Domestic laws on jurisdiction have been applied in cases against subsidiaries of companies domiciled in the EU for rights violations in third countries, as recent case law shows.

Article 6, Brussels I Regulation (Recast)

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.
2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

Recommendation CM/Rec(2016)3 on human rights and business states that the Member States of the Council of Europe must grant their national courts jurisdiction to hear civil claims related with human rights violations committed by subsidiaries of companies domiciled in their jurisdiction, provided the claims are closely connected with claims against the parent companies.

To a varying extent, application of Member States' national or regional systems allows you to file action against companies that are domiciled in third countries.

Generally speaking, the international jurisdiction rules of the domestic legislation of Member States resemble the rules of the Brussels I Regulation (Recast), since they are based on the defendant's domicile, the place where the damage was done and sometimes the wishes of the parties. But there are also some jurisdiction rules that are not envisaged and are actually not allowed in European regulations. Take the example of exorbitant jurisdiction.

EXORBITANT JURISDICTION

The national legislations of the Member States contain diverse criteria that can be identified as giving their courts what is known as ***exorbitant jurisdiction.*** In exorbitant jurisdiction, the courts of the Member States have international jurisdiction to hear cases that are only weakly related with their country.

Here are some of the most prevalent and important grounds cited by the domestic laws of EU Member States for the exercise of exorbitant jurisdiction:

a) *Nationality of the parties.*
b) *Presence of the defendant.*

NATIONALITY OF THE PARTIES	PRESENCE OF THE DEFENDANT	LOCATION OF ASSETS OF DEFENDANT ON THE TERRITORY	CAUSE OF ACTION OR ACTIVITIES IN THE TERRITORY	DOMICILE OF THE CLAIMANT	FORUM OF NECESSITY
Unconditional: Bulgaria France Luxembourg **Conditional:** Czech Republic Finland Malta Slovenia	**Unconditional:** England Finland Ireland Malta Poland **Conditional:** Scotland Slovenia	**Even if the claim is not related with the property:** Australia Czech Republic Denmark England Estonia Finland Germany Lithuania Poland Scotland Sweden **Only if the claim is related with the property:** Latvia Slovakia Slovenia	Cyprus Poland Portugal	Latvia	**Regulated:** Austria Belgium Spain Estonia Netherlands Portugal Romania **Application through case law:** France Germany Luxembourg Poland

Data are from NUYTS, Arnaud, with the collaboration of SZYCHOWSKA, Katarzyna , Study on Residual Jurisdiction Nuyts: p. 62, http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf

c) *Location of assets of defendant on the territory*.
d) *Cause of action or activities in the territory*.
e) *Domicile of the claimant.*
f) *Co-defendants*.
g) *Forum of necessity.*

These criteria can confer international jurisdiction to some of the courts of Member States to hear cases against subsidiaries of companies domiciled in the EU for damages in third countries.

A) NATIONALITY OF THE PARTIES

In some EU Member States, the nationality of the parties (claimant or defendant) provides enough of a connection to give the country's courts jurisdiction.

Country	
France	**Article 14, French Civil Code** A foreign citizen, albeit not residing in France, may be summonsed before French courts for the discharge of obligations contracted by him in France with a French citizen; he may be sued in the courts of France for obligations contracted by him in a foreign country with respect to French citizens. **Article 15, French Civil Code** A French citizen can be sued in a court of France for obligations contracted by him in a foreign country, even with a foreign citizen.
Luxembourg	**Article 15, Luxembourg Civil Code** A citizen of Luxembourg may be sued in a court of France for obligations contracted by him in a foreign country, even with a foreign citizen.

AKALA ET AL V SA COMILOG INTERNATIONAL

In the case of *Akala et al v SA COMILOG International*, the defendants claimed that the French courts had jurisdiction based on denial of justice in the jurisdiction of the Republic of the Congo and article 15 of the Civil Code. In 2011 the *Conseil de prud'homme s* of Paris dismissed the action for lack of jurisdiction, stating that there was evidence proving that the company's headquarters were in Gabon, not France, and thus the case failed to meet the nationality criterion under article 15 of the Civil Code.

A) PRESENCE OF THE DEFENDANT

The presence of the defendant in the territory, so the defendant can be notified of any action against him, gives jurisdiction to the courts of some EU Member States. This criterion is characteristic of jurisdiction attribution in common-law countries. Therefore, it is applied mainly in England, Ireland, Malta, Scotland and other countries like Finland, Poland and Slovenia.

B) LOCATION OF ASSETS OF DEFENDANT ON THE TERRITORY

In some EU Member States, the location of the defendant's property in the country's territory is the basis of a specific jurisdiction rule that allows proceedings to be filed for any action with respect to the property in question, such as action to recover ownership or possession. In just as many other Member

Country	Provision Concerning Jurisdiction According to Property Location
Germany	**Section 23, German Law of Civil Procedure, Zivilprozessordnung** **Specific jurisdiction of assets and of an object** For complaints under property law brought against a person who has no place of residence in Germany, that court shall be competent in the jurisdiction of which assets belonging to that person are located, or in the jurisdiction of which the object being laid claim to under the action is located. Where claims are concerned, the debtor's place of residence and, in cases in which an object is liable for the claims as collateral, the place at which the object is located shall be deemed to be the location at which the assets are located.
Austria	**§ 99, Court Jurisdiction Act** (1) Persons who do not have a general domestic jurisdiction can be sued in property matters at any court if the property of this person or the object of the claim are located in its district. The value of the domestic property should not be disproportionately less than the amount in controversy; for this calculation § 55 par 3 does not apply. (2) For claims, the domicile or the place of respective residence of the garnishee is regarded as the place where the property is located. If the garnishee does neither have a domestic domicile nor a place of respective residence, but the object that is liable for this claim is located in the national territory, the place where the object is located is decisive for the determination of the jurisdiction. (3) Foreign institutions, estates, corporations, cooperatives and other associations can also be sued in those domestic courts where the permanent domestic representation or the representative in charge of the errand of the business of such institutions and corporations is located. (4) For disputes relating to ships and voyages, the location within the country home port of the respective seagoing vessel shall be deemed the place where the property is situated.
Sweden	**Chapter 10, Section 3 Competent court, Swedish Code of Judicial Procedure** In disputes concerning debt obligations, a person with no known residence in the Realm may be sued where property he owns is located. In disputes involving movable property, he may be sued where the property is located.

States, the location of property is the general rule of jurisdiction for filing action against a defendant even if the claim is not related with the property. This jurisdiction rule is used in a large group of countries: Austria, the Czech Republic, Denmark, Estonia, Finland, Germany, Lithuania, Poland, Scotland and Sweden.

C) CAUSE OF ACTION OR ACTIVITIES IN THE TERRITORY

In some common-law countries, the fact that a person engages in certain ongoing substantial commercial activities within the country's territory is sufficient to establish jurisdiction. In Cyprus the mere fact that a person has activities in the territory is sufficient to establish Cypriot court jurisdiction to hear

Country	Provisions Concerning More than One Defendant
Spain	**Article 22 ter, Organic Act 6/1985 of 1 July on the Judiciary** 3. Where there is more than one defendant, Spanish courts hold jurisdiction if at least one of the defendants has his domicile in Spain, provided that a single action is exercised or several actions are exercised amongst which there is a connection by reason of the grounds or cause of action that advises joinder of actions.
The Netherlands	**Article 7, Jurisdiction over Counter Actions, Joinders and Interventions, Code of Civil Procedure** 1. If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency. 2. If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction over the legal claim, then it has jurisdiction as well over a counter action (counterclaim) and over a right of action against a third party who is called to the proceedings by a defendant as being the ultimate liable person, and over a right of action of a third party who has appeared in court for a consolidation of actions ('joinder') or an intervention, unless there is not enough connection between these other actions and the original action.
Croatia	**Article 50, Jurisdiction for Co-litigants** If several persons have been sued in one complaint (Article 196, Paragraph 1, Subparagraph 1) and they are not within the territorial jurisdiction of the same court, jurisdiction shall lie in the court which has territorial jurisdiction for one of the respondents, and if there are principal and subsidiary obligors among then, the court which has territorial jurisdiction for any of the principal obligors.
France	**Article 42, Code of Civil Procedure** The court with territorial jurisdiction, save where otherwise provided, is the court for the place of the domicile of the defendant. If the defendants are several, the plaintiff may, at his choice, address the court for the place where any of the defendants has his domicile. If the defendant has no known domicile or residence, the plaintiff may address the court for the place of his own domicile or the court of his choice should he reside abroad.

claims against that person. In other Member States (Portugal and Poland) there must be some connection with the forum. Therefore, for courts to have jurisdiction, the claims have to be related with the activities done in the territory.

This jurisdiction rule is analogous to the United States' rule of "doing business", under which a company that engages in ongoing, substantial business activities in the country's territory gives US courts jurisdiction even to hear claims that are unrelated with the company's business activities. The doing business criterion is used in the United Kingdom, too, to confer jurisdiction to UK courts.

D) DOMICILE OF THE DEFENDANT

Another jurisdiction attribution criterion that can be identified in the EU Member States is the defendant's domicile. This criterion is used in Latvia for affairs having to do with the return of real estate or reimbursement for the value of real estate.

E) CO-DEFENDANTS

The legislations of some EU Member States give their courts international jurisdiction for cases where there is more than one defendant, provided that the Member State's court has jurisdiction over at least one of the defendants. In the context of business and human rights, this makes it easier for you to sue for civil liability in human rights violations in the EU by the subsidiaries or contractors of companies headquartered in Europe, because, under some domestic rules, international jurisdiction may be held in claims against a company domiciled in the EU (parent company)

Akpan v Shell
The Netherlands/Nigeria, 2008-present

LEGAL HIGHLIGHTS IN CONNECTION WITH JURISDICTION IN CLAIMS AGAINST SUBSIDIARIES

Jurisdiction to hear claims against a subsidiary was established under article 7.1 of the Dutch Code of Civil Procedure (CPP) with respect to action against more than one defendant. Under this provision, Dutch courts have jurisdiction when at least one of the defendants has its domicile in the Netherlands (the parent company, in this case) and this occurs in such a manner that joint proceedings are justified by reasons of efficiency.

In this particular case, the Dutch court concluded the following to determine its jurisdiction in connection with claims filed against the subsidiary:

1. The defendants belong to the same corporate group, so the subsidiary's conduct plays an important role in determining the liability of the parent company.

2. The claims against all the defendants are the same.

3. The findings of fact in the claims are the same in connection with the oil spills.

4. The claim focuses on how the spills happened and whether or not enough was done to avoid them or reverse their consequences.

5. Further investigation into the facts is required.

6. The application of article 7.1 of the CPP is in line with Court of Justice case law in connection with the corresponding article (article 6.1, currently article 8.1) of Regulation (EC) No 44/2001.

Reference: Judgment 30 January 2013, District Court of The Hague, c. C/09/337050/ HA ZA 09-1580, Friday Alfred Akpan & Milieudefensie v Royal Dutch Shell plc & Shell Petroleum Development Company of Nigeria.

and a company domiciled in a third country (subsidiary), provided the claims are connected.

G) FORUM OF NECESSITY

Some Member States of the European Union regulate or include in their judicial practice the doctrine of *forum necessitatis*, jurisdiction of necessity. Jurisdiction of necessity is a special rule that allows the courts of a country to hear international litigation even if there is no specific rule giving them jurisdiction. This doctrine has its basis in avoidance of the denial of justice and more specifically the human right to a fair trial with all the necessary safeguards. *Forum necessitatis* is not regulated in the Brussels I Regulation (Recast). It is regulated in the domestic laws of some Member States. It is important to understand that, in order to allege that a court has jurisdiction of necessity, the country where the court is located has to envisage jurisdiction of necessity in its domestic laws, and the prerequisites set in those laws have to be met, or such cases have to be accepted in prior court decisions establishing case law.

The events or requirements that trigger jurisdiction of necessity (which generally have to be proved) may be summed up as follows:

- ✓ The claimant cannot sue in any other court. There is a negative conflict of jurisdiction (That is to say, no national court of any country holds jurisdiction).
- ✓ The foreign court that can hear the case does not sufficiently guarantee a fair trial. For instance, when the country is at war or is known to refuse effective judicial protection to persons of a given ethnic group, religion or gender.
- ✓ Having a foreign court hear the case would be very costly in economic or administrative terms.
- ✓ The judgment of the foreign court cannot be enforced in the other country.

Country	Provision Concerning Jurisdiction of Necessity
Spain	**Art. 11, Act on Private International Law Code of 16 July 2004** Notwithstanding the other provisions of this Law, Belgian courts are exceptionally the holders of jurisdiction when the case has close ties with Belgium and when a proceeding abroad is not possible and cannot reasonably be required to be entertained abroad.
The Netherlands	**Art. 22 octies. 3, Organic Law of the Judiciary** Spanish courts cannot abstain or decline jurisdiction when the litigious event presents some tie with Spain and the courts of the different States connected with the event have declined jurisdiction.
Croatia	**Article 9, Tacit choice of forum (*forum necessitatis*), Dutch Code of Civil Procedure** When Articles 2 up to and including 8 indicate that Dutch courts have no jurisdiction, then they nevertheless have if: a. the case concerns a legal relationship that only affects the interests of the involved parties themselves and the defendant or a party with an interest in the legal proceedings has appeared in court, not exclusively or with the intention to dispute the jurisdiction of the Dutch court, unless there is no reasonable interest to conclude that the Dutch court has jurisdiction. b. a civil case outside the Netherlands appears to be impossible, or; c. the legal proceedings, which are to be initiated by a writ of summons, have sufficient connection with the Dutch legal sphere and it would be unacceptable to demand from the plaintiff that he submits the case to a judgment of a foreign court.

AKALA ET AL V SA COMILOG INTERNATIONAL
France/Congo, 2007-2015

FACTS:
Comilog, a railway and mining company located in the Republic of the Congo, had a serious accident in 1991 in Gabon, causing the company to go bankrupt. The consequence was the dismissal of 955 employees who never received the compensation due to them. In 2007 the employees sued Comilog (a subsidiary of the French group Eramet) in the Court of First Instance of the Industrial Tribunal (***Conseil de prud'hommes***) in France for wrongful dismissal and asked for economic compensation for damages plus interest. The court of first instance declared that it had no jurisdiction to hear the case (2011). An appeal was filed at the Paris Court of Appeal (***Cour d'Appel***), which declared that it did hold jurisdiction through necessity (2013). Judgment was delivered on 10 September 2015 sentencing Comilog to pay the ex-employees compensation for severance of their employment in 1992. An appeal was filed, and the Court of Cassation (***Cour de Cassation***) confirmed the judgment of the Court of Appeal (2015).

HIGHLIGHTS CONCERNING JURISDICTION OF NECESSITY
The French court assumed jurisdiction under the argument that it could not deny access to justice for workers who had been waiting since 1992 for a reply. The court stated : "Such a situation, contrary to the principle that justice must be done within a reasonable time, characterizes clearly a denial of justice". Both requirements for triggering ***forum necessitatis*** were met: the impossibility of any other court's hearing the case and a tie between the case and the French court (to wit, Eramet's French nationality).

References: Cour d'appel de Paris, 10 septembre 2015. Cour de cassation, civile, Chambre sociale, 28 janvier 2015.

To trigger jurisdiction of necessity, in some countries (Spain and Austria) the rules or case law requires there to be some sort of connection or actual tie with the court, such as the presence of the claimant, the nationality of one of the parties or property or activities of the defendant in the court's jurisdiction. Other countries may not require such a tie (the Netherlands) or may consider a remote link sufficient (France).

REFERENCES

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.
http://eur-lex.europa.eu/homepage.html

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).
http://ec.europa.eu/justice/civil/index_en.htm

BEAR IN MIND THAT

- ✓ Residual jurisdiction is the result of applying national rules on international jurisdiction when the rules of the European Union are not applicable.
- ✓ According to diverse criteria having to do with the defendant's domicile, these rules may give international jurisdiction to the courts of Member States.
- ✓ These criteria vary from one European Union Member State to another.

Survivors and supporters march 30 years after the Bhopal gas leak, India. Source: EFE Agency.

3.7. Which Country's Laws Will Apply to the Lawsuit?

Once you have worked your way past all the various legal and practical obstacles against filing your claim and you have identified the EU Member State court that has international jurisdiction to hear a case concerning damage ocurred in another ***jurisdiction***, you have to begin the process of identifying the law that needs to be applied to the case so the victim's demands will be met. The ***applicable law*** governs the liability regime, and it is determined according to the rules for the resolution of conflicts of law. Conflict-of-law rules designate which law courts are to apply in cases where there are elements foreign to the jurisdiction and in cases where the legal rules of different legislations could be applied. In the EU the applicable law is found according to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and 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). These regulations provide legal certainty for the parties to international or cross-border lawsuits, since they contain the conflict-of-law rules that designate which law is applicable to specific cases. They give the victim certainty about which substantive law is applicable to settle the dispute, regardless of where the ***legal action*** is lodged. Rome I and Rome II apply to all EU countries except Denmark. So, the law applicable to the substance of the dispute will be the same, no matter what jurisdiction the claimant chooses.

The applicable law to the conflict will decide things like the grounds for and scope of liability, including which people can be considered liable; the reasons for which liability may be distributed or limited or exemptions may be made; the existence, nature and assessment of the damage or the requested compensation; the measures to take to guarantee the prevention, cessation or reparation of the damage; the transmissibility of the right to claim damages or seek compensation (including transmissibility by inheritance); the people who are entitled to redress for damages; liability for acts by third persons; and the procedure for the termination, prescription and limitation of obligations.

The Rome II Regulation is more widely applicable in the context of business and human rights, because there is generally no prior contractual relationship between the victims and the company that does the damage, except in cases of violations of employees' rights stemming from a pre-existing contractual relationship. The Rome II Regulation determines what law is applicable to non-contractual obligations in civil and commercial matters when the event causing the damage happened after 11 January 2009 and involves a situation where there is a conflict of laws, which means a situation containing one or more elements alien to a country's domestic social life.

Because the Rome II Regulation is a universal regulation, the courts of all EU Member States are forced to apply it regardless of the parties' domicile and nationality. Accordingly, the law of a Member State or the law of a third country may be designated as the applicable law for settling concrete matters of an intra- or extra-Community nature. The regulation designates the law applicable to compensation for damages not stemming from breach of a previous contract (non-contractual obligations) in civil and commercial matters that are the consequence of, amongst other things, a tort/delict.

The Rome II Regulation is not applied in matters of public law, like taxes, customs, administrative matters and liability for damage stemming from actions or omissions committed by the state in the exercise of its authority (***acta iure imperii***). It also rules out some cases for reasons of compatibility with other international conventions or conventions envisaged in Rome I.

In the context of businesses and human rights, there are some interesting conflict-of-law rules that determine which law is applicable to non-contractual obligations stemming from a tort/delict. The following are some of the rules that are or could be applicable in human rights lawsuits against companies.

The general rule for unlawful acts is that the law of the country where the damage occurs is the law applied to settle the controversy, no matter where the event causing the damage happened, no matter in what countries the indirect consequences may occur. That is to say, it is applied the law of the country where the personal injury or property damage ocurred. This is the basic, classic solution for finding the law applicable to non-contractual obligations. This rule is used whenever none of the special conflict-of-law rules in articles 5 to 8 of Rome II apply and the parties have not chosen to apply any particular law.

Therefore, civil liability cases filed in a court of an EU Member State seeking damages against companies in a third country are generally tried according to the legislation of the host country, where the damage took place, that is to say, where the subsidiary (which is the direct cause of the damage in most cases) does business. Now then, it is not always easy to apply the law of the country where the damage occurs, particularly if the unlawful event begins in one country and the damage appears in another country. This happens in many cases of business and human rights. Rome II does not specify which law is applicable when there is multiple damage that appears in the territory of different countries. For such cases, however, the court holding jurisdiction will have to apply

GENERAL RULE

Article 4, Rome II Regulation

General Rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the laws of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Reasons for applying the law of the damage site:

- Protection of the victim's interests.
- Greater ease in obtaining compensation for damages, because most of the time the damage site and the victim's habitual residence are the same.
- It is there that the victim bases his legitimate expectations when he files his claim for damages.

the laws of each of the countries where the damage has appeared.

CHOICE OF LAW

While the general rule is recognised as having priority, under certain circumstances the regulation also allows the parties to expressly or tacitly choose what law applies to their non-contractual obligation (Rome II Regulation, Article 14).

In cases where a company is party to human rights violations, the parties rarely choose the applicable law. The victims would want a law that affords them a better chance of compensation, while the company would prefer a more lenient law under which it would bear less of a burden if it is found liable. Conflicts of interests in the choice of law therefore may well arise in business and human rights cases. As a consequence, due to the opposing interests, it is unlikely that the company and the persons affected will ever agree on the law to apply to their conflict.

The Rome II Regulation states that the applicable law is the law of the country in which the damage occurs, irrespective of where the event giving rise to the damage occurred and irrespective of the countries in which the event's indirect consequences occur.

SPECIAL RULES

The Rome II Regulation contains specific rules for certain non-contractual obligations for particular types of unlawful acts. This includes liability for damage caused by defective products, unfair competition and acts restricting freedom of competition, intellectual property right violations and damage to the environment.

The regulation contains a special provision for ***environmental damage,*** which is understood as "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for

Akpan v Shell
The Netherlands/Nigeria, 2008 to the present

HIGHLIGHTS CONCERNING APPLICABLE LAW

Few cases like this struggle past the first wave of legal and practical obstacles and get as far as determining the applicable law. In *Akpan v Shell,* the Rome II Regulation was not applied, because the damage took place before the regulation went into force. Therefore, in this case the applicable law was found using the conflict-of-law rules of the Netherlands, The court considered, on the basis of article 3.2 of the 2001 Bill on Conflicts of Law in Tort (*Wet Conflictenrecht Onrechtmatige Daad*), that the law applicable to the case was Nigerian law, or more precisely the law of the region where the damage occurred.

Had the Rome II Regulation been in force at the time, the provisions on specific rules for environmental damage would have been applied. Then, if the victims had proved that the actions or omissions of the parent company domiciled in the Netherlands were the cause of the environmental damage, under article 7 they would have been able to choose to apply the law for the country where the event giving rise to the damage occurred, in this case, the Netherlands.

When the Rome II Regulation is applied, take account of the possibility of ***overriding mandatory provisions*** (article 16) and the ***public policy*** of the forum (article 26), which allows a court of a Member State to apply the law of its own state to the controversy instead of the foreign law designated by the conflict-of-law rules of the Rome II Regulation if the court thinks the particular application of the foreign law causes an effect contrary to the principles and values inherent in the Member State's legislation. The court may also take into consideration the rules of safety and conduct that are elements or matters of fact to assess the conduct of the person charged with liability (article 17).

ENVIRONMENTAL DAMAGE

Article 7, Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damages chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

the benefit of another natural resource or the public, or impairment of the variability among living organisms" (recital 24). In the context of business and human rights, this is one of the specific rules you can sometimes invoke against a company. Companies' activities in host countries in many cases entail environmental impact, which results in environmental damage that can affect people or their property.

Article 7 of the Rome II Regulation therefore applies to environmental damage and damage sustained by people and property as a consequence of environmental degradation. The article is based on "ubiquity theory", a theory primarily drawn from the legal systems of Germany and Switzerland for cases of environmental damage. Ubiquity theory allows the victim, in parallel with the determination of the international jurisdiction, to choose between the law of the place where the causal event occurred and the law of the place where the damage actually happened. That is to say, the victim can reject the law for the place where the damage occurred and base his claims on the law of the country where the event causing the damage occurred. Once again, if the causal event is considered to be a lack of due diligence on the part of the parent company, the claimant may choose the legislation of the EU Member State where the parent company is domiciled. Compared to the host country, Member States often have higher environmental protection standards, curb certain kinds of corporate behaviour more closely and establish stricter rules of safety and conduct.

An exception is made in the case of environmental damage. There the victim is allowed to choose between the law of the location where the event causing the damage took place and the law of the location where the damage itself took place.

BEAR IN MIND THAT

- ✓ One key point in international civil lawsuits involving several countries is which law must be applied. The result may differ in many ways, depending on which country's law is applicable.
- ✓ Specific rules are used to determine which is the applicable law. In the EU (except Denmark), in lawsuits concerning business and human rights, Regulation (EC) No 864/2007 of 11 July of 2007 (Rome II) is applied except where there is a prior contractual relationship between the victims and the enterprise that caused the damage, such as an employer/employee relationship, in which case Regulation (EC) No 593/2008 of 17 June 2008 (Rome I) is applied.
- ✓ As a general rule for all kinds of unlawful acts, the law of the country where the damage occurs is designated as the applicable law for settling the controversy.

REFERENCES

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).
http://eur-lex.europa.eu/homepage.html

3.8. International Civil Proceedings in a Court of an EU Member State

When you file a civil claim in ***international litigation*** in a court of an EU Member State, the court applies its own ***procedural law.*** That is to say, if a Dutch court is competent to rule on damage done in an African country, it applies Dutch rules of procedure, even though it may apply the ***substantive law*** of the foreign country (the African country where the damage was done) or it may apply its own Dutch law to decide on the merits of the case. The issues governed by the procedural law of the court hearing the case vary from country to country. They might include claim admission, the wording of the claim and the defendant's plea, timeframes, appeals, evidence admissibility, precautionary measures, the languages that may be used in proceedings and legal aid.
The law that governs most of the issues of judicial procedure (i.e., the process followed in an international case) is the procedural law of the competent court. The European Union has not unified civil procedural law, so each Member State applies its own. The only limit set by EU rules is that the applicable procedural law (the law of the court hearing the case) cannot discriminate on the basis of the nationality of the protected individual (article 18, TFUE; CJEU judgment of 1 February 1996, *Gianfranco Perfili*, C-177/94, "Grounds", 17; CJEC judgment of 2 October 1997, *Saldanha*, C-122/96, "Grounds", 19). Let's look at some of the major procedural issues you need to take into account in cross-border cases.

CLAIM FORM

To qualify for admission, civil claims have to meet the requirements set by the legislation for the court hearing the case. In some EU Member States, claim admission is a procedural issue, and if the claim meets the right requirements of form, it will be admitted (Spain). In most Member States, in a liability claim asking for a large amount of damages, the claim has to be made in writing, and procedural laws tell you what items you must include (e.g., identification of the parties, amount or sum claimed, etc.). Under most legislations, the written claim has to be accompanied by supporting documents. Some legislations require you to fill in a form to start proceedings (England and Wales). Most courts only accept judicial documents (claims) and attachments in the country's official language (France and Germany) or co-official languages (Spain and Belgium). Translations (generally official) of documents are therefore needed. Moreover, statements have to be given in the official language of the court. Individuals may use their own language and have an interpreter translate for them. Claims for damages are filed with the court (or government agency) that has jurisdiction over the territory according to the applicable procedural law. The criteria most legislations use to find the court with jurisdiction over the territory are the domicile or residence of the

defendant or the place where the defendant's assets are located. There are some regulations, however, that allow claims to be filed with any court (England and Wales). Some Member States allow claims to be filed on line or by fax. Most EU Member States' legislations require the services of an attorney (*letrado,* solicitor, *avocat, Rechtsanwalt, avvocato*) depending on the subject matter and the amount asked for. Some legislations regulate the parts other professionals play in judicial proceedings (such as the *procurador* in Spain), service, record keeping or enforcement (bailiff, *hussier de justice*).

PRESCRIPTION: THE TIMEFRAME FOR FILING ACTION IN COURT

Prescription varies, depending on how the law of each Member State sees it. Prescription may be a procedural issue, a cause for discontinuance of proceedings, as it is in Anglo-Saxon systems; or it may be a substantive issue, the time (subjective right) a party has to try and enforce a right, as it is in continental European systems (Italy, Austria, Belgium). The trend of late is to regard prescription as limiting not the subjective right, but the demand, i.e., the right to call for someone to engage in certain active or passive conduct and thus satisfy the subjective right (article 194.1 German Civil Code; article 121.1, Catalan Civil Code).

Different countries' laws regulate different timeframes depending on the cause of the litigation (subject). Some (Netherlands, Portugal) distinguish between prescription and limitation. You will have to check the legislation concerned for the specifics about tort claims. Where no specific timeframe is given for tort claims, the general timeframe is used. In Italy the standard timeframe is 10 years, but for torts it is five years. In Spain the general period of prescription is five years, but for torts it is one year under the Spanish Civil Code and three years under the Catalan Civil Code. In England and Wales the general prescription period is six years, but there are other time limits depending on the subject matter (Limitation Act 1980). In Luxembourg the period for tort claims is 30 years. In Belgium there are various prescription periods; in tort matters the period is five years. In the Netherlands and Greece the general period is 20 years, but in claims for damages it is five years. Prescription rules do not just set the time you have to file action; they also regulate when the countdown starts (as of the circumstance causing the harmful event, or as of the time when the claimant learned of the events leading to the action), how action might be interrupted or stayed, the effectiveness of prescription in terminating the action and limitation.

It is very important to bear this in mind: In cross-border tort litigation, if a court of a Member State hears the case, it will apply Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). When the court determines what law is applicable to the non-contractual obligation (damage) using the criteria in Rome II, that same law will be the one that dictates the how and when of prescription of action. So, if a German court hears a claim for damages done in Colombia, and under Rome II Colombian law is applicable, Colombian law will regulate all the issues covered by article 15, including the rules of prescription (provided that the Colombian rules are not contrary to the public policy of the forum (article 26, Rome II) and do not violate the overriding mandatory provisions of the forum (article 16, Rome II)).

LAW OF EVIDENCE: MEANS OF PROOF AND PROBATIVE VALUE

The law of evidence is essentially procedural. Therefore, the law of evidence is the law of the court, specifically as regards:

- the admissibility of means of proof: questioning of witnesses and parties, documentary evidence, expert opinions (expert reports), judicial recognition, etc.,
- evidential value or assessment of evidence, that is to say, the judge determines the efficacy of the means of proof submitted; the judge may do this according to a scale defined by law, or the judge may be free to assess the evidence however he sees fit,
- the evidence procedure and
- the taking of evidence.

But evidence may also be linked to the substantive law the court will apply. So, the court may admit evidence that is required by the foreign law under which the case is heard (answering the question, "What has to be proved?"). The limit is generally the ***public policy*** of the forum. The foreign law applicable to the case may also be what determines which parties have to prove a given fact ("Who must prove certain things?"). There is also the possibility that a court may decide on an *ex officio* basis to have certain evidence taken (Spain, France, Italy).

Article 15, Rome II:

The law applicable to non-contractual obligations under this Regulation shall govern in particular: . . . h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 21 Rome II.

Formal validity. A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.

Article 22 Rome II.

Burden of proof. 1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof. 2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

The law of evidence is not unified or harmonised by the EU. Each Member State therefore has its own regulations on the types of evidence that are admissible and the evidential worth or value of what is submitted to the court. Rome II, which is the regulation that determines which substantive law the court of an EU Member State will use in an international case of liability for damages, does regulate the burden of proof and the means of proof admitted. (article 22, Rome II). Rome II states that presumptions of law and the distribution of the burden of proof are determined by the substantive law applicable to the merits of the case under Rome II. Furthermore, it establishes that the means of proof for acts intended to have legal effect will be formally admitted by the court hearing the case when they are admitted by: a) the law of the forum, b) the law governing the merits of the case or else the law of the country where the act was performed (article 21, Rome II), provided that the means of proof in question

can be used at the court that is hearing the case. So, Rome II opts for broad acceptance of legal acts that satisfy the formal requirements of the various legislations linked to the case.

All EU Member States generally admit the same types of means of proof: documentary evidence, oral evidence and experts' reports. Documentary evidence may be divided into authentic instruments (documents formalised in the presence of a foreign authority, which includes judicial decisions, registration certificates and authentic instruments; notarial documents are not regulated in northern European countries or in common-law countries) and private documents (such as private contracts). All are required at least to be translated into the language used by the court (with some exceptions), and authentic instruments are required to be ***legalised by a diplomatic or consular authority*** or to bear the ***Hague apostille*** of the Convention abolishing the requirement of legalisation for foreign public documents made in The Hague on 5 October 1961. No requirements or forms are needed when there is a convention between the countries that exempts documents from legalisation and determines their evidential value. Bear in mind that the probative value of authentic instruments may vary widely, depending on the court that receives them. In Spain, Italy and France, public instruments are regarded as full proof of the event, act or state of things they document, plus the date and identity of the certifying officials; in other legislations, no one means of proof is any stronger than any other (Germany), and in other legislations, there is a hierarchy of means of proof (Belgium). The court is generally free to weigh the value of evidence; that is to say, the general rule is court independence in evaluating the evidence (Spain, France, Germany, Austria).

PROOF OF FOREIGN LAW

When the court of a Member State is competent to hear a case in a matter of non-contractual liability with a foreign element, it has to single out the applicable law *(lex causae)*. In some matters, the court does this using Rome II; in matters not covered by Rome II, the court uses its own domestic law. If the conflict-of-law rules show that a law other than the court's (i.e., a foreign law) is applicable, this must be proved, so that the court can apply the foreign law just as if it were the court's own law. How to prove or accredit the applicable foreign law is a question that is neither unified nor harmonised in the EU. Neither are the consequences if it proves impossible to prove or accredit the foreign law. You have to know how a foreign law is proved or accredited (the requirements) under each Member State's legislation, who bears the burden of proof or accreditation and what happens if you cannot prove or do not prove it.

In Belgium, France and Luxembourg, the rules on when the foreign law is sufficiently proved are quite liberal. You may use law codes, handbooks and other documentary evidence and expert reports. Plus, the court may decide to make an exception and conduct its own investigation. In France and Spain, the law must be proved by the parties. In England and Wales, Luxembourg and Portugal, the foreign law must be claimed and proved by the party who wishes to have it applied. In the Netherlands, the party must prove the foreign law, but the court can also secure information through international conventions, request an expert's report from the *Internationaal Juridisch Instituut* or investigate the matter for itself. In Germany and Greece courts have the obligation to investigate the foreign law or request an expert's report, although the parties are also allowed to submit experts' reports. The consequences of failing to prove the foreign law vary. For instance, it may be the case that the court applies its own country's law (the law of the forum) only when the parties are allowed choose the applicable law (France), or only in exceptional cases (Spain), or as a last resort (Italy, Portugal).

WHAT SHOULD YOU KNOW ABOUT THE PROCEDURAL LAW OF THE COURT THAT'S HEARING THE CASE BEFORE YOU COMMENCE CROSS-BORDER LITIGATION?

- ✓ The court (*forum*) that hears the case will apply its own procedural law (*lex fori regit processum*) regardless of the substantive law it uses to decide on the merits of the case.
- ✓ Study the procedural law of the court: the formalities for commencing proceedings, what substantive law applies, the timeframes, the procedure, the means of service (if an international convention is applicable).
- ✓ Study the applicable rules on prescription and limitation (whether they are the rules of the law applicable to the merits of the case under Rome II or the procedural law).
- ✓ When there is a choice between filing your claim for damages in one of two courts without changing the applicable substantive law, weigh up the procedural laws of both forums, their advantages and their disadvantages, before deciding where to file suit.
- ✓ Before you draw up the claim, find out which law will be used to decide the merits of the case. If it is the foreign law, investigate who must accredit and prove the foreign law (the parties, the court), the means of proof and the costs.
- ✓ Examine the possibilities of proving your allegations before you go to court.
- ✓ Check the accepted means of proof, the formal requirements evidence has to meet for admission by the court (according to the laws indicated in Rome II) and the probative or evidentiary value of your evidence.
- ✓ Check whether authentic instruments need to follow the consular or diplomatic legalisation procedure or whether the apostille will be enough.

REFERENCES

Information on procedural law in the Member States of the EU at e-justice, How to proceed:
https://e-justice.europa.eu/content_how_to_proceed-34-en.do?clang=en

Polluted lake in Goi, Nigeria. Source: Milieudefensie. Friends of the Earth Netherlands.

3.9. International Judicial Cooperation for Service and the Taking of Evidence or for Enforcement of Judgments in a Country Other than the Issuing Country

When you file a civil claim in international litigation at a court of an EU State, the court applies its own procedural rules. But the court of an EU State cannot take action outside its country's borders without the cooperation of the judicial (and/or administrative) authorities of other countries. There are EU regulations, international conventions and domestic rules for this purpose, which regulate how to serve process and submit evidence in third countries. To have a judicial decision executed in another country, you also need specific regulations that enable that country's authorities to enforce foreign judgments in the country's territory.

Although the EU has addressed judicial assistance through the Regulation on the service of judicial and extrajudicial documents (Regulation 1393/2007) and the Regulation on cooperation between courts in the taking of evidence in civil or commercial matters (Regulation 1206/2001), these regulations only apply to Member States of the European Union (taking Denmark's special features into account). The circulation of judgments within Europe is also heavily regulated in a number of EU regulations, including the Brussels I Regulation (Recast), that facilitate the recognition and, where appropriate, the execution of judgments issued by authorities of a Member State and enforceable authentic instruments that are intended to have effects in another EU Member State. These regulations cannot be used in relations between an EU State and a country that is not an EU State to serve notice or to execute a court's decision. When an EU State requests cooperation from a non-EU country (or vice-versa, when a non-EU country requests cooperation from an EU Member State), the first thing is to ascertain whether there is an international cooperation convention between the countries involved. If not, the countries follow the rules given in their respective domestic legislations.

The foundation of international judicial assistance is the right of citizens to receive effective judicial protection from a country's courts.

INTERNATIONAL JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

(*asistencia judicial internacional en materia civil y mercantil, coopération judiciaire en matière civile, Zusammenarbeit in Zivilsachen*) consists in eliminating the obstacles raised by incompatibility between different countries' legal and administrative systems. In addition, a state cannot exercise its jurisdiction in another state; that is why cooperation is required. The foundation of today's international judicial assistance is the right of private citizens to receive effective legal protection from a country's courts (article 6, European Convention on Human Rights, 1950; article 47, Charter of Fundamental Rights of the European Union, 2007).

The courts of the two countries involved have the duty to request cooperation and the duty to cooperate with foreign courts. This is regulated in each country's legislation.

Article 277, Organic Law of the Judiciary (Spain)

Spanish courts will furnish foreign judicial authorities with the cooperation they request for the performance of their function as such, in accordance with the terms of the international treaties and conventions to which Spain is a party, the rules of the European Union and Spanish law on this subject.

Service is a formal act of procedure whereby a court officially delivers some judicial document (such as a subpoena, a summons, a writ or a judgment) to a person. The court that is hearing the case decides when service is required. Service is international when, for example, the address of the person the document is for is in a third country. When the person to be served with some document is a person in the legal sense, the service issue takes on a number of special features, because the document can be served at the legal person's central administration, its statutary seat, its principal place of business or its branch office (not a subsidiary). Again, it is the right to effective legal protection that guarantees the diligence of the court that has to arrange for service abroad. Therefore, every mechanism must be used to locate the addressee's domicile, so that service can be done properly and the recipient will have time to respond.

For the taking of evidence abroad, letters rogatory are used. In letters rogatory, one court (the requesting court) asks a court in another country (the receiving court) to secure evidence on the requesting court's behalf (for instance, to take statements from witnesses or obtain expert evidence). The foreign court does so according to the procedural law of its own country, and the resulting evidence has the effect and the evidential value of the procedural law of the court that is hearing the case and requested cooperation. As regards form, the evidence is admitted under one of the laws provided for in Rome II.

There are a great many multilateral international conventions on international judicial cooperation that are signed by the Member States of the European Union. You have to check whether the country where you want documents served or evidence taken is also a party. The table below contains some of the multilateral conventions on international judicial cooperation prepared by The Hague Conference on Private International Law.

There are also bilateral conventions, which have to be checked individually for each case of litigation. The most recent international rules require and implement assistance through forms that make the process quicker and easier. When there are no international conventions at all or no international conventions that are applicable to the particular case, you have to fall back on the international judicial cooperation rules of individual countries. Whatever the source, international judicial assistance entails procedural costs for the processing and execution of the cooperation request. You have to find out who the expenses will be charged to, the requesting court (court costs paid during the proceedings) or the party on whose behest international judicial cooperation is requested. Ascertain whether the expenses can be claimed in costs or if judicial assistance

International Convention	States Party (1/3/2016):	Initial Entry into Force
Convention of 1 March 1954 on Civil Procedure	49	12/4/1957
Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	69	10/2/1969
Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters	58	7/10/1972

is provided by professional officers of justice (such as bailiffs or *hussiers de justice*).

The **e-justice** portal (https://e-justice.europa.eu/content_cooperation_in_civil_matters-75-en.do) is a useful tool for gaining a rough-and-ready overview. There you can check the regulations on cooperation in civil matters (with service of documents and taking of evidence handled separately) country-by-country in each EU Member State.

Procedures for enforcing a foreign judgment (*procedimientos de ejecución de una resolución extranjera, procédures d'exécution d'une décision de justicie, Vollstreckungsverfahren*): If a conviction for tort is handed down by a court of an EU Member State against a company domiciled in an EU Member State, the company does not comply with the court's decision, and you want it to, you must have the judgment enforced. The enforcement procedure is simple when enforcement takes place in the same country where the court issued the judgment, where in general the company's assets are to be found. If the company's assets lie in another EU Member State, the process is not very difficult, either, because you use the Brussels I Regulation (Recast). If you have a conviction handed down by a Dutch court, to be enforced on the assets of a company headquartered in the Netherlands that also has assets in England, you have the judgment enforced in the Netherlands according to Dutch enforcement laws. To enforce the judgment in England, use the Brussels I Regulation (Recast), which facilitates automatic enforcement provided that the requirements of form are met and the rights forms are filled out (articles 39 et seq., Brussels I Regulation (Recast)).

The authorities of the country where the decision is to be enforced are the only authorities competent to enforce the decision.

If the judgment has to be enforced in a third country or the decision to be enforced comes from a third country that is not an EU Member State, then you will have to check if there is a multilateral or bilateral international convention between the countries.

When enforcement is not entirely confined to European Union (Brussels I Regulation (Recast)) and you cannot use any ***bilateral or multilateral international conventions,*** use the procedure for the enforcement of foreign judgments provided for in the Member State's domestic legislation. Generally the system for the execution of decisions ("enforcement" proper) as regulated in domestic procedural law is the system that applies to foreign judgments. This includes limitation periods for judgment enforcement (in Belgium, 30 years or one year, depending on what the judgment says; in Spain, five years). What varies is the recognition procedure, that is, the conversion of the foreign enforcement order into an enforcement order that is valid in the jurisdiction where enforcement has to take place. This process goes by the name of "exequatur". It means yet another proceeding in the receiving court. In this proceeding, the court authorities check the foreign decision for acceptability according to that country's legislation. Put briefly, the court may check: the competence of the court or authority that handed down the foreign decision; the law applied in the decision; the points of form and the authenticity of the foreign decision; whether it violates the ***public policy*** of the country where enforcement is requested; whether the defendants' rights of defence were guaranteed during proceedings; whether the foreign decision is enforceable in the country where it was delivered; and whether the decision is final. The *exequatur* procedure regulated in the domestic law of each country covers procedural issues, such as the way proceedings are begun, objection, grounds for appeal and grounds for denial. You ought to learn about the exequatur procedure and the enforcement procedure according to the domestic law of the country where you want the foreign judgment enforced.

Bear in mind that international enforcement of a conviction again involves procedural costs: yet another proceeding, sometimes with attorneys, translations and, depending on the legislation, the services of professional officers of justice.

SO, THE LAW ON THE ENFORCEMENT OF FOREIGN JUDGMENTS AND THE PROCEDURAL LAW OF THE RECEIVING COUNTRY ARE THE LAWS APPLICABLE IN THE ENFORCEMENT PROCEDURE. THAT ALSO MEANS THEY DECIDE:

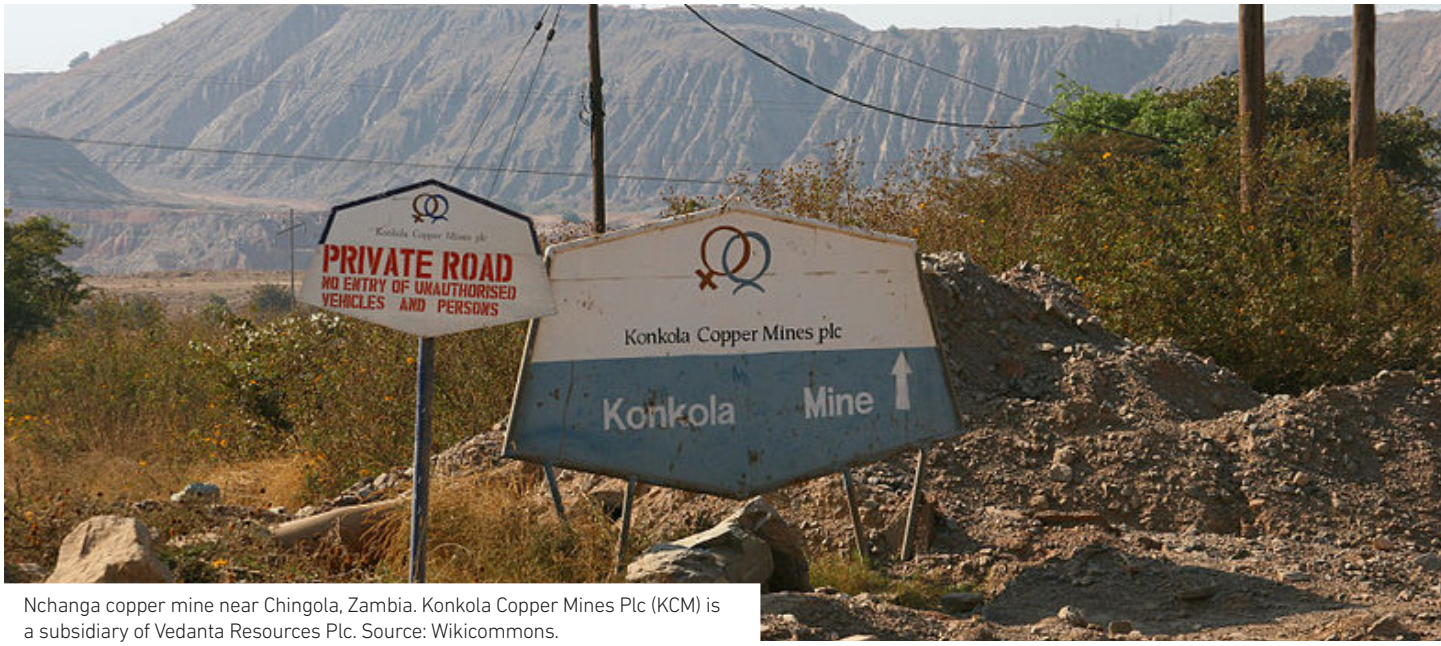
- ✓ the requirements the judgment has to meet (such as finality) and the requirements of form it has to meet as an authentic instrument (translation, legalisation, apostille);
- ✓ the need for proceedings in the receiving court to have the foreign judgment declared enforceable;
- ✓ the reasons for turning down an exequatur request (public policy, violation of rights of defence, etc.);
- ✓ the possibility of checking or reviewing the court's competence to issue the foreign judgment and checking or reviewing the applied law;
- ✓ the competent enforcement authorities, which may be courts, debt collection organisations or court officers.

REFERENCES

The Hague Conference on Private International Law:
www.hcch.net

CIDIP (Inter-American Conference on Private International Law):
www.oas.org

European e-justicia portal:
https://e-justice.europa.eu/home.do



Nchanga copper mine near Chingola, Zambia. Konkola Copper Mines Plc (KCM) is a subsidiary of Vedanta Resources Plc. Source: Wikicommons.

3.10. The Cost of International Civil Litigation and the Legal Aid Possibilities in EU Member States

Going to court costs money. Going to court in an international case costs a lot of money. The costs of civil justice systems vary from one EU Member State to another, since they are governed by each country's domestic legislation. Various types of costs are charged in any lawsuit: fees for lawyers (*letrados, avocats, Rechtsanwält*), reports from experts (*peritos,* legal opinions) and fees for the judicial professionals who provide enforcement and/or document service (bailiffs, *hussiers de justice, Gerechtsdeurwaarder*). There are other costs, too, which are specific to international cases: translation and interpretation, proof of foreign law and reimbursement of cross-border witnesses' expenses. Each case is unique, so there is no standard set of fees. Only at the end of proceedings will you know exactly how much the expenses add up to. Before commencing international proceedings, make sure to calculate the possible costs, see if you can get legal aid and warn the people concerned of the consequences of losing the lawsuit. In many countries the loser pays the court costs as well, which means paying the costs of the winner.

The costs of civil litigation are different in every country. The costs you most usually find are filing fees, lawyers' fees, charges for document service by professional officers of justice (even officers who are officially linked to the court), experts' fees, witnesses' expenses, your own court costs, the court costs of the other party if you lose the case, taxes (VAT), the costs of taking evidence and deposits for costs. The costs specific to transnational lawsuits are the cost of document translations and interpretation services and the expenses of international judicial cooperation, certification or proof of foreign legislation, legalisation or apostilles for public documents and international enforcement of decisions. Let's have a look at the costs of proceedings (*costas procesales, frais de procédures, Verfahrenskosten*) most frequently found in international civil proceedings in EU Member States.

COURT AND FILING FEES: In most EU Member States, you are charged for going to court and using the public service provided by the justice system. There are two basic factors in court fees and filing fees: the type of proceedings (e.g., estate litigation or something else) and the amount being claimed (Germany). To a lesser degree, the costs may depend on the jurisdiction and the stage of proceedings (Belgium), the matter at issue (England and Wales), who is filing the claim or appeal and whether the claimant is a legal person or an individual (Spain) and a mixed bag of other criteria. Just because your case is international does not generally mean the fees will be higher. There are some exceptions where the fees yielded under objective criteria actually are higher, although there are also some countries that eliminate fees in certain matters when the defendant is not a citizen or resident (Romania). In some Member States, court and filing fees are not regulated (Luxembourg); in others, there is a difference between procedural fees and documentation fees (Finland). In some Member States there are exemptions depending on the subject matter concerned in the case; such exemptions normally apply in labour or family matters or when there are underage children. When you have to pay varies as well. In most countries payment is due when the claimant files the suit. In others payment may be collected before the case is dismissed or after the civil proceedings have concluded (Finland). There are different means of payment: by stamps (Romania), wire transfer, credit card or cash. The sums vary greatly and may range from less than a euro to thousands of euros.

LAWYER'S FEES: This is one of the major costs of any international civil litigation. Under most Member States' regulations, a lawyer (and/or other legal professionals, like ***procuradores*** in Spain and barristers) must participate in proceedings or represent the parties in court in most types of litigation. Attorneys generally negotiate their fees with their client. Fees vary depending on the complexity of the case, its length and other factors. In some countries fees are regulated by scales that set the minimum and maximum fees to charge whenever there is no prior agreement in writing (Greece, Slovakia); fees may be reviewed and changed by the court if they are excessive (Luxembourg); fees are calculated according to the sum claimed, the proceedings and the stage of proceedings, although attorneys are free to reach an agreement about their fees (Germany); in other Member States, there are non-binding scales proposed by bar associations for guidance (United Kingdom, Slovenia, Luxembourg, Spain). In most Member States fees are a contractual issue subject to negotiation. That is why it is hard to calculate fees when proceedings are just starting, especially when a case is expected to be international and to last some time. Fees may be negotiated on an hourly basis, at a fixed price, as a function of the sum claimed or won or in a combination of criteria. In some Member States lawyers are allowed to negotiate fees for winning (success fees) (Slovakia, United Kingdom), and in others, they are forbidden to do so (Denmark, Malta, Sweden). Bear in mind that most Member States have legislation stating that when a court issues its judgment it can order the loser to pay the lawyer's fees of the winner.

EXPERT FEES: Experts (doctors, engineers, legal scholars, handwriting experts, bookkeepers, and so on) provide the court with technical information in the form of opinions or reports, certificates, accounts, statements and appraisals, and they may be ordered to put in an appearance in court to answer technical questions in person. The costs of expert services vary from one country to another. They are rarely regulated. When they are regulated, they are given in publications released by the country's justice authorities, and it is the courts that set the expert's fees when the case is finished, according to the rates approved by law (Bulgaria, Hungary, Italy). In some other countries, experts' fees are included in court fees (Germany, Luxembourg), they are generally calculated on an hourly basis, and they may include travel expenses (Luxembourg). In other countries an expert's fees depend on the expert's own rates; sometimes associations or groups of experts publish rates to give you an idea of what you can expect to be charged.
It is generally after the proceedings have already begun that you find you need an expert's services, and need them badly. Therefore, the litigants ought to be informed in advance that this cost is usually a significant part of the total costs of litigation. Also, many countries require you to put up a deposit before you may call in an expert. In almost all EU Member States, the court can order the losing party to pay the expert's fees, whether the experts' evidence was proposed by the parties or required by the court itself. Before you order a report from an expert in a third country other than the country of the court hearing the case, find out if the legislation for the court would

allow a foreign report to be admitted and recognised by the court as having probative value.

BAILIFFS' FEES: The profession of judgment enforcer or bailiff is not harmonised in the EU. Judgment enforcement may be handled through the justice authorities, in which case it is a court officer who enforces judgment (for instance, in an attachment), so that the cost of enforcement can be included in the court fees (Spain, Germany, Finland, Italy). Nevertheless, the procedure for enforcing a foreign judgment may require fresh proceedings in the enforcing court, where an attorney's services and the pertinent costs (translation of the decision, document legalisation, filing fees) will have to be paid. In other legal systems, a judgment can be enforced through a justice officer who is a liberal professional (bailiff, ***hussier de justice***, *Gerechtsdeurwaarder*) who is connected to the courts but whose services must be paid for by the party desiring enforcement (Netherlands, France, Luxembourg, Ireland, Slovenia, Romania). In some countries there are both options (England and Wales: county court bailiffs paid out of court fees and certificated bailiffs). In some countries the professional enforcer (bailiff, ***hussier de justice***, *Gerechtsdeurwaarder*) can also serve documents (France, Belgium, Luxembourg, Netherlands) and charges for doing so according to certain rates, while in other countries documents are served by public functionaries who work for the justice system (Spain), although the costs may sometimes be passed on to the parties once judgment is handed down.

The rule of access to justice allows everybody to attend court, even when they do not speak the court's language.

COST OF DOCUMENT TRANSLATION AND INTERPRETATION: Judicial and extrajudicial proceedings require foreign public and private documents that need to be translated into the court's language. Some Member States will accept documents in more than one language (Belgium, Denmark, Finland). Most Member States require translations to be done by official translators. In most Member States, prices are set by the translator; in some Member States, they are set by law; and in others, prices are determined by the court. It is the responsibility of the parties to procure translations, but in some Member States the justice system takes charge (Hungary). Translation and interpretation expenses can be passed on to the losing party in costs. Translation prices per page vary, depending on whether the translator is especially certified or not and depending on how charges are calculated (by the page, by the line, by the word or by the hour). Before arranging for the translation of a document you must submit to the court of another Member Country, check that the receiving authority's legislation will allow the translation to be accepted, because it might be inadmissible (Netherlands, Luxembourg, the Czech Republic).

If witnesses have to be examined, interpretation expenses may be incurred as well. Interpretation expenses may be included in the proceedings and therefore borne by the justice system, under the argument that access to justice is a fundamental right (Belgium, Bulgaria, France); in other Member States, the cost of interpretation is not covered (Netherlands) or must be borne by the parties. In other countries the court may order the loser to pay. The price will depend on the rates set by the interpreter or his or her guild. In half the EU Member States, a person who is receiving legal aid also has his or her translation and interpretation costs covered.

WITNESSES: In over half the Member States, the law allows you to apply for economic compensation or indemnities for witnesses (witness compensation) to cover their expenses and any loss of income (damages) due to having left their work unattended to go to your proceedings. Every Member State regulates the criteria it uses to calculate and justify witnesses' expenses, the items covered (room, board, transport, childcare), limits on the sums covered and whether or not witnesses who live in other countries qualify. Some countries' laws also allow paid witnesses (United Kingdom, Belgium, Luxembourg). Witness compensation may be provided by the party that requires the witness's testimony, with the possibility of reimbursement if the party wins the suit (Italy, United Kingdom, Netherlands, Luxembourg, Slovenia); it may be covered by the justice system at no extra cost for the parties (Denmark); or it may be passed on to the loser (Estonia, Slovakia). If you have been granted legal aid, there are many EU Member States that cover witness compensation (United Kingdom, Malta), but others that don't (Netherlands, Slovakia).

WHAT COSTS SHOULD YOU CHECK OUT BEFORE YOU START TRANSNATIONAL LITIGATION?

- ✓ Filing fees. Find out if you have to pay filing fees and, if so, how much they are and whether their amount depends on the amount you are suing for.
- ✓ The price of having documents translated into the court's language. Find out how much it will cost and whether the translator has to be certified and recognised by the court's country.
- ✓ Costs of proceedings. Find out if the loser pays, what the costs might include (expert's reports, translations, witness compensation, lawyer's fees, court fees) and whether exemptions might be made.
- ✓ Expert's opinions and reports. Find out if they are needed and how the experts calculate their fees.
- ✓ Experts. Bear in mind where they come from and whether their opinions/reports will count as evidence in the competent court.
- ✓ Foreign law. If the court applies a foreign law in its decision, that law must be proved, often via expert's reports.
- ✓ Witness compensation. Find out if it is available and who pays it.
- ✓ The expenses of appealing to a higher court.
- ✓ Enforcement. Find out if you need to pay a private bailiff and calculate the cost of doing so. Or, if the justice system provides enforcement, find out what the cost of enforcement in another country is going to be.

One good way to calculate costs is to visit the websites of the justice ministries and the associations of each profession in each of the European Union Member States. The **e-justice** portal (https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do?init=true) is useful for gaining a rough-and-ready overview, though it is not updated often enough. There you can check the regulated costs of proceedings in each EU Member State and find links to the websites of each Member State, which can be useful in calculating costs.

The European Court of Human Rights says effective remedy includes legal assistance, so that people with scarce economic resources can afford international civil proceedings, too.

LEGAL AID (*asistencia jurídica gratuita, aide judisdictionnelle, Prozesskostenhilfe*)

Legal aid, or exemption from the costs of proceedings, provides people who can prove they haven't the money to go to court with a way to engage in litigation at little or no cost. Legal aid is a right recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 6.3.c), which guarantees the right of the defendant to receive legal assistance from a legal aid lawyer free of charge if the defendant hasn't the means to pay for an attorney, when the interests of justice so require. The right also appears in the Charter of Fundamental Rights of the European Union (article 47).

Legal aid is a procedural question, so the law that applies is the law of the court where suit is filed. Regulations vary from country to country. However, the European Union issued a directive (Directive 2002/8/EC) to harmonise certain aspects of legal aid in cross-border litigation, i.e.: pre-litigation advice to try and reach a settlement before bringing proceedings, bringing a case before court, representation in court and total or partial coverage of or exemption from the costs of proceedings. The European regulation affects or is limited to the European Union, so its possible beneficiaries are EU citizens or nationals of third countries who habitually reside or have their domicile in an EU Member State. To apply for legal aid in cross-border cases, you have to fill out a form (https://e-justice.europa.eu/dynform_intro_form_action.do?idTaxonomy=157&plang=en&init=true&refresh=1). Again, be reminded that each EU Member State has its own legal aid system that specifies what it includes and excludes, depending on whether the case is domestic or international; and if it is international, the law may take into account if the case is intra-European (in which event interpretation services, document translation, witness travel expenses and other expenses may be included) or it is not but the applicants are residents in a third country not belonging to the EU. That is to say, in general, there

are two requirements for getting the benefit of legal aid: 1) Proof that the claimant does not have the means to engage in litigation (Each Member State has different scales for this) and 2) A connection of nationality or residence in the country where aid is applied for. For example, the applicant has to be a citizen or resident of the country where legal aid is requested or be a citizen of an EU Member State or be a foreign citizen not residing in the country when this requirement is expressly set by international convention (Spain, Belgium, France). There are countries, though, that grant legal aid regardless of the applicant's nationality (Germany, Finland) or regardless of the nationality and residence of the beneficiary (Denmark, England and Wales). Furthermore, some countries' laws open the door to legal aid for legal persons, usually not-for-profit organisations (associations and/or foundations), but business partnerships too if they can show proof that they haven't the funds for litigation. You need to check the legislation of the state of the court where the litigation will take place.

WHAT SHOULD YOU KNOW ABOUT LEGAL AID BEFORE YOU START TRANSNATIONAL LITIGATION?

- ✓ Check the legislation for the court hearing the case to find out if a non-resident foreign citizen can apply for legal aid. Check also whether a legal person (an NGO) can apply for legal aid.
- ✓ Check the legislation of the country where legal aid is requested to find out what the criteria are and what ceiling there is on the applicant's income in order to qualify.
- ✓ Check the legislation of the court hearing the case to find out if there are any matters (civil law, contract law, labour law) that don't qualify for legal aid and whether the coverage is full or partial.
- ✓ Check whether the applicant must furnish a deposit before getting legal aid.
- ✓ Check whether the granting of legal aid can be reviewed by the court and whether legal aid can be withdrawn after proceedings have begun. Check whether the applicant can appeal to the government or the court if the legal aid application is denied.
- ✓ Check whether legal aid covers things like translations, interpretation, expert's reports, witness compensation, recordings and copies of court documents.
- ✓ Check whether legal aid covers enforcement.
- ✓ Check whether legal aid covers further appeal.
- ✓ Check what consequences legal aid has if the beneficiary loses the case.

REFERENCES

Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union (2007):
https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do?init=true.

A. Layton, H. Mercer & O'Malley (Editors), *European Civil Practice*, Volume 2, Thomson, 2004.
The e-justice portal is a useful though sometimes rather out-of-date tool for checking each Member State's regulations on legal aid and finding links to the Member States' official websites:
https://e-justice.europa.eu/content_legal_aid-55-en.do?init=true **and**
https://e-justice.europa.eu/content_costs_of_proceedings-37-be-en.do?init=true&member=1.

Demonstration in Tripoli, Libya. Source: Wikicommons.

4. RECOMMENDATIONS WHEN PLANNING YOUR STRATEGY

In short, what do you need to bear in mind?

The things you have to weigh before filing international civil proceedings claiming liability from a multinational headquartered in the European Union

1. Specialised legal advice. The practical handling of cases like these involves a great many tricky technical questions. To design a good strategy for a specific case, go to an attorney who is an expert in the matter and talk to him or her about which mechanisms offer the best chance of winning compensation for the victims.

2. The organisational capacity and support that will be available to the victims through networks of social organisations, in their home country and in the country where litigation takes place, throughout the length of proceedings, which will be long and costly.

3. The political, economic and social consequences of suing a multinational in the country where the human rights violation happened, especially for the people directly involved.

4. The possibility, advantages and consequences of using alternative mechanisms instead of court action, to reach an agreement with the multinational's subsidiary.

5. The advisability of considering a strategy aimed at de-escalating and de-legalising the conflict, especially (but not exclusively) in the early days. Alternative mechanisms like mediation may be an avenue to explore. Non-judicial mechanisms are generally much simpler and more affordable than suing.

6. The possibility and advisability of involving pertinent national human rights institutions in public or private mediation between the company and the victims, since NHRIs enjoy certain prerogatives and have the resources to conduct independent investigations.

7. If the business activity in which the abuse happened is financed by the World Bank (especially through the International Finance Corporation) or the European Investment Bank. If so, you could use the bank's non-judicial grievance mechanism.

8. If the country where the abuse occurred or the parent company's home country has subscribed to the OECD Guidelines for Multinational Enterprises. If so, you can go to the National Contact Point (The government of any OECD country must have one) to attempt international mediation with the company.

9. The possibility and probability of success if you file a civil claim concerning amage done by a multinational's subsidiary to people (victims) or the territory in the courts of the country where the damage was done.

10. Another key thing to do before undertaking litigation in the courts of the country where the damage was done is to study the possibilities of international enforcement in the event of a conviction. How will enforcement work, for example, in the country where the multinational's parent company is domiciled? It is important to know which specific legal instrument will

apply and if there are any other factors, like bilateral agreements between the two countries that will facilitate enforcement.

11. If you can prove that the action or omission of the multinational's parent company is what caused the damage and you can provide the necessary evidence.

12. The possibility of suing for damages at the courts of the EU Member State, as outlined in section 3 of this Handbook, where the multinational's parent has its legal headquarters, its central administration or its main place of business — Brussels I Regulation (Recast) — or using some other jurisdiction rule set in the Recast Regulation.

13. The possibility of suing for damage at the courts of an EU Member State under the state's own domestic rules, if you cannot apply the Brussels I Regulation (Recast) or international conventions..

14. Which law the court will apply to decide on your liability claim, and what the scope of its legal consequence will be (economic compensation, damage repair).

15. The great difficulty of applying foreign laws, and the obstacles and costs of bringing charges and submitting evidence if the court is not familiar with the foreign laws.

16. The rules on prescription and limitation that will apply to your action.

17. In international litigation, certain procedural rules will apply, which will determine important points such as the legal practitioners who have to be involved, the probative value of evidence, document authenticity requirements, translations if documents are in a different language, proof of foreign laws, court and filing fees, payment of costs if you lose the case and so on.

18. The fact that international judicial cooperation will be necessary for judicial activities such as service of process, taking of evidence and even the enforcement of judgments. Check for multilateral or bilateral conventions between the countries at issue.

19. The great length of proceedings, since they are transnational, and the extremely high economic costs of transnational litigation.

20. The possibility that the victims might file class action, the possibility that the victims, or an NGO acting in their name, might qualify for legal aid and, if so, what the legal aid would cover.

The Jerusalem Light Rail, Israel. Source: Erin Amsili.

GLOSSARY

Access to justice
People's ability as individuals or as groups to use formal or informal institutions of justice to seek and obtain redress for violations of their rights.

Applicable law
The domestic law that determines the system underlying international private situations. The applicable law is determined by conflict-of-law rules. When a court hears international litigation, it does not necessarily apply its own domestic law in its decision.

Brussels I Regulation
The name "Brussels I" refers to Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Brussels I entered into force on 1 March 2002 and therefore applies to legal action exercised after that date. The regulation replaces the Brussels Convention of 27 September 1968 of the same name. Brussels I regulates how international jurisdiction is assigned in the European Union and the conditions and modes of recognition and enforcement of judgments given in Member States, authentic instruments and court settlements.

Brussels I regulation (recast)
On 26 July 2012 the European Commission presented a proposal for the amendment of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, since termed "the Brussels I Regulation (Recast)". The Brussels I Regulation (Recast) is applicable as of 10 January 2015 and replaces Regulation (EC) No 44/2001. The regulation aims at filling out the jurisdiction rules in connection with defendants from third countries.

Case law
The set of principles and doctrines established by court decisions with regard to a certain issue. Case law may be binding, in the fashion and to the extent established in the country's constitution. Case law is a tool for interpreting a term properly or filling legal vacuums or loopholes.

Civil procedural law
The set of rules that regulate how private persons act to exercise their rights and settle legal controversies in civil matters in domestic courts.

Conflict of jurisdiction
The legal situation that arises when two or more courts endeavour to hear an international case directly or indirectly. Conflicts of jurisdiction can also arise between courts of the same state.

Conflict of laws
The legal situation that arises when an international case is subject to two or more rules from different legal systems belonging to sovereign, independent states.

Contractual obligations
Obligations that stem from a pre-existing connection between the parties, such as a contract; that is to say, obligations that arise from the power of one's private autonomy to create one's own legal relationships. Contractual obligations are governed by whatever stipulations the parties have made, provided that the stipulations are lawful.

Corporate social responsibility
The voluntary integration of social and environmental concerns by enterprises

into their commercial transactions and stakeholder relations.

Competent court
The court capable of hearing judicial proceedings, exclusively or in preference to other courts of the same state or other states.

Domicile of the defendant
In matters of civil procedural law, the domicile of the defendant traditionally determines which court has civil jurisdiction. A court is competent to hear a controversy if the defendant is domiciled in the court's jurisdiction.

Environmental damage
In general terms, adverse changes in natural resources, such as water, soil or air, impairment of one natural resource's function for the benefit of another or of the public, or damage to biodiversity or ecosystems. Environmental damage can in its turn affect people or their assets and property.

European Investment Bank Complaints Mechanism
The EIB Complaints Mechanism is the means for facilitating and handling complaints filed with the EIB by private persons, organisations or enterprises that feel they are injured by the EIB's activities. Complaints may concern actions and/or decisions by the EIB Group that the authorities consider incorrect, unfair or illegal. Complaints may refer to access to information, projects' social or environmental impact, public tendering procedures, human resources issues, customer relations, etc.

Exorbitant jurisdiction
International jurisdiction enabling a country's courts to hear cases that have weak connections with the forum.

Extraterritorial jurisdiction
The ability of a state, through various laws, regulations and judicial instruments, to exercise its authority over actors and activities outside the state's territory.

Financial penalty
A penalty consisting in the payment of money, exacted by the state through its jurisdictional power from the perpetrator of a crime or an infringement of administrative rules.

Foreign direct investment
In our current economic system, FDI is regarded as one of the driving forces behind development. FDI consists in the investment of capital by an individual or legal person (institution, public enterprise, private company, etc.) in another state. Multinationals are some of the primary agents of FDI in their search for low-cost labour and natural resources and access to larger or growing markets.

Forum
The state in which judicial proceedings take place.

Forum necessitatis
The jurisdiction of necessity or f*orum necessitatis* allows a country's courts to hear international litigation even when there is no particular rule giving them jurisdiction, solely to avoid a denial of justice.

Forum non conveniens
The doctrine of *forum non conveniens* is known and applied primarily by common-law countries. This doctrine allows the initial court to decline to exercise jurisdiction when it deems that it is not connected strongly enough with the events or when it believes its decision would not be recognised and enforced in foreign territory by other national courts.

Forum shopping
The choice by the plaintiff of a forum whose connection is weak and whose proximity is not especially reasonable, in order to obtain certain substantive or procedural advantages. This choice may be made by virtue of the application of a substantive rule and/or a procedural rule that the plaintiff finds beneficial.

Global North and South

The term "global North" is an artificial concept used to refer to the rich, developed economies, which are generally situated in the northern hemisphere. The term "global South" is employed to signify the poorer and developing economies situated in the south.

Grievance mechanisms

Non-judicial procedures through which individuals and communities can seek remedy for alleged abuses by companies in matters of labour standards, human rights in general, protection of the environment or safety standards, generally in regard to the same company.

Guiding Principles on Business and Human Rights

A set of principles approved by the United Nations Human Rights Council in June 2011. They implement the "Protect, Respect and Remedy" Framework. This framework is based on three things: the state duty to protect human rights, the corporate responsibility to respect human rights and access to avenues of remedy for the victims of business-related abuses.

Hague apostille

A stamp or seal that the competent authority of each state that is a party to the Hague Convention of 5 October 1961 adds to an authentic instrument to certify the authenticity of the situation, the capacity in which the document's signatory acts and, where needed, the identity of the seal or stamp the document bears, so that no legalisation is necessary. To check which countries are parties to the convention, see www.hcch.net.

Home country

The state where the parent company has its domicile, is registered, has its headquarters or does most of its business.

Host country

The state where a multinational invests and operates through its subsidiaries. Part of the goods and services companies produce are obtained from activities in host countries.

Human rights

Human rights are essential guarantees inherent in all human beings, whatever their nationality, place of residence, gender, national or ethnic origin, colour, religion, language or anything else. Human rights are generally covered by law, international treaties, customary international law, general principles and other sources of international law.

Human rights violation

Conduct that impedes, injures or attacks the rights of the human being. Such conduct may belong directly or indirectly (through omission) to state bodies in the exercise of their power or to individuals, companies and other actors.

International human rights law

The set of state obligations under conventional or customary international rules, forcing states to take measures in certain situations or to abstain from acting in a certain way in other situations, so as to promote and protect the human rights and fundamental freedoms of individuals or groups.

International jurisdiction

This is a concept stemming from private international law, which determines the jurisdiction of the courts of a particular country to hear a case that is of an international nature, for example, when the parties have different nationalities or don't live in the same country. In this case, the courts of several countries may have jurisdiction to try the case; this is what is called a *conflict of jurisdiction.* International jurisdiction rules set the criteria for determining the country whose courts have the power to hear litigation of this type.

International litigation

Disputes between two or more people involving some alien element (i.e., the

defendant or claimant is domiciled abroad or the harmful acts occurred in a third country).

International convention
An international agreement by any name made in writing by states and governed by international law. A convention may be a single instrument or two or more connected instruments.

Jurisdiction
The power of a country's courts to judge and to enforce their judgments.

Legal action
The faculty of the individual to demand that domestic courts exercise their jurisdiction so that the individual can assert his claims.

Legalisation of a foreign authentic instrument
The formality whereby the diplomatic or consular agents of the country in whose territory the document is to take effect certify the authenticity of the signature, the capacity in which the document's signatory acts and, where needed, the identity of the seal or stamp the document bears.

Lex causae
The law that applies to the merits of a case in litigation under private international law, once the conflict-of-law rules have designated which law applies.

Lex fori
The law of the forum. The application of the law of the country whose court hears the case.

Limited liability
The doctrine that holds that the shareholders of a company cannot be held responsible for the company's debts beyond the extent of their investment. This doctrine is applied in the relationship between parent companies and their subsidiaries.

Limping relationship
A legal relationship that is unable to take definitive effect outside the legislation of the country where the relationship was formed.

Multinational enterprise
An enterprise that is made up of a parent company created according to the legislation of the country where the parent company is situated, which operates beyond the borders of that country by means of direct foreign investment, through subsidiaries that are organised as local companies pursuant to the legislation of the investee country.

National human rights institutions
Independent organisations created in numerous countries, through public law, with the specific mandate of protecting and fostering respect for all human rights, regardless of their civil, political, social, cultural and economic nature.

Non-contractual liability
The obligation to make reparation for damage due to an event or omission other than non-execution or defective execution of a contractual obligation.

Non-contractual obligations
Obligations that arise not from any pre-existing connection such as a contract or other legal institution (duty of child support, in-rem rights, etc.), but from other sources, such as the law, quasi-contracts and unlawful acts (regardless of their classification under civil or criminal law).

OECD Guidelines for Multinational Enterprises
Government recommendations to multinationals that do business or are headquartered in OECD countries. The Guidelines contain non-binding rules and principles for responsible corporate conduct within the global context, pursuant to the applicable laws and internationally recognised rules. The latest revision of the OECD Guidelines dates from 2011.

OECD National Contact Point
Governments adhering to the Guidelines are obligated to establish national contact points, whose primary function is to enhance the Guidelines' efficacy through

promotional activities and response to inquiries and to help solve problems in alleged failures to observe the Guidelines in specific cases, providing a mediation and conciliation mechanism.

Parent company
A company that exercises direct or indirect control over one or more other companies. A parent company may be a shareholder in companies that it has organised, or it may own shares that it has purchased in other companies. Generally the parent company's headquarters or domicile is in the company's home country, where the parent company takes decisions about the operations of the entire corporate group. In most cases, but not always, the home country is in the global North. From there the parent company exercises economic, financial and administrative control directly or indirectly over the companies subordinate to it.

Personal jurisdiction
International civil jurisdiction that is conferred to a domestic court by virtue of a real and/or legal connection between the court and one or both of the parties involved in the litigation. This connection may be the nationality, residence, domicile, work or professional practice, etc., of the defendant or the claimant.

Piercing the corporate veil
A judicial technique employed under certain exceptional circumstances and for certain aims, to correct and penalise acts in which limited corporate liability is used fraudulently.

Private international law
The set of rules and principles that each national legislation establishes to regulate international private situations.

Public international law
The set of rules and principles generally given in international treaties or conventions or in customary rules on the relations between the subjects of public international law (fundamentally states and international organisations) or the protection of the international community's general interests.

Public policy
An exception that allows the application of a foreign law to be stopped if the law's contents are obviously incompatible with the higher values and principles of the forum.

Rome II Regulation
The name "Rome II" refers to 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. Since the adoption of this regulation, the European Union has a unified rule on non-contractual obligations in civil and commercial matters and in those situations where there is a conflict of laws; that is to say, the courts of all Member States now apply the same conflict-of-law rules in these matters. Therefore, this regulation is applied to international cases in which there is an element foreign to the forum and in which rules drawn from different countries' legislation could potentially be applied.

Separate legal personality
Under this legal doctrine, legal persons are legally distinct and separate from their owners. Separate legal personality is applied to the relationship between parent companies and subsidiaries.

Subject-matter jurisdiction
The scope of subject-matter jurisdiction is established in law or international rules, generally on a case-by-case basis.

Subsidiary
Any company whose decisions depend directly on its parent company. A subsidiary has limited liability and a separate legal personality from its parent company. Subsidiaries primarily operate in countries of the global South.

Territorial jurisdiction

The power of a domestic court to hear proceedings to which the court is connected because the circumstances of fact or law bear some relationship with the territory.

Universal jurisdiction

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

TO FIND OUT MORE

AUGENSTEIN, Daniel, "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union", This study was prepared for the European Commission by the University of Edinburgh, under de the direction of Daniel Augenstein. http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf.

COMPLIANCE ADVISOR OMBUDSMAN - CAO (IFC-MIGA); http://www.cao-ombudsman.org/

ENNEKING, Liesbeth F.H., *Foreign direct liability and beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability*, The Hague, Eleven International Publishing, 2012.

EUROPEAN E-JUSTICE PORTAL. https://e-justice.europa.eu.

EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS. http://ec.europa.eu/civiljustice.

EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS (ENNHRI). http://ennhri.org.

EUROPEAN PARLIAMENT, Directorate General for Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Legal Affairs: "Possibility and terms for applying Brussels I Regulation (recast) to extra-EU disputes", STUDY, 2014. http://www.europarl.europa.eu.

EUROPEAN UNION. 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). http://eur-lex.europa.eu.

EUROPEAN UNION. 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). http://eur-lex.europa.eu.

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, Handbook on European law relating to access to justice, 2016. http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf

FIDH, *Corporate Accountability for Human Rights Abuses A Guide for Victims and NGOs on Recourse Mechanisms,* 3rd edition, May 2016. Available at: https://www.fidh.org.

INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (ICC), recently renamed as *Global Alliance of National Human Rights Institutions.* http://nhri.ohchr.org.

INTERNATIONAL LAW ASSOCIATION, The Hague Conference (2010), International Civil Litigation and the Interests of the Public. «Final Report: International Civil Litigation for Human Rights Violations»; available at: http://www.ila-hq.org.

JOSEPH, Sarah, Corporations and Transnational Human Rights Litigation, Oxford and Portland, Oregon; Hart Publishing; 2004.

LAYTON, Alexander; MERCER, Hugh (Editors), *European Civil Practice,* Vol. 2, 2nd Edition; London, Sweet & Maxwell, 2004.

NUYTS, Arnaud, with the collaboration of SZYCHOWSKA, Katarzyna , *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)". General Report (Final Version Dated 3 September 2007); http://ec.europa.eu/civiljustice.

OECD. The OECD Guidelines for Multinational Enterprises, 2011 – Text and Commentary. http://mneguidelines.oecd.org.

PIGRAU A., BORRÀS, S., JARIA i MANZANO, J., CARDESA-SALZMANN, A. 2012. Legal avenues for EJOs to claim environmental liability. EJOLT Report No. 4, 96 p. http://www.ejolt.org.

SKINNER, Gwynne; MCCORQUODALE, Robert ; DE SCHUTTER, Olivier; with Case Studies by LAMB, Andie. *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business.* ICAR/CORE/ECCJ. December 2013. http://icar.ngo.

ZERK, Jennifer, Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights, 2014. http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

Human Rights in European Business. A Practical Handbook for Civil Society Organisations and Human Rights Defenders is written as a rough overview of the main procedural and substantive problems about filing a claim in European courts in connection with human rights violations caused outside EU territory by the activities of companies linked to EU Member States. The handbook provides a selection of legal problems and paperwork hurdles we have chosen to help the reader to identify the main obstacles in setting up a claim with a reasonable expectation of success and the possible solutions to those obstacles.

This handbook is not written for the victims themselves, but for the legal professionals of the countries where these human rights abuses are more likely to happen and the non-government organisations that support or defend the victims. The explanations given here are therefore written for the people who provide assistance on the front line, giving them clues and yardsticks they can use to assess what cross-border litigation has the potential to be plausible and successful. This handbook does not address an academic public, and it does not provide legal first aid for the victims. It is a practical handbook for professionals and activists who have a certain amount of legal knowledge, to help them design their strategies for defending and protecting the affected communities. The handbook also contains a short glossary giving concise descriptions of some basic concepts.

The contents of the handbook are designed to help build strategies for the professionals and activists who are helping the victims. This includes, to begin with, the options available domestically through judicial and non-judicial redress mechanisms. The handbook does not deal with specific national mechanisms. It does deal extensively with other international non-judicial avenues and with litigation in the parent company's home country or another country that offers suitable pathways for lawsuits on business and human rights.

HUMAN RIGHTS IN BUSINESS

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